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Triangulation of Rights, Balancing of Interests: Exploring the Tensions between Freedom of Conscience and Freedom of Religion in Comparative Constitutional Law

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Résumé

La liberté de religion, souvent reconnue comme étant la « première liberté » dans de nombreuses traditions juridiques, reflète également les différentes conceptions de la place de l'individu et de la communauté dans la société. Notre étude analysera les modèles constitutionnels canadien, américain et européen de liberté de religion et conscience. Dans un premier chapitre, nous examinerons les conceptions théoriques de la religion dans les sciences sociales ainsi les approches juridiques afin de mieux cerner comment la religion est conçue et de plus, comprendre les diverses influences sur sa conceptualisation. Dans un second et troisième chapitre, nous tenterons d'une part, de qualifier la relation entre la liberté de conscience et la liberté de religion au Canada en nous livrant à une analyse approfondie des deux libertés et d'autre part, d'identifier les questions qui demeurent irrésolues. Dans le chapitre final, nous observerons comment la liberté de conscience a été interprétée dans les contextes américain et dans l'Union Européenne, par le biais de la Cour Européenne des droits de l'Homme. Notre hypothèse est que l'on peut arriver à une meilleure compréhension de la relation entre les libertés de conscience et religion en clarifiant les conceptions théoriques de la religion et de la conscience en droit constitutionnel comparé.

Mots clés : Droit constitutionnel – liberté de conscience et religion – Canada – Convention Européenne des droits de l'Homme – États-Unis – Droit comparé

Abstract

Freedom of religion, often recognised as “first freedom” in numerous legal traditions, also reflects the different conceptions of the place of the individual and the collectivity in society. Our study will analyse the Canadian, American and European constitutional models of freedom of religion and conscience. In a first chapter, we will examine the theoretical conceptions of religion in the social sciences as well as from the perspectives of legal approaches in order to discern the manner in which religion is conceived and to better understand its various influences. In this way, we hope to enhance our understanding of both identity and to a greater extent, culture, both in and out of law. In the second and third chapters, we will attempt to characterise the relationship between freedom of conscience and freedom of religion in Canada, as well as identify unresolved issues. In the final chapter, we will observe how freedom of conscience has been interpreted in the American legal setting as well as in the European Union, by way of the European Court of Human Rights (ECtHR). We hypothesise that a better understanding of the relationship between the freedoms of conscience and religion can be arrived at by clarifying the theoretical conceptions of religion and conscience in comparative constitutional law.

Key words: Constitutional law – Freedom of conscience and religion – Canada – European Convention on Human Rights – United States – comparative law

List of Abbreviations

Alberta	*AB*
Alberta Court of Queen's Bench (neutral citation)	*ABQB*
Appeal Cases (House of Lords and Judicial Committee of the Privy Council)	*A.C.*
Appeal Cases	*A.C.*
Archives philosophiques du droit	*Arch. philo. Dr.*
Article(s)	*Art.*
Australian Law Journal	*Austl. L.J.*
Australian Law Journal Reports	*ALJR*
British Columbia	*BC*
British Columbia Court of Appeal (neutral citation)	*BCCA*
British Columbia Supreme Court (neutral citation)	*BCSC*
Brandeis Law Journal	*Brandeis L.J.*
British Yearbook of International Law	*Brit. Y.B. Int'l L.*
Chapter	*C.*
Cahiers de droit	*C. de D.*
California Law Review	*Cal. L. Rev.*
Canadian Journal of Law and Jurisprudence	*Can. J.L. & Jur.*
Canadian Journal of Law and Society	*C.J.L.S.*
Canadian Legal Information Institute	*CanLII*
Cardozo Law Review	*Cardozo L. Rev.*
Constitutional Forum Constitutionnel	*Const. Forum Const.*
Democratization	*Democratization*
DePaul Law Review	*DePaul L. Rev.*
Ecclesiastical Law Journal	*Eccl. L.J.*
Emory International Law Review	*Emory Int'l L. Rev.*
Ethics	*Ethics*
European Convention on Human Rights	*ECHR*
European Court of Human Rights	*ECtHR*
European Commission of Human Rights	*EComHR*
European Human Rights Law Review	*Eur. H.R.L. Rev.*
Federal Court (neutral citation)	*FC*
Federal Court of Appeal (neutral citation)	*FCA*

Georgetown Law Journal	*Geo. L.J.*
Harvard Human Rights Journal	*Harv. Hum. Rts. J.*
Harvard International Law Journal Online	*Harv. Int'l L.J. Online*
Harvard Law Review	*Harv. L. Rev.*
Hastings International and Comparative Law Review	*Hastings Int'l & Comp. L. Rev.*
Human Rights Tribunal of Ontario (neutral citation)	*HRTO*
International Journal for Philosophy of Religion	*Int'l J. Phil. Rel.*
International Journal of Children's Rights	*Int'l J. Child. Rts.*
International Journal of Constitutional Law	*ICON*
International Journal of Law in Context	*Int. J.L.C.*
Journal for the Scientific Study of Religion	*J. Sci. Stud. Relig.*
Journal of Catholic Legal Studies	*J. Cath. Legal Stud.*
Journal of Church and State	*J. Church & State*
Journal of Human Development	*J. Hum. Dev.*
Journal of Law, Philosophy and Culture	*J.L. Phil. & Culture*
Juridical Review	*Jurid. Rev.*
LexisNexis / Quicklaw	*LN / QL*
Manitoba (neutral citation prefix)	*MB*
Manitoba Court of Appeal (neutral citation)	*MBCA*
Manitoba Court of Queen's Bench (neutral citation)	*MBQB*
McGill Law Journal	*McGill L.J.*
Method & Theory in the Study of Religion	*Meth. Theor. Stud. Relig.*
National Journal of Constitutional Law	*N.J.C.L.*
New Brunswick (neutral citation prefix)	*NB*
New York University Law Review	*N.Y.U.L. Rev.*
Newfoundland (neutral citation prefix)	*NF*
Newfoundland Court of Appeal (neutral citation)	*NFCA*
Newfoundland & Labrador (since 2002)	*Nfld*
North Dakota Law Review	*N.D.L. Rev.*
Northwest Territories (neutral citation prefix)	*NT or NWT*
Notre Dame Law Review	*Notre Dame L. Rev.*
Nova Scotia (neutral citation)	*NS*
Ontario (neutral citation prefix)	*ON*
Ontario Appeal Cases	*O.A.C.*

Ontario Court of Appeal (neutral citation)	*ONCA*
Ontario Superior Court of Justice	*Ont. S.C.J.*
Osgoode Hall Law Journal	*Osgoode Hall L.J.*
Oxford Journal of Legal Studies	*Oxford J. Legal Stud.*
Prince Edward Island (neutral citation prefix)	*PE*
Queen's Bench	*Q.B.*
Québec Court of Appeal (neutral citation)	*QCCA*
Québec Human Rights Tribunal (neutral citation)	*QCTDP*
Québec Judgments (Q.L.)	*Q.J.*
Review of Religious Research	*Rev. Relig. Res.*
Revised Statutes of Alberta	*R.S.A.*
Revised Statutes of British Columbia	*R.S.B.C.*
Revised Statutes of Manitoba	*R.S.M.*
Revised Statutes of Newfoundland	*R.S.N.*
Revised Statutes of Nova Scotia	*R.S.N.S.*
Revised Statutes of Ontario	*R.S.O.*
Revised Statutes of Prince Edward Island	*R.S.P.E.I.*
Revised Statutes of Saskatchewan	*R.S.S.*
Revised Statutes of Yukon	*R.S.Y.*
Revised Statutes of Canada	*R.S.C.*
Religion, State & Society	*Relig. State Soc.*
Revue de droit de l'Université de Sherbrooke	*R.D.U.S.*
Revue du Barreau	*R. du B.*
Revue Juridique Thémis	*R.J.T.*
Revue Trimestrielle des droits de l'Homme	*R.T.D.H.*
Saskatchewan (neutral citation prefix)	*SK*
Sasketchewan Court of Appeal (neutral citation)	*SKCA*
Saskatchewan Court of Queen's Bench (neutral citation)	*SKQB*
Section(s)	*S.*
Statutes of Manitoba	*S.M.*
Statutes of Newfoundland (prior to 2002)	*S.N.*
Statutes of Newfoundland and Labrador (since 2002)	*S.N.L.*
Statutes of Nova Scotia	*S.N.S.*
Statutes of Ontario	*S.O.*
Statutes of Saskatchewan	*S.S.*

Supreme Court of Canada (neutral citation)	*SCC*
Supreme Court Reports (since 2004)	*S.C.R.*
Social Research	*Social Research*
Stanford Law Review	*Stan. L. Rev.*
St. John's Journal of Legal Commentary	*St. John's J.L. Comm.*
Supreme Court Law Review	*Sup. Ct. L. Rev.*
Texas Law Review	*Tex. L. Rev.*
Tulsa Journal of Comparative and International Law	*Tulsa J. Comp. & Int'l L.*
Windsor Yearbook Access to Justice	*Windsor Y.B. Access Just.*
University of British Columbia Law Review	*U.B.C. L. Rev.*
University of Chicago Law Review	*U. Chicago L. Rev.*
University of Colorado Law Review	*U. Colo. L. Rev.*
University of Illinois Law Review	*U. Ill. L. Rev.*
University of New Brunswick Law Journal	*U.N.B.L.J.*
University of Toronto Law Faculty Review	*U.T. Fac. L. Rev.*
United States	*U.S.*
Yale Law Journal	*Yale L.J.*
Yukon (neutral citation prefix)	*Y*

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Introduction

Freedom of conscience and freedom of religion are constitutionally recognised as fundamental freedoms by the *Canadian Charter of Rights and Freedoms*[1]. However, their history and protection predate that point. In an effort to better understand and conceptualise the current – and future – relationship between freedom of conscience and freedom of religion, I have chosen to explore the tensions that exist, subsist and resist appeasement. To explore involves the following, according to the *Oxford Dictionary*:

> **1** travel through (an unfamiliar area) in order to learn about it.
> **2** inquire into or discuss in detail.
> **3** evaluate (a new option or possibility).
> **4** examine or scrutinize by searching through or touching.[2]

Exploring freedom of conscience and religion entails a similar exercise, since I will travel through anthropological and sociological interpretations of religion in order to better understand how religion is perceived in law; I will inquire into how religion is conceived in law and how it affects its sister provision of freedom of conscience; I will then evaluate the right to freedom of conscience in an effort to develop an enhanced view of this fundamental freedom; finally, I will scrutinise freedom of conscience from a comparative perspective, enabling me to seek out alternative interpretations of this freedom.

My master's thesis is divided into four chapters. The first chapter will argue that a better understanding of religion *in* law can be achieved by examining religion *out* of law. I will draw on different definitional philosophies of religion found in the fields of sociology and anthropology in order to form an understanding of religion; in a second movement, I will examine various approaches to defining religion in law,

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[1] The primacy of the Constitution of Canada is guaranteed by s. 52(1) of the *Constitutional Act of Canada*, which states that the Constitution of Canada is the supreme law of Canada. Freedom of conscience and religion is protected under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitutional Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 **[*Canadian Charter*]**, s. 2a).

[2] COMPACT OXFORD ENGLISH DICTIONARY, "Explore", 3rd ed. rev. (Oxford, Oxford University Press, 2008, online: http://www.askoxford.com/concise_oed/explore?view=uk (site last accessed 18.12.2009).

directing us ultimately to what constitutes “freedom of religion”. In studying religion out of law, the role of the community is greatly emphasised and valued, which constitutes the foremost difference with religion *in* law. Three approaches to defining religion in law are also proposed, setting the stage for our comparative constitutional analysis of Canada, the United States and the decisions under article 9 of the European Convention on Human Rights. I posit that the Supreme Court of Canada has espoused a definition of freedom of religion that straddles the subjective-functional and substantive-content approaches since *Syndicat Northcrest* v. *Amselem*[3], demonstrating the inherent difficulty of defining religion in law. In practice, this means that both religion and religious belief have been defined, constituting a coloured framework approach to freedom of religion. Adding to this difficulty is the qualification of its relationship with its relationship with its sister provision of freedom of conscience in Canada.

The second chapter will examine freedom of religion, also known as the ‘first freedom’ in Canadian constitutional law. The study of freedom of religion should be understood as the backdrop to my analysis of freedom of conscience. In this sense, I will attempt to redress the composition of freedom of religion and freedom of conscience in an effort to better understand these two fundamentally interrelated freedoms. I have elected to study freedom of religion in three successive waves: first, before the enactment of the *Canadian Bill of Rights*; second, under the *Canadian Bill of Rights*; lastly, after the enactment of the *Canadian Charter of Rights and Freedoms*. Moreover, the accommodation as well as the proportionality of one’s freedom of religion is also addressed. Freedom of religion, as it shall be demonstrated, has engendered a re-positioning of individual and community interests as well as a reinterpretation of the justifications leading to the safeguarding of these beliefs.

The third chapter will study how freedom of conscience has been understood in the Canadian constitutional context. Freedom of conscience has been explained in the case law as either signifying the absence of autonomy of freedom of conscience or as a synonym related to free choice and personal autonomy. Freedom of

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[3] *Syndicat Northcrest* v. *Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 **[*Amselem*]**.

conscience, as a fundamental freedom, has yet to find its own voice in the broader discourse on freedom of conscience *and* religion. Drawing on Canadian legal literature, however, I construct an understanding of freedom of conscience based on a scale with freedom of religion; this position differs from the case-law interpretation of freedom of conscience. In this way, all authors attribute a certain role to freedom of conscience, whether it be *lesser than*, *equivalent to*, or *broader than* freedom of religion. I will argue that recognising freedom of conscience as *equivalent to* freedom of religion constitutes its optimal interpretation in the Canadian constitutional context. Through this examination of freedom of conscience, the interdependence of that freedom with freedom of religion provides its strongest rallying point and justifies further analysis.

The final chapter will analyse freedom of conscience through the comparative lenses of American and European case law and legal literature. This comparative approach will, in my view, enhance the understanding of freedom of conscience in the Canadian constitutional context. The European perspective on freedom of conscience seems to rely on both religious and secular conceptions of conscience. Alternatively, freedom of conscience is not recognised in the American Constitution or through its Amendments; it has served instead to demonstrate what should be included in a claim of religion rather than a claim of conscience. Within comparative legal literature, freedom of conscience has been afforded marginally more place than within the comparative case law. Freedom of conscience, as understood in the American constitutional experience, remains secondary to the all-pervasive nature of free exercise. The European perspective has revealed an imbalance between the rates at which freedom of conscience has developed in the legal literature perspective versus the case law. In this sense, freedom of conscience has been suggested as a flexible tool for re-imagining, reinterpreting and reclaiming the relationship not only between the individual and the community, but also between minorities and the majority group.

In fact, my exploration and consequent analysis of freedom of conscience and freedom of religion lead me to conclude that both freedoms draw from multiple legal and social science sources concurrently, engaging at once the individual and the community and revealing the underlying philosophical discourses in Canada. By

legally constructing freedom of religion from both the perspective of the individual as well as the religious institution and conceptualising freedom of conscience as relating to the absence or presence of personal autonomy and free choice, a call is put forward for a more contextual approach to these fundamental freedoms within to the Canadian constitutional discourse.

Chapter I. Theoretical Conceptions of Religion: Toward a Better Understanding *In* and *Out* of Law

Introduction

Freedom of religion has often been seen as the "first" freedom afforded. Granting missionaries secure passage, offering minorities a safe haven to practice and decidedly, reflecting a society's makeup, all constituted rationales for protecting that freedom. Indeed, freedom of religion has played an increasingly central role in understanding the interactions of groups and individuals. Nevertheless, one may be tempted to ask the following: *who* establishes or defines religion? According to *what* criteria? *When* were these standards devised? *Where* were these conditions documented? *Why* are these norms recognised? And finally, *how* were these principles acknowledged? Although not purporting to answer these vast questions, I am rather underlining the breadth of this freedom. I shall turn my attention more particularly to a related perspective, namely, how does the interpretation of religion, both *in* and *out* of law, affect its relationship with its sister provision of freedom of conscience in Canada?

Given the recent case law in Canada, it becomes all the more important to understand how one might interpret freedom of religion. Within the Canadian constitutional context, the Supreme Court of Canada has seemingly espoused a definition of freedom of religion that straddles the subjective-functional and substantive-content approaches since *Syndicat Northcrest* v. *Amselem*[4]. At issue in

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[4] *Amselem*, *supra* note 3, ¶ 39, 46. See also *Congregation of the Followers of the Rabbis of Belz to Strengthen Torah* c. *Val-Morin (Municipalité de)*, 2008 QCCA 577 (application for leave to appeal dismissed, No. 32663, 25 September 2008, 2008 CanLII 48619 (S.C.C.)) **[*Rabbis of Belz*]**; *Bruker* v. *Marcovitz*, 2007 SCC 54, [2007] 3 R.C.S. 607 **[*Bruker*]**; *A.C.* v. *Manitoba (Director of Child and Family Services)*, 2009 SCC 30 **[*A.C.*]**; and *Alberta* v. *Hutterian Brethren of Wilson Colony*, 2009 SCC 37 **[*Hutterian Brethren of Wilson Colony*]**. Our position differs from the conclusions of authors Ahdar and Leigh, who suggest a substantive-content approach (Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005) at 119 and Lori Beaman, who suggests that although we start with a substantive-content approach, we come out with a subjective-functional approach to religion in law at the end: see Lori G. Beaman, "Defining Religion: The Promise and the Peril of Legal Interpretation" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008), 192 at 194 **[Beaman, "Defining Religion"]**.

Amselem was whether Orthodox Jews could erect *succahs*[5] on their balconies in pursuance to their religious beliefs but contrary to the declaration of co-ownership. The majority of the Supreme Court defined "religion"[6] and developed at the same time a test based on the sincerity of the claimant's beliefs[7].

Decided a few years later, *Bruker* dealt with the refusal of the husband to give his wife a *get*, a divorce under Jewish law (*Halakhic* law) after obtaining a divorce under civil law[8], and this, despite the fact that a standing agreement had been negotiated, known as the Consent to Corollary Relief. When the sincerity (or lack thereof) of the husband's religious beliefs[9] was balanced with the wife's "ability to live her life fully as a Jewish woman in Canada"[10], the majority of the Supreme Court held that the breach in the husband's rights was inconsequential[11]. In doing so, the test for freedom of religion became more objective, rather than subjective[12].

The scope of freedom of religion was again questioned in *A.C.*, where a child of fourteen years and ten months wished to refuse a blood transfusion on the basis of her religious beliefs as a Jehovah's Witness. This case unequivocally illustrates

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[5] The *succah* is explained as follows in *Amselem*, *supra* note 3, at ¶ 5: "A succah is a small enclosed temporary hut or booth, traditionally made of wood or other materials such as fastened canvas, and open to the heavens, in which, it has been acknowledged, Jews are commanded to "dwell" temporarily during the festival of Succot, which commences annually with nightfall on the fifteenth day of the Jewish month of Tishrei. This nine-day festival, which begins in late September or early- to mid-October, commemorates the 40-year period during which, according to Jewish tradition, the Children of Israel wandered in the desert, living in temporary shelters."

[6] *Amselem*, *supra* note 3, ¶ 39.

[7] *Ibid*, ¶ 56.

[8] The *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), was reformed in 1990 following the alliance of B'Nai Brith, the Canadian Jewish Congress and the Canadian Coalition of Jewish Women for the Get. The reform, as illustrated through article 21.1 of the *Divorce Act,* now provided the opportunity for either side to initiate proceedings and submit an affidavit to remove the barriers to religious remarriage. The reform was therefore aimed at protecting Jewish women who found themselves in a problematic divorce situation and ultimately help them toward obtaining a *get* (Jewish divorce).

[9] *Bruker*, *supra* note 4, ¶ 78-79.

[10] *Ibid*, ¶ 93.

[11] The majority did not discern any errors in the assessment of damages by the trial judge and therefore elected to leave them undisturbed: *Bruker*, *supra* note 4, ¶ 97-99. According to the minority position, damages would not have been awarded, since the issue of this case falls outside the jurisdiction of civil courts: *Ibid*, ¶ 177-180.

[12] *Ibid*, ¶ 68-70.

the Court's admission that there is no "eureka moment"[13] delineating the child from the adolescent, dividing between those who are in need of protection from harm from those who have the capacity to understand its effects[14].

Most recently in *Hutterian Brethren of Wilson Colony*, new regulations regarding the issuing of photographs with all drivers' licenses[15] were instituted by the Albertan government, upsetting a careful balance that had existed with the Hutterian Brethren for the last thirty years[16]. The Brethren believed that graven images, such as those obtained by the process of photography, would contravene the Second commandment[17]. The majority of the Supreme Court concluded that "the Charter guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion."[18] In examining the deleterious effects of such legislation, McLachlin C.J. (writing for the majority) admits that there is no "magic barometer" to measure the implication of a particular limit on a religious practice: "[r]eligion is a matter of faith, intermingled with culture."[19]

The past five years have indeed provided much food for thought for freedom of religion; many questions have also been elicited, many of them still unanswered. In light of this, our understanding of religion *in* law can arguably be aided by an examination of religion *out* of law and more particularly, within the realm of the social sciences.

My study of freedom of religion will begin by examining the mechanisms involved in defining a concept. I will draw on different definitional philosophies of religion in order to form a more complex understanding of religion and, in a second

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[13] *A.C., supra* note 4, ¶ 4.
[14] *Ibid,* ¶ 108, 111.
[15] *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, s. 14(1)(b) (am. Alta. Reg. 137/2003, s. 3
[16] The Hutterian Brethren had benefited from an exemption, obtaining a Code G license, which was a non-photo license and could be obtained at the discretion of the Registrar for religious objectors.
[17] "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4): *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 29.
[18] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 95.
[19] *Ibid*, ¶ 89, 90.

movement, of freedom of religion. I will then present three ways of thinking about religion: first, by looking at the 'essence' of religion as explained by Max Weber (1.1); second, by examining the dichotomy between the sacred and the profane as argued by Émile Durkheim (1.2); and third, by understanding religion as cultural system as suggested by Clifford Geertz (1.3). While I admit that these interpretations of religion cannot entirely be transposed into a legal setting[20], they nevertheless represent a necessary step to enrich the law's understanding of freedom of religion.

In a second part, I will turn to contemporary legal authors in order to appreciate the difficulty of not only defining religion, but *defining religion in law*. Three distinct approaches to defining religion in law have been suggested[21]: first, the subjective-functional approach, which places the emphasis on the individual (2.1); second, the substantive-content approach, focusing primarily on identifying the characteristics of religion (2.2); third, the so-called "Strasbourg approach", which follows the provision set out by the *European Convention on Human Rights* (2.3). Finally, the strengths and weaknesses of these various approaches to defining religion in law will be discussed, as will alternative conceptions of religion *in* law.

1. Defining Religion in Life: Religion through the Lens of Anthropology and Sociology

"Every definition is dangerous."[22]

Erasmus

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[20] Author Benjamin Berger has explained that "law has no choice but to conceive of religion in terms cognizable within constitutional liberalism" and has argued for the relationship between law and religion to be reconceived, namely as the interaction of two cultural systems: see Benjamin Berger, "Law's Religion: Rendering Culture", (2007) 45(2) *Osgoode Hall L.J.* 277, at 281 **[Berger, "Law's Religion"]** and Benjamin Berger, "Understanding Law and Religion as Culture: Making Room for Meaning in the Public Sphere" (2006) 15(1) *Const. Forum Const.* 15 **[Berger, "Understanding Law"]**.

[21] I will build on the approaches offered by Ahdar & Leigh, *supra* note 4.

[22] Rodney Stark and Charles Young Glock, *Patterns of Religious Commitment, American Piety: The Nature of Religious Commitment* (Berkeley, University of California Press, 1968), 11 as cited in George C. Freeman, "The Misguided Search for the Constitutional Definition of "Religion"", (1982-1983) 71 *Geo. L.J.* 1519, at 1519 **[Freeman, "Misguided Search"]**.

How does one define the act of definition? Author Aldo Antonelli explains that the classical theory of definition 'captures' the true nature of what is being defined[23]. Applied to religion, however, the task becomes inherently more complex, since the subject spans both time and disciplines. This classical approach to defining underlines the difficulty of capturing the true nature of religion; identifying techniques – *who*, *what*, *when*, *where*, *why* and *how* – further illustrate the intricacies of religion.

Defining religion has never been a task for the faint of heart. While it is wholeheartedly acknowledged that this topic merits its own study[24], I intend to limit myself to a few overarching ideas in order to establish a broad interdisciplinary framework on religion. At the same time, I also recognise that my very attempt at definition might reveal a bias; this issue will be addressed further on in the study. I will successively and briefly examine the positions of theorists Max Weber, Émile Durkheim and Clifford Geertz. I suggest that these social science approaches to religion may, and will, enhance our awareness of the ramifications of defining religion in law.

1.1 The 'Essence' of Religion

Best known for his contributions to the fields of sociology and economics at the turn of the twentieth century, Max Weber challenged perceptions of society with unparalleled scientific rigour. In his work *Economy and Society: an Outline of Interpretative Sociology*, Weber explains indirectly that a given religious conception's

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[23] Aldo G. Antonelli, "Definition" in E. Craig, ed., *Routledge Encyclopedia of Philosophy,* (London, Routledge, 1998). Retrieved February 20, 2009, from http://www.rep.routledge.com/article/Y057: "A ''definition'' is a phrase signifying a thing's essence' (Aristotle). Historically, philosophers have come to distinguish these 'real' definitions from 'nominal' definitions that specify the meaning of a linguistic expression rather than signify the essential nature of an object, 'making another understand by Words, what Idea, the term defined stands for' (Locke)."

[24] The study of defining religion has been tackled effectively and methodologically by various authors: See Jan G. Platvoet and Arie L. Molendijk, eds., *The Pragmatics of Defining Religion: Contexts, Concepts and Contests* (Leiden (Netherlands), Koninklijke Brill NV, 1999); Arthur L. Greil and David R. Bromley, *Defining Religion: Investigating the Boundaries Between the Sacred and the Secular*, Religion and the Social Order coll. (London, JAI, 2003); Victoria S. Harrison, "The Pragmatics of defining religion in a multi-cultural world" (2006) 59 *Int'l J. Phil. Rel.* 133.

endurance – and by extension its acceptance – depends most importantly on personal experiences[25]:

> "To define 'religion', to say what it *is*, is not possible at the start of a presentation such as this. Definition can be attempted, if at all, only at the conclusion of the study. *The essence of religion is not even our concern, as we make it our task to study the conditions and effects of a particular type of social behaviour*."[26]

Max Weber's choice not to define religion requires that we stop and ask ourselves whether religion should or should not be defined. Perhaps it is not a question of rituals, practices and beliefs but rather about the "essence of religion". Author Alan Aldridge, in his recent edition of *Religion in a Contemporary World*, addresses critics' concerns about Weber's stance on religion[27], concluding that a Weberian interpretation would focus on "conditions and effects" of religion rather than the formal act of defining religion. Max Weber's perspective on religion is founded, therefore, not on the basis of pre-determined content, but rather on the consequences of those beliefs on society. This is not to say that religion is unimportant – rather it is a question of *how* one should approach this type of 'social behaviour'.

Weber's understanding of religion could be qualified as experiential: by focusing on the outcomes of religious beliefs rather than their definition, Weber was indeed evaluating the impact of religion on society as a whole. By examining the essence of religion, both the individual and the collective become engaged in the discourse on religion.

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[25] Max Weber, *Economy and Society: an Outline of Interpretative Sociology* (edited by Guenther Roth and Claus Wittich; translated by Ephraim Fischoff et al., New York, Bedminster Press, 1978), 403

[26] *Ibid*, 399 [my emphasis]

[27] Alan E. Aldridge, *Religion in the Contemporary World: A Sociological Introduction*, 2nd ed. (Cambridge, Polity, 2007), 30-31. Specifically, the author addresses the critique of Weber's interpretation of religion on several grounds at the same pages: "First, is it true that a formal definition of religion is indispensable? […] Second, any formal definition of religion is bound to contain theoretical assumptions that are contentious. […] Third, sociologists should ask: who is demanding a definition, why, and with what consequences? […] Fourth, society changes and religion changes with it."

1.2 The Dichotomy between the Sacred and the Profane

Émile Durkheim, known as the "father" of modern French sociology[28] as well as a contemporary of Max Weber's, focussed on the interactions between the individual and the 'collective'. However, unlike Weber, Durkheim put forth a preliminary definition of religion. He opined that religion should be defined by distinguishing the sacred from the profane[29]. Religion could be understood as

> "un système solidaire de croyances et de pratiques relatives à des choses sacrées, c'est-à-dire séparées, interdites, croyances et pratiques qui unissent en une même communauté morale, appelée Église, tous ceux qui y adhèrent. »[30]

While it might be difficult to conceive of religion in such categorical terms of "sacred" and "forbidden", Durkheim provided a social intersection between the individual and the community: the Church. For Durkheim, religion was an eminently social and therefore collective, thing[31]. This is not to say, however, that all collective gatherings can be qualified in religious terms. As noted by Durkheim, magical societies can

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[28] L'ENCYCLOPÉDIE DE L'AGORA, « Émile Durkheim », online : < http://agora.qc.ca/mot.nsf/Dossiers/Emile_Durkheim> (last consulted on 26.02.2009)

[29] Durkheim was not alone in defining religion along the sacred/profane dichotomy: on this subject, see also Mircea Eliade, *The Sacred and the Profane: the Nature of Religion* (translated by Willard Trask, New York, Houghton Mifflin Harcourt, 1968), who explained the dichotomy as different experiences of space ("sacred space" and "profane space"). Eliade, at page 22, explained "sacred space" as "possess[ing] existential value for the religious man; for nothing can begin, nothing can be *done*, without a previous orientation – and any orientation implies acquiring a fixed point. It is for this reason that religious man has always sought to fix his abode at the "centre of the world". Profane space, on the other hand, was described as "homogenous and neutral; no break qualitatively differentiates the various parts of its mass". The subject of sacred versus profane space is considered, by author Woulter J. Hanegraaff, as a glimpse into the "heart of Eliade's entire oeuvre: the perception that modern man lives (or, at least, tried to live) in an 'unreal', meaningful, ordered cosmos of archaic man.": see Woulter J. Hanegraaff, "Defining Religion in Spite of History" in Platvoet & Molendijk, *supra* note 24, 337 at 358.

[30] Émile Durkheim, *Les formes élémentaires de la vie religieuse,* 5th ed. (Paris, Les Presses universitaires de France, 1968), Livre I. Online : <http://classiques.uqac.ca/classiques/Durkheim_emile/formes_vie_religieuse/formes_elementaires_1.pdf> (last consulted 23.02.2009), 51.

[31] *Ibid*, 21 [my translation]. More recently, author Russell Sandberg examined how Durkheim's formulation of the individual and the collective phenomenon of religion helped illustrate that "[c]ollectivity remains a definitional attribute of religion: legal instruments show that States have not yet fully embraced the idea that religion is an individual and private affair (although international authorities seem closer to embracing this notion." See Russell Sandberg, "Religion and the Individual: a Socio-Legal Perspective" in Abby Day, ed., *Religion and the Individual: Belief, Practice, Identity* (Vermont, Ashgate Publishing, 2008), 157 at 165.

exist, but a *Church of magic* cannot[32]. The difference lies in the ultimate vocation: a magician provides a service to a clientele whereas religion offers a true community, bound by belief[33]. While it is beyond my reach to explain Durkheim's complex and intricate definition of religion, I regard his divide between the sacred and the profane as presenting an appealing and challenging way of looking at the role of religion in society.

Beyond the sacred and profane dichotomy, Émile Durkheim's focus on the community presents an interesting point of view: although often set aside, the notion of community remains incontrovertible to one's understanding of religion. By requiring the existence of a moral community ("*communauté morale*"), Durkheim was in fact appealing to a collective sense of self. This constitutes, in my view, the backbone of Durkheim's conception of religion.

1.3 Religion as a Cultural System

Building on both Weber and Durkheim's versions – lest we say visions – of religion, Clifford Geertz later offered his interpretation of religion as a cultural system. Culture, for Geertz, meant "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conception expressed in symbolic forms by which men communicate, perpetuate, and develop their knowledge about and attitudes toward life."[34] Culture, therefore, seems to be a constant state of redefinition, building on existing meanings to create future understandings. Geertz also reminds us that a definition can provide a "useful orientation, or reorientation, of thought"[35] but admits

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[32] Durkheim, *supra* note 30, 49 [my translation, emphasis in original].
[33] Anne Warfield Rawls, *Epistemology and Practice: Durkheim's The Elementary Form of Religious Life* (Cambridge, Cambridge University Press, 2005), 122.
[34] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York, Basic Books, 1973), 89.
[35] Clifford Geertz, « Religion as a Cultural System » in Michael Lambek, ed., *A Reader in the Anthropology of Religion*, Blackwell Anthologies in Social and Cultural Anthropology coll., (Malden (MA), Blackwell Publishing 2002), 61 **[Geertz, "Religion as a Cultural System"]** at 63. With regard to religion, Geertz explains that there must be a logic to religion, at page 68 of the same text: "What any particular religion affirms about the fundamental nature of reality may be obscure, shallow, or, all too often, perverse; but it must, if it is not to consist of the mere collection of received practices and conventional sentiments we usually refer to as moralism, affirm something. If one were to essay a minimal definition of religion today, it

that the difficulties of defining religion scientifically are not insignificant[36]. Religion can thus be considered as

> "(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) moods and motivations seem uniquely realistic."[37]

Geertz, unlike Durkheim, did not define religion to the exclusion of all other social forces and believed that this did not explain its socio-anthropological interest. Indeed, according to Geertz, religion should not describe the social order, but help shape it[38]. It was in this sense that Geertz, believing much like Max Weber, explained that "man is an animal suspended in webs of significance, he himself has spun. I take culture to be those webs, and the analysis of it to be therefore not an experimental science in the search of law but an interpretative one in search of meaning."[39] By placing the emphasis on the *meaning* of cultural acts or patterns, Geertz was effectively illustrating his "thick description of culture". By searching for the meaning of and behind these cultural acts and patterns, Geertz, like Weber before him, was far more interested in the conditions, effects and thus meaning of a 'particular kind of social behaviour'.

Clifford Geertz's contribution to the definition of religion is substantial. Though I do not claim to have exhausted his theory on the definition of religion, he has provided, in my view, a new mode to evaluate the *meaning* of religion. Ultimately,

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would not be Tylor's famous "belief in spiritual being," to which Goody, wearied of theoretical subtleties, has lately urged us to return, but rather what Salvador de Madariaga has called "the relatively modest dogma that God is not mad."" [references omitted]

[36] Geertz, "Religion as a Cultural System", *supra* note 35, 80-81.

[37] *Ibid*, 63. The anthropological study of religion was explained as a two-step process by Geertz at page 81, highlighting simultaneously the neglected and the concerned: "The anthropological study of religion is therefore a two-stage operation: first, an analysis of the system of meanings embodied in the symbols which make up the religion proper, and, second, the relating of these systems to social-structural and psychological processes."

[38] Geertz, "Religion as a Cultural System", *supra* note 35, 79.

[39] Clifford Geertz, " Thick Description: Toward an Interpretative Theory of Culture" in Michael Martin and Lee C. McIntyre, eds., *Readings in the philosophy of social science,* 5th ed., (Boston, MIT Press, 1994), 213 at 214.

approaching religion as a cultural system allows for the believer's input on what he or she might think religion is or can be[40].

1.4 Conclusion on Defining Religion in Life

Authors Weber, Durkheim and Geertz were selected not only for the theories of religion they proposed, but also for the questions further elicited on religion. Defining religion is not a mere reflexive process; it must heed to historical, sociological, geographical and temporal considerations. I have sought to broaden the discourse on religion by introducing their perspectives.

What conclusions can be drawn from their considerable insight into religion? First, I question whether religion should even be defined unless one is compelled to do so for external reasons (such as constitutional guaranteed). By providing a definition, I believe that certain preconceptions or preliminary conditions become unarguable, effectively short-circuiting potential discussions on a concept. Second, I wonder whether the dichotomy between the sacred and profane should serve as the point of reference for religion, since its legitimacy is determined on the basis of the existence of a Church. While Durkheim did not limit the existence of communities, he challenged their vocation. In doing so, certain communities became undeniably more valuable than others[41]. *Religion* and *religiosity* must therefore be distinguished:

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[40] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (London, Fontana, 1993), 93, 118 as cited in Arun Micheelsen, « « I don't do systems » : An Interview with Clifford Geertz » (2002) 14 *Meth. Theor. Stud. Relig.* 2, at 16: "Geertz, with his concept of "model of" and "model for" has stressed the interpretive function of religion for the believer. Nevertheless, this changes several things, for we now have to clarify what it is we wish to study. Is it our task to study *what* a religion means, or is it our task to study *how* religion generates and articulates meaning? It is my view that Geertz is concerned with both issues, which is why he applies and combines a phenomenological and hermeneutical perspective. If this is the case, then the specific *what* and the general *how* is combined in Geertz's method and therefore one cannot do without the other. The question is: what is the general, and in which way is it related to the concept of symbol, culture, or even one's general assumptions?" [references omitted]

[41] Unlike Durkheim, however, Clifford Geertz stated that one can be considered "religious" about an activity, if that activity is symbolic of some transcendent truths: "A man can indeed be said to be "religious" about golf, but not merely if he pursues it with passion and plays it on Sundays: he must also see it as symbolic of some transcendent truths.": Geertz, supra note 32, 68. For a recent argument in favour of hockey as a religion (in the very unique setting of Montréal): see Jean-Marc Barreau and Olivier Bauer, eds., *La religion du Canadien de*

whereas the former points to established dogma, the latter has been generally interpreted as a "multidimensional phenomenon"[42] that should be understood as religion in everyday life. In other words, while *religion* establishes the framework (macro level), *religiosity* illustrates the internalisation of religion by individuals, as seen by their practices, beliefs and commitment to the institution (micro level)[43]. Lastly, in considering whether religion should be regarded as a culture[44], one must be aware of the claim of the individual believer and thus the accompanying symbolic act. Although religion as a cultural system invites a contextualising approach to the social order, the importance of the individual believer must not be forgotten and how he or she relates to a religion.

A final point must be made about the importance of the community by all three of these authors: for Weber, the community served as the sounding board to religious beliefs; for Durkheim, religion was an undeniably social thing and the

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Montréal (Montréal, Fides, 2009). Given the discussion below, I consider that hockey in Montréal should be understood in terms of religiosity rather than religion: we detect the presence of both components and modes of religiosity. In this way, there is an undeniable *orthodoxy* surrounding the famed Canadiens; the *feelings* about the Canadiens run deep, as does fans' loyalty to the team (though thoroughly unforgiving at times); finally, *support* for the Canadiens is seen throughout the year and especially during the season, through sell-out crowds at the Bell Centre, the sporting of team paraphernalia and pilgrimages to local establishments to watch the games. Moreover, religious fervour about the Canadiens can be exercised in *public* or in *private*, reinforcing the various modes of religiosity.

[42] Although authors Marie Cornwall and Stan Albrecht admit that this position is not unanimous amongst authors, it can be interpreted as a 'general agreement': see Marie Cornwall and Stan Albrecht, "The Dimensions of Religiosity: A Conceptual Model with an Empirical Test" (1986) 27(3) *Rev. Relig. Res.* 226, at 226. The authors add, at pages 227-228, that religiosity is comprised of components (religious beliefs, religious feelings and religious works or practices) and modes of religious involvement (personal and institutional). Indeed, while Cornwall and Albrecht's study clearly supports the contention that religiosity is best viewed as multidimensional, it is also admitted that this model was developed for a particular religious group (Mormons) and would need to be adapted to other religious realities: see *ibid*, 242.

[43] See Karel Dobbelaere, "Assessing Secularization Theory" in Peter Antes, Armin W. Geertz and Randi R. Warne, eds., *New Approaches to the Study of Religion, Vol. 2: Textual, Comparative, Sociological, and Cognitive Approaches* (Berlin, Walter de Guyter, 2004), 229 at 243.

[44] Examining religion as culture has pervaded other related discourses as well. Paul Kahn has developed a more 'flexible' manner in which to describe law through culture: see Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship,* (Chicago, University of Chicago Press, 1999). Author Benjamin L. Berger has built on Kahn's approach of law as culture, and more specifically with regard to Canadian constitutional rule of law as culture, in order to form a better understanding of religion: see Berger, "Law's Religion", *supra* note 20.

Church proved to be the necessary junction between the individual and the community. Finally, for Geertz, a social order is made up of many different cultural acts: "cultural acts, the construction, apprehension and utilization of symbolic forms, are social events like any other; they are as public as marriage and as observable as agriculture."[45] In this sense, culture patterns can exemplify models *for* and *from* reality[46]. The role of the community (and thus the collective) has been greatly emphasised and valued in the discourse of defining religion in life. The same cannot be said about defining religion in law, where the individual approach is favoured for resolving claims. This is not an insignificant point: I will pursue this distinction between religion in life and in law further on in my study.

In sum, delineating religion in life has proven to be a fruitful yet demanding exercise. These questions are not exclusive to the field of the social sciences and I will demonstrate that similar queries and challenges are present in the discourse on defining religion in law.

Nevertheless, defining religion in law imposes an additional framework, engendering a multiplication of meanings and systems. I will attempt, in the next section, to understand the different approaches employed to define religion in law.

2. Defining Religion in Law

As seen previously, religion can be defined in a variety of manners, placing emphasis on different actors in society and changing therein the manner in which religion is perceived and thus, to a greater extent, religious claims. Authors Rex Ahdar and Ian Leigh have offered, in *Religious Freedom in the Liberal State*[47], three

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[45] Geertz, *supra* note 35, 64.
[46] *Ibid*, 65: "The intertransposability of models *for* and models *of* which symbolic formulation makes possible is the distinctive characteristic of our mentality."
[47] Ahdar & Leigh, *supra* note 4. Author T. Jeremy Gunn also provides a typology of defining religion, albeit less thorough, see: T. Jeremy Gunn, "The Complexity of Religion and the Definition of "Religion" in International Law" (2003) 16 *Harv. Hum. Rts. J.* 189, 194 **[Gunn, "Complexity of Religion"]**. Gunn stated that an "essentialist" definition identifies the elements that are *necessary* for something to be designated as a "religion" whereas a "polythetic" definition does not require that all religions have specific elements in common. The former definition relies on the assumption that religion has one or more elements in

distinct approaches to defining religion in law, which appropriately span our three spheres of interest. They are known as the "subjective-functional approach" (2.1) and the "substantive-content approach" (2.2): the latter referring to *what religion is* and the former indicating *what religion does*[48]. The final approach offered by Ahdar and Leigh is known as the "Strasbourg approach" (2.3). They will now be examined each in turn.

2.1 The Subjective-Functional Approach

The "subjective-functional approach" defines religion from the perspective of the individual claimant. The foremost condition of this approach is therefore the sincerity of belief of the individual[49]. Interestingly, author Wojciech Sadurski offered Clifford Geertz's definition of religion as an example of the functionalist approach, since "a "general order of existence" need not reach the dimension of "transcendence" required by the concept of the supernatural."[50] In using the Geertzian typology of religion, the emphasis is therefore placed on experiences – religiosity – rather than the sacredness of the system.

The subjective-functional approach has been the focus of many authors' critiques which will be identified and discussed. A first point of contention has been privileging the individual's perspective on religion. Indeed, this approach does not require a definition of religion; however, this raises a qualitative issue since there is no 'barometer' by which to measure an individual's belief. In this way, the subjective-functional approach encourages a circular understanding of religion[51]. As such, it

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common with all other religions. Wittgenstein's meaning of game serves to illustrate the "polythetic" definition of religion in Gunn's theory; this approach is similar to the substantive-content approach advocated by Ahdar and Leigh [Ahdar & Leigh, *supra* note 4, 119]. Nevertheless, the use of "essentialist approach" to demonstrate one or more common features in order to qualify as "religion" by Ahdar and Leigh contra-indicates Gunn's approach which supports a separation between what is necessary to *religion* and what is common to *religions*. While I find Gunn's approach interesting, I consider that his typology does not reflect the elaboration of the different approaches to defining religion.

[48] See Beaman, "Defining Religion", *supra* note 4, at 193.

[49] Ahdar & Leigh, *supra* note 4, 115.

[50] Wojciech Sadurski, "On Legal Definitions of "Religion"" (1989) 63 *Austl. L.J.* 834, 838 **[Sadurski, "Legal Definitions"]**.

[51] Sadurski, *ibid*, 836; Ahdar and Leigh, *supra* note 4, 116.

becomes difficult to describe the sincerity of beliefs when religion goes unexplained. A second criticism of the subjective-functional approach focuses on the over-inclusiveness of beliefs[52], since it can dilute at once the meaning of religion as well as its distinctiveness. The final and more substantial criticism of the subjective-functional approach rests on the evaluation of the individual's sincerity of belief[53].

As noted earlier, even though the subjective-functional approach places the emphasis on individual beliefs, it still remains impracticable (for some) not to provide a definition of religion, since the word "religion" is used in this approach. At the same time, proponents of the subjective-functional approach will claim that religion is a social behaviour or cultural system amongst many: a definition will not delineate what constitutes religion nor should it limit its possible content[54]. According to Sadurski, the line between the sacred and the profane is illusory, as is the need for a definition, *proprio motu*, of religion, since "both religious and non-religious beliefs, if held sincerely by an individual *as the motivating grounds of his or her actions*, call for legal protection in a liberal and secular State."[55] Opponents of this approach will argue, like Ahdar and Leigh, that 'avoiding' a definition of religion is 'unpersuasive' since "the legal system still needs some means of differentiating which beliefs are important enough to be respected by non-interference."[56] By relying on an individual's account of beliefs, as well as eschewing a definition of religion, non-religious beliefs can be protected, so long as their motivation is sincere. This is especially true in a context where the principle of constitutionalism prevails, as in the case of Canada, unlike that of New Zealand or the United Kingdom. Therefore, a belief can be sincere while not being important; however, a belief can be important but not sincere, or even religious.

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[52] Sadurski, "Legal Definitions", *supra* note 50, 836; Ahdar and Leigh, *supra* note 4, 116.
[53] Sadurski, *ibid*; Ahdar & Leigh, *ibid*, 117.
[54] Following the logic that religion is therefore but one amongst many, it should not receive a differential form of protection. It behoves us to demand that the proponents of this approach proceed to a further explanation of the subjective-functional approach with regard to the place of religion, as well as identify more clearly its shortcomings.
[55] Sadurski, "Legal Definitions", *supra* note 50, 843 [my emphasis].
[56] Ahdar & Leigh, *supra* note 4, 117.

The subjective-functional approach also draws its biggest strength as well as most significant weakness from the same concept: sincerity. While this point is not substantively addressed by Ahdar and Leigh, Sadurski argues that the 'shortcomings' of the subjective-functional approach are actually strong points, since they can be justified by "the overall pattern of freedom of religion moulded"[57]. With particular attention to the importance placed on the sincerity of the belief, Sadurski maintains that the inquiry is not qualitatively different from any other judicial scrutiny of the individual state of mind, such as in the examination of criminal *mens rea* or legislative intent for the purpose of statutory interpretation, since internal safeguards exist to prevent the ill use of religious exemption[58]. He proposes that this cannot be considered a "serious objection", since there are a number of methods of measuring the sincerity of a claim already in place, such as the

> "conformity of this claim with the written or empirically verifiable traditions and proscriptions of the church or cult, congruence between the pressed religious tenets and one's actions, the willingness to undertake alternative duties and burdens, equally onerous from the point of view of that's religion's proscriptions, etc."[59]

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[57] Sadurski, "Legal Definitions", *supra* note 50, 836.

[58] *Ibid*, 836-837. The issue of "sincere beliefs" has been questioned in more than one field in Canada, rendering analysis at times more complex or simplistic that necessary. I bring the reader's attention to an interesting article on the conjunction of beliefs and tort law, where the author provides a plausible argument for religious thin skulls as a third alternative (to mitigation of damages and the thin skull rule). Consider, as the author did, the following intersection of competing claims: a Jehovah's Witness suffers injuries due to a driver's negligent driving. Although a full recovery would be expected if the victim underwent proscribed surgical treatment, the victim refuses due to necessity of blood transfusions, which contravene the beliefs of a Jehovah's Witness. The victim proceeds, nonetheless, to sue the negligent driver. The author concludes by stating that "[w]e cannot refuse to recognize religious thin skulls without making a negative judgment against the reasonableness of the victim's religion.": Marc Ramsay, "The Religious Beliefs of Tort Victims: Religious Thin Skulls or Failures to Mitigate?", (2007) 20 *Can. J.L. & Juris.* 399 at 399 and 427. A Canadian author has recently challenged the term 'honest belief' in consent to determine culpability in sexual assault. The author argues that this outdated approach cuts short the comprehensive study of criminal responsibility. See: Lucinda Vandervort, "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault" (2004) 42 *Osgoode Hall L.J.* 625. On this point, see also Alison Dundes Renteln, *The Cultural Defense* (Oxford, Oxford University Press, 2004), who examined the nature of the debate surrounding the admissibility of cultural evidence in the courtroom. The author concludes that cultural evidence should be considered in all cases, even if it is ultimately not used as the basis for mitigation, damages, or other remedies: *Ibid,* 5, 213.

[59] Sadurski, "Legal Definitions", *supra* note 50, 837.

While the existence of these parameters indicates a framework of religion, it does not, for all intents and purposes, proceed to a definition. Nevertheless, these parameters do reintroduce an objective rather than a subjective test for freedom of religion[60]. By playing devil's advocate to Sadurski's final claim, I posit that the sincerity of a claim can also act as a springboard for ignoring "embarrassing beliefs"[61], under the banner of an objective test for freedom of religion.

The subjective-functional approach[62] has garnered some support in the United States; the Supreme Court has adopted this approach in two conscientious objector cases[63], namely *United States* v. *Seeger*[64] and *Welsh* v. *United States*[65]. A

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[60] This can be seen in *Bruker, supra* note 4, at ¶ 68-70, where Abella J. questions the religious sincerity of the ex-husband's beliefs; she concludes that the ex-husband refused to give the get on the basis of emotions rather than beliefs.

[61] *Bruker, supra* note 4, at ¶ 68-70.

[62] The definition of religion adopted by the Supreme Court in these cases was largely derived from the writings of theologian Paul Tillich: see Jeffrey Omar Usman, "Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, The Arts, and Anthropology" (2007) 83 *N.D.L. Rev.* 123, 193, citing *Grove* v. *Mead School Dist. No. 354*, 753 F. 2d 1528, 1537 n. 10 (Canby, J., concurring). As Usman notes at page 194, "[w]ith religion no longer requiring a god or gods, the *Seeger*/Tillichian functional phenomenological approach "treats an individual's 'ultimate concern' – whatever that concern may be – as his religion." [references omitted] Although beyond the scope of my study, I note that the subjective-functional approach has also found partial support in Australia: see Sadurski, *supra* note 50, 836-837, citing *Church of New Faith* v. *Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 **[*Church of New Faith*]**. Author Carolyn Evans has argued recently that the Australian courts – and the High Court in particular – need to be able to develop more sophisticated legal approaches to questions of religious freedom: Carolyn Evans, "Religion as Politics and not Law: the Religion Clauses in the Australian Constitution (2008) 36(3) *Relig. State Soc.* 283 **[Evans, "Religion as Politics"]**. As Evans explains, Australia does not have a bill of rights; religion is protected under s. 116 of the Constitution [*An Act to constitute the Commonwealth of Australia* [9th July 1900] (63 & 64 Victoria - Chapter 12)] which reads: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." Judges have, for the most part, interpreted this section as a limitation on government power rather than on the basis of a free-standing right, according to Evans at pages 298-299 and "[u]ntil the High Court is prepared to take a more robustly rights-oriented view of Section 116 it is likely to be a marginal influence in these debates."

[63] As noted by both Sadurski and Ahdar and Leigh: Sadurski, *supra* note 50, 835-836; Ahdar & Leigh, *supra* note 4, 115-116.

[64] *United States* v. *Seeger,* 380 US 163 (1965) **[*Seeger*]**. At issue in *Seeger* was the interpretation of s. 6(j) of the *Universal Military Training and Service Act*, which created an exemption for conscientious objectors on the basis of their "religious training and belief". Although Seeger did not profess exemption on the basis religious faith but rather on the basis of a purely ethical creed, the Supreme Court interpreted his request as based on religious

few years later, however, it was held that sincere beliefs could not be extended to personal beliefs by the United States' Supreme Court[66]. In Canada, the Supreme Court opined in *R.* v. *Big M. Drug Mart*[67] that the concept of freedom of religion should be understood as the right to entertain religious beliefs, but also that each is entitled to their views. In this way, a positive and negative right to religion co-exist[68], which serves as a first parameter of the individual's conception of religion. Furthermore, the Canadian approach as defined most recently by *Amselem*[69], offers in my view, both a definition of religion as well as a test based on the sincerity of beliefs and seems to straddle the subjective-functional and the substantive-content approaches[70]. Although this point will be examined in greater detail later in the study, it is the conjunction of these approaches that demonstrate the intrinsic difficulties of defining religion in law.

In closing, while the subjectivist-functional approach rightfully places the attention on an individual's beliefs and rather than official dogma, I think that this

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faith. Nevertheless, the reference to a "Supreme Being" in s. 6(j) of the Universal Military Training and Service Act was deleted: see John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, 7th ed. (St. Paul (MN), Thomson West, 2004), 1507.

[65] *Welsh* v. *United States,* 398 US 333 (1970) **[*Welsh*]**. While factually similar to *Seeger*, the Supreme Court in *Welsh* examined whether Welsh's set of beliefs could qualify for the exemption set out in s. 6(j) of the *Universal Military Training and Service Act*. The Supreme Court found that given Welsh's beliefs, he should be entitled to a conscientious objector exemption. See *Welsh, supra,* at 343-344.

[66] *Wisconsin* v. *Yoder*, 406 US 205 (1972) **[*Yoder*]**.

[67] *R.* v. *Big M. Drug Mart*, [1985] 1 S.C.R. 295 **[*Big M Drug Mart*]**.

[68] *Ibid*, ¶ 94-95.

[69] *Amselem*, *supra* note 3, ¶ 46: "To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion**, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials**." [our emphasis]

[70] As noted in Beaman, "Defining Religion", *supra* note 4, 194: "The Court's definition embarks on a journey through religion from a substantive perspective and arrives at a functional definition (from *Amselem, supra*, "a particular and comprehensive system of faith and worship") often lack the fluidity that a complex understanding of religion requires." Although Beaman ultimately concludes that the Court in *Amselem* adopts a functional approach, I cannot share that conclusion. As I will argue further on, I consider that both the subjectivist-functional and the substantive-content approach serve as the foundation of the "Canadian approach" and is also reflected in later case law.

approach can fall prey to the complexities of qualifying the 'sincerity' of beliefs[71]. Ultimately, it boils down to the credibility of the witness. By drawing on both the theories of religion developed by Weber and Geertz, it is possible to understand that the focus should not be on the experience of the Church but rather on the experience of the individual vis-à-vis the Church. Nevertheless, the subjective-functional method also illustrates the inherent limits of applying complex social sciences approaches to religion to legal discourse on freedom of religion. In this way, the subjective-functionalist approach promotes a continual re-evaluation of religion by the individual and its relationship with other social orders, making it, in a way, 'lived religion'[72].

2.2 The Substantive-Content Approach

The substantive-content approach favours a method that identifies the primary characteristics of religion, thereupon eliciting a *broad* or *outer* definition of religion. However, this approach should not be understood as being entirely rigid since it relies on common features; an approach by analogy to religion[73] can be developed. As explained by Ahdar and Leigh, "[t]hese judgments take on an

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[71] This approach can however lead to alternate uses and sometimes abuses. On this subject, see Jean-François Gaudreault-DesBiens, « Quelques angles morts du débat sur l'accommodement raisonnable à la lumière de la question du port de signes religieux à l'école publique : réflexions en forme de points d'interrogation » in Myriam Jézéquel, ed., *Les accommodements raisonnables : quoi, comment, jusqu'où?* (Montréal, Éditions Yvon Blais, 2007), 241-286.

[72] This approach was developed by Robert Orsi, "Is the Study of Lived Religion Irrelevant to the World We Live In?" (2003) 42(2) *Journal for the Scientific Study of Religion* 169, 172 who argued that "[t]he study of lived religion is not about practice rather than ideas, but about ideas, gestures, imaginings, all as media of engagement with the world. Lived religion cannot be separated from other practices of everyday life, from the ways that humans do other necessary and important things, or from other cultural structures and discourses (legal, political, medical, and so on). Nor can sacred spaces be understood in isolation from the places where these things are done – workplaces, hospitals, law courts, homes, and streets – from the media used to do them, or from the relationships constructed around them." **[Orsi, "Lived Religion"]** Author Lori G. Beaman has repeatedly advocated this approach when attempting to define religion in law. See, for example: Beaman, "Defining Religion", *supra* note 4, 194; Lori G. Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2007), 3.

[73] Ahdar & Leigh, *supra* note 4, 119. This approach has been termed "definition by analogy". Eduardo Peñalver explains his version as a "category-concept": see Eduardo Peñalver, "Note. The Concept of Religion" (1997) 107 *Yale L.J.* 791, 809 **[Peñalver, "Note"]** citing John McDowell, "Wittgenstein on Following a Rule", in A.W. Moore (ed.), *Meaning and Reference* (Oxford, Oxford University Press, 1993) 257 288.

essentialist approach, requiring all religions to demonstrate one or more common features before qualifying, in law, as a 'religion'."[74] Just as Sardurski drew on Geertz to demonstrate a general order of existence for the functionalist approach, authors Ahdar, Leigh and T. Jeremy Gunn, amongst others, have drawn on philosopher Ludwig Wittgenstein[75] to explain the presence of common features[76] for the substantive approach. Wittgenstein argued that no one definition of the term 'games' existed, but rather a series of "family resemblances"[77], akin to conceptions of language[78]. Indeed, this approach to defining is novel insofar as it invites or promotes flexibility; however, by identifying "feature" elements, one is necessarily excluding others, even if recourse to a definition by analogy is available. Although Wittgenstein's approach to language takes unpredictable evolution into account, it also highlights the problems with seeking a dictionary-style definition of religion in law, according to author Eduardo Peñalver[79].

Proponents of this approach in the United States have suggested a *method* rather than a *definition* of religion. According to George Freeman, the starting point must be the value attributed to one thing over another; by using the purpose of religion as a starting point, Freeman proposed a paradigm of a religious belief system[80]. Author Kent Greenawalt has argued that adopting this method by analogy

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[74] Ahdar & Leigh, *supra* note 4, 119.
[75] Ludwig Wittgenstein, *Philosophical Investigations: the German Text, with a Revised English Translation* (translated by Gertrude Elizabeth Margaret Anscombe, 3rd ed., Oxford, Blackwell, 2001).
[76] Ahdar & Leigh, *supra* note 4, 119; Gunn, *supra* note 47, 194. Author George C. Freeman, draws on Wittgenstein to argue that religion can be understood as having a focus, coupled with a set of paradigmatic features; a "definition" of religion would be interpreted as ill-advised: Freeman, "Misguided Search", *supra* note 22, 1565.
[77] See Carolyn Evans, *Freedom of Rights Under the European Convention on Human Rights* (Oxford, Oxford University Press, 2001), 63.
[78] Wittgenstein, *supra* note 75, 4e: "We can also think of the whole process of using words in (2) as one of those games by means of which children learn their native tongue. I will call these games "language-games" and will speak of a primitive language as language-game. And in the process of naming stones and repeating words after someone might also be called language-games. Think much of the use of words in games like ring-a-ring-a-roses."
[79] Peñalver, "Note", *supra* note 73, 810
[80] Freeman, "Misguided Search", *supra* note 22, 1553. The author listed, at the same page, relevant features of a religious belief system; they are as follows:
"1. A belief in a Supreme Being
2. A belief in a transcendent reality
3. A moral code

would ensure 'sound' outcomes consistent with Supreme Court decisions[81]. Fifteen years later, Peñalver sought to build upon the framework established by Freeman and Greenawalt by addressing the problems of their definitions by analogy[82] as well as suggesting a methodology for determining whether a belief system is (or is not) a religion that satisfies three criteria[83]. However, like all methods, the substantive approach is not infallible and has had a difficult time addressing borderline religions[84]

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4. A world view that provides an account of man's role in the universe and around which an individual organizes his life
5. Sacred rituals and holy days
6. Worship and prayer
7. A sacred text or scriptures
8. Membership in a social organization that promotes a religious belief system"

[81] Kent Greenawalt, "Religion as a Concept in Constitutional Law" (1984) 72(5) *Cal. L. Rev.* 753, 815 **[Greenawalt, "Religion as a Concept"]**. The author states that the most important guide to this approach is a focus on relevant constitutional purpose. According to Greenawalt at 815-816, "for constitutional purposes, religion should be determined by the closeness of analogy in the relevant respects between disputed instance and what is indisputably religion." He admits, however, that this approach will likely not help "borderline cases". This is also echoed by George Freeman: see Freeman, "Misguided Search", *supra* note 22, at 1565. More recently, Kent Greenawalt has stated that the analogical approach is compatible with most cases and flexible enough to correspond to a variety of substantive approaches to free exercise and establishment rights. He points, however, to what he calls a major challenge to the flexible analogical approach: namely, its uncertain application. He argues that "[a]n unduly restrictive approach threshold definition may foreclose appropriate relief; an unduly generous approach may compel legal relief that is unwarranted." See Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness*, vol. 1 (Princeton (NJ), Princeton University Press, 2006), p. 144-145.

[82] Author Eduardo Peñalver emphasized two problems with their approaches by analogy: first, their failure to discuss in more detail the effect of the actual selection of the "paradigm cases" of religion on the outcome of the test; second, they [Freeman and Greenawalt] would do nothing to constrain the decision making processes of individual judges. See Peñalver, "Note", *supra* note 73, 815-816.

[83] *Ibid*, 814: "[f]irst, it should define religion and not some broader concept, hewing as closely as possible to the use of the word "religion" in everyday language; second, it should have the potential to evolve along with the colloquial standards governing the use of the word "religion"; and third, it should minimize the risk of judicial, particularly pro-western, bias in the classification of belief systems by constraining the decisionmaking process." Author Peñalver placed particular emphasis on resolving the issue of western bias operating within the use of the word "religion"; these guidelines were considered as "negative guidelines" by Peñalver at page 818.

[84] The decision of *Africa* v. *Pensylvania*, 662 F.2d 1025 (3rd Cir. 1981) **[*Africa*]** exemplified the issues of dealing with a "borderline religion". In this case, a prisoner claiming to be a 'naturalist minister' for the MOVE organisation, wanted the correctional authorities to recognise his right to a raw food diet; the judge, using the definition by analogy set out in *Malnak* v. *Yogi*, 592 F.2d 197, 207-210 (3rd Cir. 1979) **[*Malnak*]** ultimately found that the MOVE organization was akin to "philosophical naturalism" rather than a religion: *Africa,* 1035. Author Eduardo Peñalver provided an excellent discussion and analysis of *Africa* and argued

or "New Religious Movements" (NRM)[85] in a satisfactory manner. In this way, the substantive-content approach is reminiscent of the sacred and profane dichotomy put forward by Durkheim[86]. While certain religious groups will have their religion acknowledged or recognised by analogy, others will not meet the criteria developed by the proponents of the substantive-content approach, branding them with an unrequited title of secularism[87].

Interestingly, this approach has garnered circumscribed case law support in the United States as well as in Canada. At issue in *Malnak* v. *Yogi*[88] was whether the "Science of Creative Intelligence – Transcendental Meditation" (known as SCI/TM) could be considered a religion. SCI/TM was based on the teachings of Maharishi Mahesh Yogi and was offered as an elective class in New Jersey Public high schools[89]; an injunction was sought against the teachings of SCI/TM, arguing that it constituted an infringement on the Establishment clause[90]. Judge Arlin Adams, in a concurring opinion, explained that "[u]nder the modern view, "religion" is not confined to the relationship of man with his Creator, either as a matter of law or as a matter of

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that by employing his proposed methodology as well as his negative guidelines, MOVE would have been categorized as a religion: see Peñalver, "Note", *supra* note 73, 799-801, 818-820.

[85] Author Leonard Hammer explains the goal of current-day New Religious Movements is to address the internal, personal, needs of its members and not to transform society, create a moral standard, or achieve the status of formal religion. Examples of NRM can be as varied and as contrasting as the Salvation Army, Jehovah's Witnesses and the Moon sect. See Leonard M. Hammer, *The International Human Right to Freedom of Conscience: Some Suggestions for its Development and Application* (Aldershot, Ashgate, 2001), p. 260.

[86] I cannot claim to take credit for this idea; see Ahdar & Leigh, *supra* note 4, 121, at footnote 151, where the authors refer to Stanley Ingber, "Religion or Ideology: A Needed Clarification of the Religion Clauses" (1988-1989) 41 *Stan. L. Rev.* 233, at 285-286 who draws on Émile Durkheim to explain that religious conscience and obligations must be distinguished: "It is the role played by the sacred or the divine that separates religions from other belief systems (i.e. ideologies) for legal purposes. Although not necessarily bound by any theistic precept, religious duties must be based in the "otherwordly" or the transcendent – transcendent not as an abstract concept reachable only by reason and intellect is transcendent but a transcendent reality." [emphasis in original]

[87] Ahdar & Leigh, *supra* note 4, 122.

[88] *Malnak, supra* note 84.

[89] According to the facts in *Malnak, ibid,* at 198 "[e]very student who participated in the SCI/TM course was required to attend a puja as part of the course. A puja was performed by the teacher for each student individually; it was conducted off school premises on a Sunday;"

[90] E. Peñalver, *supra* note 73, at 799, citing *Malnak, supra* note 84, at 197-198. Interestingly, as noted by authors Ahdar and Leigh, the practitioners of SCI/TM protested that SCI/TM was not a religion: see Ahdar & Leigh, *supra* note 4, 119.

theology."[91] Under the modern view of religion, three "useful indicia" are purported to be basic to or "sufficiently analogous to 'unquestioned and accepted'"[92] religions:

> "The first and most important of these indicia is the nature of the ideas in question. This means that a court must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion.[93]
>
> […]
>
> Thus, the "ultimate" nature of the ideas presented is the most important and convincing evidence that they should be treated as religious. Certain isolated answers to "ultimate" questions, however, are not necessarily "religious" answers, because they lack the element of comprehensiveness, the second of the three indicia. A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive "truth."[94]
>
> […]
>
> A third element to consider in ascertaining whether a set of ideas should be classified as a religion is any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions. Of course, a religion may exist without any of these signs, so they are not determinative, at least by their absence, in resolving a question of definition."[95]

While this approach to religion has earned certain support[96], Judge Adams' 'useful criteria' are far from decisive. In considering religion by analogy, one must be conscious that these features will necessary exclude certain beliefs and favour others. Furthermore, if certain of these features are not determinative in nature, then

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[91] *Malnak, supra* note 84, 207. Judge Adams warned, however, at the same page that "it is one thing to conclude "by analogy" that a particular group or cluster of ideas is religious; it is quite another to explain exactly what indicia are to be looked to in making such an analogy and justifying it." [references omitted]

[92] *Ibid,* 207-208. These criteria should not been seen as a "final test", since according to Judge Adams, "[d]efining religion is a sensitive and important legal duty.": *Ibid,* 210 [references omitted].

[93] *Ibid*, 208 [references omitted].

[94] *Ibid*, 208-209 [references omitted].

[95] *Ibid,* 209 [references omitted].

[96] For example, *Africa, supra* note 84. In the interest of full disclosure, that Judge Adams also presided over the aforementioned case. I consider therefore that the definition by analogy approach is irremediably impregnated with his perspective.

the question of religion by analogy revolves in the end around the (ultimate) nature of ideas.

The substantive-content approach to religion has also been put forth by the Supreme Court of Canada in *Amselem*[97]. As mentioned previously, at issue in *Amselem* was whether the terms of the by-laws in the declaration of co-ownership in a luxury building could override individual owners' right to freedom of religion. More specifically, the appellants believed that it was their biblical obligation to set up a *succah* (a small temporary enclosed hut) during *Succot*, a nine day holiday commemorating the time of harvest. Justice Iacobucci, writing for the majority, explained religion must be defined broadly in order to be able to define what religious freedom is:

> "While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. **Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith**."[98]

By addressing religion by its essence or core characteristics, this approach suggests 'two steps forward one step back'. While Wittgenstein's approach to language as a series of "family resemblances" enhances the substantive-content approach to religion by its method by analogy, its success is moderated by the fact that one must take into account the ultimate nature of ideas. The notion of a divine power is irksome for a few, but questioned by many. The substantive-content approach, which boasts what I could call a "non-definition definition" (defining the essence of religion) is actually a definition of religion in law. The fact that Wittgenstein took into account 'unpredictable evolution' of language means that, in a

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[97] *Supra* note 3.
[98] *Amselem, supra* note 3, ¶ 39.

certain way, one must take a certain description (or definition) of religion into account[99] but remember that we are not bound or limited by it[100].

As with the subjectivist-functional approach, subjectivity is central to defining religion; the difference however lies in the focus. While the subjective-functional approach is determined by the individual, the substantive-content approach is decided by the judge. The level of individual discretion allocated to a judge is therefore high[101]. Although I do not believe that the presence of 'useful indicia' is *per se* negative, its existence has revealed itself problematic. Consider, for instance, whether humanistic and naturalistic groups[102] could be recognised under the substantive-content approach to religion, or conversely, when practitioners are recognised as constituting a religion without soliciting such recognition, by judicial powers[103]. Indeed, by placing unambiguous importance on the presence of the supernatural, the substantive-content approach unequivocally draws the line between the sacred and the profane.

2.3 The Strasbourg Approach

The "Strasbourg approach" refers to the jurisprudence decided under Article 9 of the *European Convention on Human Rights* (*ECHR)* by the European Commission on Human Rights (EComHR), and the European Court of Human Rights (ECtHR)[104]. Article 9 *ECHR* states that:

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[99] As explained by Peñalver, "[t]o argue, then, that no definition of religion is necessary is to say that "religion" is more like "majority" than it is like "speech". Such a position, however, requires justification. In other words, even to deny the need for definition for the purposes of constitutional adjudication is to propose a definition of sorts (that is, "the everyday, clear meaning of the term"), one that must be defended." See Peñalver, "Note", *supra* note 73, 792.

[100] *Ibid*, 809: "Our decision to apply or not to apply a word to a new situation is affected by the nature of our customary use of the word, but at the same time, our decision to apply the word in a new situation (or not to apply it) is itself part of the definitional process."

[101] One must be conscious of judicial bias in the approach by analogy to law, according to Peñalver, "Note", *supra* note 73 816.

[102] Greenawalt, "Religion as a Concept", *supra* note 81, at 805 as cited in Ahdar & Leigh, *supra* note 4, 121.

[103] As was done in the case of SCI/TM: see Ahdar & Leigh, *supra* note 4, 119.

[104] While it is not my objective to examine the practice and procedure surrounding the *European Convention on Human Rights*, I would be remiss not to acknowledge the change in structure, from the European Commission and Court of Human Rights to the European Court

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[105]

Religion is listed as a prohibited ground of discrimination[106]. Finally, the *ECHR* also recognises a parent's right to educate their child in conformity with their religious and philosophical beliefs[107]. Article 9 *ECHR* operates as a two-pronged protection, protecting both inner thought and outer demonstration, to varying degrees. These

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of Human Rights (ECtHR). Briefly, *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, Strasbourg, 11.V.1994, ETS No. 155 (Protocol No. 11) was aimed at restructuring the 'control machinery' established by the European Convention on Human Rights in order to maintain efficiency; it came into force on November 1st 1998. In this way, Protocol No. 11 replaced the existing Commission and Court of Human Rights with a new permanent Court. Another significant change associated with Protocol No. 11 was the *de facto* repealing of Protocol No. 9 by article 2(8) of Protocol 11, which addressed the seriousness of the question raised before the European Court of Human Rights. Finally, the effectiveness of the European Court of Human Rights has once again been compromised by the ratification of the Convention by thirteen new states by 2004; the *European Convention on Human Rights* was open to no fewer than 800 million people by then: see Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No. 194 (Explanatory Report), online: < COUNCIL OF EUROPE >, http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm (site last accessed 25.05.2009), ¶ 6. In an effort to remedy this increasing problem, Protocol No. 14 (signed May 13th 2004) was put forth; however, it will only come into force once all member states of the Council of Europe ratify the Protocol and Russia has thus far refused to do so: see COUNCIL OF EUROPE, Protocole n° 14 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, amendant le système de contrôle de la Convention STCE no. : 194, online : http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=8&DF=5/19/2009&CL=FRE (last accessed 25.05. 2009).

[105] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.1950, art. 9.

[106] *Id.,* art. 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." We note that article 14 has "no independence existence" and thus must be associated to another provision of the ECHR: See Malcolm D. Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, coll. "Council of Europe Manuals, Human Rights in Culturally Diverse Societies" (Leiden, Martinus Nijhoff Publishers, 2009), 35.

[107] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.1950, Protocol 1, art. 2: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions."

spheres of action are better known as the *forum internum* and the *forum externum,* the former referring to internal (and thus individual) thought, conscience and religion, while the latter denotes the external manifestation of religion or beliefs. While it is obvious that the inner and outer protections do not cover the same areas, I will limit my comments to the following two points. Firstly, religion is the only right that receives unequivocal protection both as an individual internal right as well as an external manifested right. Nevertheless, "the term "practice" as employed in Article 9(1) *ECHR* does not cover each act which is motivated or influenced by a religion or belief."[108] Secondly, while thought and conscience are recognised as solely individual protections, belief is perceived only as an outer manifestation[109]. As such, inconsistencies in the interpretation are created, as well as further questions on the actual scope of these freedoms.

The Strasbourg approach has been largely dismissed by critics for failing almost entirely to confront the issue of defining religion and lacks the intricacies – though certainly not above reproach – of the other approaches[110]. Even though this approach has benefited from much interest from authors[111] and despite its crisp theoretical demarcation, the ECtHR has been slow to develop its interpretation of

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[108] *Arrowsmith* v. *U.K.*, App. No. 7050/77, Commission Report of 12 October 1978, Decisions and Reports 19 **[*Arrowsmith* 2]**, p. 5, ¶ 71 as cited in Evans, *supra* note 106, 14. The author adds, at the same page: "[t]hus not all activities undertaken which are motivated or inspired by a belief are necessarily protected since not only might they not be related to the *forum internum* and the sphere of 'inner conviction' but they may also be considered not to amount to a manifestation of the belief for the purposes of Article 9(1)."

[109] There are three conditions for a claim to be successful under 9(2) *ECHR*, as stated by authors Robin Hopkins and Can V. Yeginsu in "Religious Liberty in British Courts: A Critique and Some Guidance" (2008) 49 *Harv. Int'l L.J. Online* 28, 29, **[Hopkins Yeginsu, "Religious Liberty in British Courts"]** citing Lord Walker in *R (Williamson)* v. *Secretary of State for Education and Employment*, [2005] 2 A.C. 246, ¶ 77 (H.L.) **[*Williamson*]**: "(1) the claimant sought to manifest his or her religion or belief; (2) the respondent interfered with this manifestation; and (3) this interference was unjustified."

[110] Ahdar & Leigh, *supra* note 4, 122, citing Peter W. Edge, "Current Problems in Article 9 of the European Convention on Human Rights" (1996) *Jurid. Rev.* 42, 43 **[Edge, "Current Problems"]** and C. Evans, *supra* note 77, 51-66.

[111] For an excellent sample bibliography on freedom of thought, conscience and religion under the *ECHR*, see: Jean-François Renucci, *Traité de droit européen des droits de la personne* (Paris, L.G.D.J., 2007), 191, 193-194, 206-207.

freedom of religion[112]. *Kokkinakis*[113], in 1993, was the first case that directly addressed Article 9 *ECHR* and explained the provision as followed:

> "As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[114]

While the court in *Kokkinakis* was commended for addressing freedom of religion at length at last, the pluralism inseparable from a democratic society has been the subject of much criticism, bringing to the forefront the level of state discretion that should be attributed in matters of religion[115]. I consider that the Strasbourg approach

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[112] Ahdar & Leigh, *supra* note 4, 122; Edge, *supra* note 110, 43 and C. Evans, *supra* note 77, 51-66; Renucci, *ibid*, 197; M.D. Evans, *supra* note 106, 9-14.

[113] *Kokkinakis* v. *Greece*, judgment of 25 May 1993, Series A no. 260-A **[*Kokkinakis*]**.

[114] *Kokkinakis, supra* note 113*,* ¶ 31.

[115] Consider, most recently, *Şahin* v. *Turkey,* No. 44774/98, ECHR 2005-XI **[*Şahin*]**, ¶ 109, where the Court was faced with the issue of students wearing headscarves in universities in Turkey. The Court recognised that the role of the national decision making body must be given special importance when opinions differ widely on the relationship between the state and religion in a democratic society. Domestic differences are determinate in such cases. Author Howard Gilbert, in a case comment on *Şahin* argued that the ECtHR should clearly identify the extent to which it has overruled past jurisprudence. First, the Court must articulate what beliefs held by an individual fall within the scope of Art. 9(1). […] The second area of development concerns the relationship between the belief and its manifestation. […] The third area of development, which the Court has begun to articulate, is under what circumstances is the State justified in restricting manifestations of belief?", see Howard Gilbert, "Case Comment. Redefining Manifestation of Belief in *Leyla Şahin* v. *Turkey*" (2006) *Eur. H.R.L. Rev.* 308, 326. On the other hand, author Lech Garlicki has observed recently that the ECtHR's jurisprudence on freedom on religion has developed into an "organized system of precedents" and submitted that freedom of religion must be afforded a wider margin of appreciation according to national differences: see Lech Garlicki, "Collective Aspects of the Religious Freedoms: Recent Developments in the Case Law of the European Court of Human Rights" in András Sajó, ed., *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Utretch, Eleven International Publishing, 2008), 217 at 230-232. Finally author Nicholas Hatzis recently decried *Kokkinakis* as being an "elliptical judgment" that leaves the reader with more questions than answers: see Nicholas Hatzis, "Neutrality, Proselytism, and Religious Minorities at the European Court of Human Rights and the U.S. Supreme Court" (2009) 49 *Harv. Int'l L.J. Online* 120, 122. The recent decisions of *Dogru c. France*, App. No. 27058/05, decision of December 12 2008 **[*Drogu*]** and *Kervanci* v. *France*, App. No. 31645/04, decision of December 12 2008 (def. decision on March 4 2009) **[*Kervanci*]** also found that the right to freedom of religion had not been violated by the State. At issue was the claimants' exclusion from their school, following their refusal to remove their veil during physical education classes. In both cases, the Court unanimously found that the claimants' right to freedom of religion, as protected under art. 9 *ECHR*, as well as under art. 2

appropriately reflects the intrinsic difficulties of managing multiple national discourses under a supranational umbrella, and thus bringing diverse yet relevant considerations to the forefront in the discourse on defining religion in law.

Ahdar and Leigh have expressed disapproval of the ECtHR's reticence to clarify its notion of 'religion' and questioned the seemingly haphazard approach in protecting religious rights[116]. Authors Robin Hopkins and Can V. Yeginsu, in their recent analysis of religious liberty in British courts, argue that "[c]umulatively, the Article 9 apparatus demands too much of claimants and too little of defendants."[117] Author Paul Taylor, in a comprehensive volume on UN and European human rights law and practice on freedom of religion, has suggested that the European Court of Human Rights should pay more attention to the global context in general and to the United Nations materials in particular when rendering decisions on religious minorities[118]. Finally, authors Malcolm Evans and Peter Petkoff have argued that it is time for the ECtHR to adopt a new narrative when deciding on freedom of religion cases. More particularly, they argued that "[o]ne specific problem area which

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of the First Protocol, had not been violated. The Court found, as related in *Kervanci*, that the restriction to the rights of the claimants to manifest their religious convictions was justified given the imperatives of *laïcité* in the shared space of schools: see *Kervanci*, supra, ¶ 17. For further discussion on the margin of appreciation, see *infra*, Chapter III, section 1.2.

[116] Ahdar & Leigh, *supra* note 4, 124. The authors explain, at the same page, that "[c]omplainants from the major religions alleging violation of their Article 9 rights have been accepted as falling within its purview with no explanation, as have those from the Druids, Scientologists and a new religion, the Divine Light Zentrum. […] The reason why Article 9 has been passed over may be the explanation suggested by [Wojciech] Sadurski (although the court has never articulated it with this degree of prescience): courts harbour a general unwillingness to differentiate religion from other beliefs deemed worthwhile." [references omitted]

[117] Hopkins & Yeginsu, "Religious Liberty in British Courts", *supra* note 109, 38. The authors propose that the risk of future injustice could be reduced in two ways, at the same page: "First, claimants' choices should be examined alongside defendants' conduct under the justification test, rather than in isolation under the interference test. Interference should simply be treated as a substantial restriction on manifestation. Secondly, defendants should not be afforded a deferentially wide margin of appreciation; rigorous judicial scrutiny is essential to the protection of religious liberty."

[118] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice,* (Cambridge, Cambridge University Press, 2005), 351. The author suggested, at the same page, that the ECtHR should "derive a greater appreciation of the significance to minority religions in European countries of different forms in which religious beliefs is manifested; to avoid any unnecessary departure from Human Rights Committee practice; and to forewarn the European Court of the significance of certain violations where they are better understood by reference to parallel situations in countries outside Europe."

emerges from the jurisprudence of the ECHR is the way in which the Court combines neutrality with certain sociological and empirical patterns when considering what is or is not 'religious'."[119]

This brief incursion into the issues surrounding article 9 *ECHR* – and thus the Strasbourg approach – has underscored a general lack of cogency when examining freedom of religion. In addition to the definitional problem, I also point to the unresolved nature of the protection of sects[120]; the place of beliefs, which receive protection only when manifested[121]; the private-public divide when exercising one's beliefs[122]; as well as the protection that should be afforded to the (religious) community. I consider it necessary, however, to demonstrate the difficulties in managing pluralism and democracy in a supranational discourse on freedom of religion.

2.4 Conclusion on Defining Religion in Law

Christopher Eisgruber and Lawrence Sager have recently best explained the problem of defining religion in law by employing an unlikely source: the dark humour of Monty Python. In one skit, a deadly joke is created by the British to counter the Germans during the Second World War. The German version of the joke proved to be lethal and has its auditors fall into hysterics and explode; a similar fate is also reserved for the teller of the joke, which proves to be its fatal flaw[123]. Eisgruber and

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[119] Malcolm Evans and Peter Petkoff, "A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights" (2008) 36(3) *Relig. State Soc.* 206, 206 **[Evans & Petkoff, "Separation of Convenience"]**. The authors conclude at page 216 that "[i]n this particular context the neutrality approach, or at least the way it has been developed by the ECHR, marks a departure from an understanding of human rights as legal tools, and as far as freedom of religion or belief is concerned, has resulted in a problematic notion of what neutrality entails."

[120] Renucci, *supra* note 111, 197-198.

[121] Ahdar & Leigh, *supra* note 4, 124-125; C. Evans, *supra* note 77, 65-66.

[122] Renucci, *supra* note 111, 199-200.

[123] Authors Eisgruber and Sager note that the Monty Python skit can be viewed at YouTube.com, Monty Python: World's Funniest Joke, http://www.youtube.com/watch?v=LhmnOpoGAPw (site last accessed 03.07.2009), see Christopher L. Eisgruber and Lawrence G. Sager, "Does it really Matter what Religion Is?" (2009) 84(2) *Notre Dame L. Rev.* 807 at 807.

Sager draw a parallel with religious liberty, since its definition proves to be as self-destructive:

> "The problem goes roughly like this: in order to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are entitled to special treatment as "religion" while others are not, we are creating a sphere of orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore."[124]

While this situation is particularly apt at describing the American constitutional condition and the costs of wading into the debate on freedom of religion – and this, contrarily to the Establishment Clause, no less – the implications of this dilemma are far reaching.

While both the substantive-content as well as the subjective-functional approach provide interesting avenues of discussion of religion in law, they each suffer from a fatal flaw. While the latter approach focuses on the sincerity of the individual's belief, the former approach concentrates on the ultimate nature of the ideas. Not to be outdone, the Strasbourg approach does not provide a central focus to the protection and leaves many questions unanswered in its wake.

I considered that an examination of religion in life (though the lens of sociology and anthropology) would provide a better understanding of defining religion in law. I posit that the same questions can be asked of religion in both life and law. First, should there be a definition of religion in law? Both the substantive-content and subjective-functional approaches to religion demonstrate, in my view, that it is equally challenging to define religion from the perspective of the individual as well as from the perspective of the idea (religion). The subjective-functional approach promotes a continual re-evaluation of religion by the individual and its relationship with other social orders; the substantive-content approach, by placing unwavering importance on the presence of the supernatural, unequivocally draws the line between the sacred and the profane. Nevertheless, the substantive-content approach, by Wittgenstein's interim, also makes way for 'unpredictable evolution',

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[124] *Ibid*.

which renders this approach more difficult. In both these discourses, the importance of the community is omitted; in doing so, contextualising the definition of religion in law becomes improbable. Second, in defining religion, is there necessarily a definition of what is to be considered sacred and profane? The result cannot be ignored since islands of sacred space are created and secular justifications can become misappropriated[125] in this discourse on religion in law. Lastly, can religion in law be interpreted as being a culture? This approach to defining religion in law can be observed in the Strasbourg approach, which points to religion as being part of a larger web of influences, lest I say cultures, which indicates to a cacophony of voices.

In conclusion, defining religion in law has established that it should not be taken as a solitary exercise, but rather that other forces and social orders should be taken into account, in order to better grasp the implication of definition and the consequence of protection.

Conclusion

Religion has been examined and further understood in both life and law. The reservations as well as the complications in defining such a laden concept in both settings have also been witnessed. Examining religion through the lenses of Weber, Durkheim and Geertz has granted us with a better understanding of the action and reaction to religion in life. This socio-anthropological lens on religion has also presented an unseen facet of religion in law: the importance of the community. In all three discourses on religion in life, the community calibrates the timbre of the religious beliefs. However one must also accept that religion, as understood in the social sciences, is not entirely transposable in law. As such the limits of constitutionalism and more specifically, of constitutional liberalism[126], must be acknowledged.

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[125] See Evans & Petkoff, "Separation of Convenience", *supra* note 119.
[126] See Berger, "Law's Religion", *supra* note 20.

Both the sincerity approach (subjective-functional) and the sacredness approach (substantive-content) pose significant problems to defining religion in law, since one relies on the sincerity of the individual's beliefs and the other depends on the sacredness of the belief system, as understood by the judge. While the Strasbourg approach focuses at once on freedom of religion as inseparable from pluralism and democracy, the results are underwhelming and do not provide a consistent discourse on religion. However, unlike the substantive-content and subjective-functional approaches, the Strasbourg approach makes place for both religious and non-religious beliefs, for both the individual and the community.

The Supreme Court of Canada has made it clear that there are no 'magic barometers' or 'eureka moments' to help one discern what can be considered a trivial burden on one's religious beliefs or when one can be considered mature enough to make decisions based on their religious beliefs. Justice LeBel's reference to freedom of religion as "highly textured"[127] in *Hutterian Brethren of Wilson Colony* fully illustrates the complexity of handling such a fundamental freedom in the *Charter* era. The texture of freedom of religion – if one can use such a term – can differ according to the feel, surface, quality, consistency and grain. In examining sincere individual beliefs to profoundly communitarian interests of religion, a subtle shift in paradigm can be observed. Whereas *Amselem* defined both religion and sincere beliefs, the focus has shifted to the impact of competing beliefs and *Charter* values[128]. In this manner, we are witnessing, I believe, the intersection of the definitions of religion and of sincerely held beliefs. Put differently, this sheds light on the reluctant juncture between the subjective functional and substantive content approaches to defining religion in law in Canadian constitutional law.

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[127] *Hutterian Brethren of Wilson Colony, supra* note 4, ¶ 181.

[128] On the rise of "Charter values" and their significance, see Mark Antaki, "The Turn to "Values" in Canadian Constitutional Law" in Luc B. Tremblay and Grégoire C. Webber, eds., *La limitation des droits de la Charte: essais critiques sur l'arrêt R. c. Oakes/The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (Montréal, Éditions Thémis, 2009), 155-181. The author observes at pages 180-181 that in order "[t]o better grasp the significance of "values" as our ethical keyword, then, we must inquire into the significance of our having become "subjects" – as individuals, groups, societies, even as humanity – and of all beings (including ourselves) having become "objects". […] Changing our "values" may not be much more than a first step in achieving some clarity about our world and ourselves, including how we live a life in, or of, the law."

I have emphasised that the Canadian approach to religion in law straddles the subjective-functional as well substantive-content approach. The survey of religion in life (through the social sciences) has helped illustrate the forces at work and the powers at play when managing such a concept and balancing it with other rights in society. This interpretation differs from the one presented by authors Ahdar and Leigh[129] who inserted the Canadian approach in the substantive-content typology and Beaman[130] who concluded on a subjective-functional definition of religion. This straddling approach, at times both subjective and substantive, demonstrates and exemplifies the Canadian condition, in my view. In a way, the approach put forward by the Canadian Supreme Court demonstrates that methods employed to define religion should not be exclusive, but rather, should draw from all available sources to truly reflect, to the best of their abilities, what religion means in a particular legal circumstance.

[129] Ahdar & Leigh, *supra* note 4, 119.
[130] See Beaman, "Defining Religion", *supra* note 4, 194.

Chapter II. The 'First Freedom': Freedom of Religion in Canada

Introduction

In this chapter, I will examine the relationship between freedom of conscience and freedom of religion, as protected under the *Canadian Charter of Rights and Freedoms*. The study of freedom of religion should be understood as the background to my study on freedom of conscience. Freedom of religion is present, as is its sister freedom of conscience, in constitutional as well as quasi-constitutional documents; their fates are unequivocally and conceptually linked. In this sense, I will attempt to redress the composition of freedom of religion and freedom of conscience in an effort to better understand these two fundamentally interrelated freedoms.

Freedom of religion has benefited from a long tradition of existence in Canada. However, this right has never been perceived as being absolute: in this way, not only should the development of freedom of religion be examined – as well as its limits – but also its accommodation. While it is beyond my scope of study to trace a linear history of freedom of religion, I have elected to examine freedom of religion under three successive waves: first, before the enactment of the *Canadian Bill of Rights* (1.1); second, under the *Canadian Bill of Rights* (1.2); lastly, after the enactment of the *Canadian Charter of Rights and Freedoms* (1.3). I have labelled these waves as follows: 'witnessing' religion; 'observing' religion; and 'protecting' religion. By 'witnessing' religion I intend to examine the period under the *British North America Act* and thus before the enactment of the *Canadian Bill of Rights*. This period is of interest since it marks the increasingly visible minority religious groups. By 'observing' religion, I plan to analyse the situation of religious freedom under the *Canadian Bill of Rights*, where freedom of religion was acknowledged but its protection was severely limited in scope. Finally, 'contextualising' religion refers to freedom of religion as protected as a fundamental freedom under the *Canadian Charter of Rights and Freedoms*.

My objective is to present a jurisprudential view of religion up to the definition of religion proffered by the Supreme Court in *Amselem* (1.3.1). The aftermath of *Amselem* is addressed further on in my study (1.3.2). While it is uncontested that freedom of religion has developed most profoundly in the *Charter* era, I consider it

necessary to contextualise its progress. Finally, I will examine how a violation of freedom of religion can be addressed in law (1.4), through the duty to accommodate religion within reasonable limits (1.4.1) and under the proportionality lens of the *Oakes'* test (1.4.2).

In a second section, I will address, without purporting to settle them all, certain unresolved issues pertaining to freedom of religion in Canada, namely: the sincerity of the belief of the individual (2.1), the place of expert evidence and the impact on community views of religion (2.2) and a child's right to freedom of conscience and religion (2.3). I will also offer, in closing, a brief conclusion on freedom of religion in Canada (2.4).

To the extent that freedom of religion has been, as I shall demonstrate, the main concern of Canadian courts since the enactment of the *Canadian Charter of Rights and Freedoms*, I will thus first address the constitutional interpretation of that "first freedom". I will examine how freedom of conscience can be disentangled from it in the following chapter.

1. Freedom of Religion: a Retrospective

1.1 Witnessing Religion: Prior to the *Canadian Bill of Rights*

The *British North America Act*[131] established a roadmap for the union of Canada and indicated the federal division of powers. It did not, however, confer individual rights, never mind religious rights[132]. Pierre Elliott Trudeau, in one of his

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[131] *British North America Act*, (1867) 30 & 31 Victoria, c. 3. (U.K.) **[*BNA Act*]**.

[132] In *Saumur* v. *City of Québec*, [1953] 2 S.C.R. 299 **[*Saumur*]**, Kerwin J. explained that Canada did not have a Bill of Rights at page 324: "We have not a Bill of Rights such as is contained in the United States Constitution and decisions on that part of the latter are of no assistance. While it is true that, as recited in the preamble to the *British North America Act* the three Provinces expressed a desire to be federally united with a constitution similar in principle to that of the United Kingdom, a complete division of legislative powers being effected by the *Act,* I assume as it was assumed in *Re Adoption Act 18,* (with reference, it is true, to entirely different matters) that Provincial Legislatures are willing and able to deal with matters of importance and substance that are within their legislative jurisdiction. It is perhaps

last articles as a law professor, trenchantly set aside the *BNA Act* for 'its lack of principles, ideals, or other frills"[133]. Under the *BNA Act,* religion was conceptualised in terms of majority-minority group setting[134] and thus special status was granted to certain minority groups, namely through education provisions[135]. For instance, whereas the laws on marriage were of federal competence[136], the solemnization of marriage was deemed a provincial matter[137]. Moreover, s. 92(13) and 92(16) of the *BNA Act* could also be read as applying to (religious) civil rights[138].

In this way, it was not surprising that certain minority religious groups, such as Mennonites, Hutterites and Jehovah's Witnesses, found more than their fair share of cases before the courts. In particular, the increasing visibility of Jehovah's Witnesses and protracted friction with both the Roman Catholic Church and State amplified adjudication before the courts in the 1950s in Québec. During this period, religious beliefs were thought to be at odds with criminal code provisions[139],

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needless to say that nothing in the foregoing has reference to matters that are confined to Parliament."

[133] As quoted by Margaret H. Ogilvie, "Between *liberté* and *égalité* : Religion and the state in Canada" in Peter Radan, Denise Meyerson and Rosalind F. Croucher, eds., *Law and Religion: God, the State and the Common Law* (London, Routledge, 2005), 134 at 135 [Ogilvie, "Between liberté and égalité"], citing Kevin J. Christiano, "Church and State in Institutional Flux: Canada and the United States" in David Lyon and Marguerite Van Die, eds., *Rethinking Church, State, and Modernity* (Toronto, University of Toronto Press, 2000), 69 at p. 73.

[134] According to Ogilvie, *ibid*, at 137 [notes omitted]: "[b]etween 1867 and 1982, religion was subjected to constitutional judicial review in relation to temperance and Sunday closing legislation as promoted by the Social Gospel movement, as well as ongoing s 93 denominational school funding disputes."

[135] *BNA Act*, *supra* note 131, s. 93. Québec and Newfoundland have opted out of the aforementioned educational provisions: see s. 93A of the *BNA Act* and *Constitution Amendment, 1997 (Quebec)*, SI/97-141 and *Constitutional Amendment, 1998 (Newfoundland)*, SI/98-25.

[136] *Ibid*, s. 91(26).

[137] *BNA Act*, *supra* note 131, s. 92(12).

[138] This was noted by Rand J. in *Saumur, supra* note 132, 329. See *BNA Act*, *supra* note 131, s. 92(13) and 92(16): "92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

[…]

13. Property and Civil Rights in the Province.

[…]

16. Generally all Matters of a merely local or private Nature in the Province."

[139] *Boucher* v. *The King*, [1951] S.C.R. 265 **[*Boucher*]**.

provincial licensing laws[140] as well as municipal by-laws[141], implicating each level of government in turn.

The distribution of a pamphlet was at the centre of the controversy in *Boucher* and was entitled "Québec's burning hatred for God and Christ and freedom is the shame of all Canada". While a highly divided Supreme Court (Rinfret C.J., Taschereau, Cartwright and Fauteux JJ. dissenting) found that the accusation of seditious libel was ultimately unfounded due to lack of evidence in *Boucher*, the hostile passages in the pamphlets questioned the 'good will' between the people of Québec and Jehovah's Witnesses. Justice Rand thoughtfully and thoroughly dissected the act of sedition[142] and opined that differences in ideas were indispensable:

> "Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? **Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the frame-work of freedom and order on broader and deeper uniformities as bases of social stability.** Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally."[143]

While the distributed pamphlet was undoubtedly inflammatory, Justice Rand's comments still resonate, emphasising the need for difference in opinions, difference actually strengthens the foundations of the social framework.

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[140] *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121 **[*Roncarelli*]**.
[141] *Saumur, supra* note 132.
[142] For an interesting discussion on the common law definition of sedition, see Luc B. Tremblay, *The Rule of Law, Justice, and Interpretation* (Montreal, McGill-Queen's University Press, 1997), 112-115. According to the author at page 122, Justice Cartwright's interpretation of sedition in *Boucher* "was consistent with the orthodox doctrine of the sovereignty of Parliament. The paramount guiding point of view was the legislative intention and, insofar as one tries to infer it from the pre-existing state of law, that intention was reasonably clear."
[143] *Boucher, supra* note 139, 288 [my emphasis].

The legality of distributing pamphlets was once again raised in *Saumur*, where a less divided Supreme Court (Rinfret C.J. and Taschereau J. dissenting) had to determine whether Jehovah's Witnesses were entitled to free exercise and enjoyment of their religious profession and worship[144]. At issue was clause 2 of By-Law 184 of the City of Québec, which stipulated that no pamphlets – amongst other forms of communication – should be handed out without having previously obtained the written permission of the Chief of Police. While By-Law 184 unearthed questions of jurisdiction, the Supreme Court ultimately decided that the plaintiff should not be found guilty of contravening the aforementioned municipal by-law. Subjected to harsh criticism by certain judges, the by-law was deemed to be overly broad and imprecise in the language employed. The unintended outcome of this was a tangle in the division of powers and a curtailing of constitutional protections[145]. *Saumur* furthermore demonstrated the historical legacy of religious freedom in Canada, as put once again so eloquently by Justice Rand:

> "From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, **that the untrammelled affirmations of 'religious belief' and its propagation, personal or institution, remain as of the greatest constitutional significance throughout the Dominion is unquestionable**."[146]

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[144] While Kerwin J. noted that even though Jehovah's Witnesses would not consider belonging to a « religion », he stated that they were entitled to enjoy their religious tenets, whether they are through worship or sharing the message of their faith: see *Saumur*, *supra* note 132, 299, 321.

[145] As stated by Justice Rand in *Saumur*, *supra* note 132, 333: "In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers. Where the language is sufficiently specific and can fairly be interpreted as applying only to matter within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary license cannot be brought within either of these mechanisms; and the Court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. **If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented**." [my emphasis]

[146] *Saumur*, *supra* note 132, 327 [my emphasis].

> "That legislation "in relation" to religion and its profession is not a local or private matter would seem to me to be self-evident: the dimensions of this interest are nationwide; it is even today embodied in the highest level of the constitutionalism of Great Britain; it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; **a religious incident reverberates from one end of this country to the other, and there is nothing to which the "body politic of the Dominion" is more sensitive**."[147]

Reference to the Dominion provided an opening into the affirmation of an alleged "implied bill of rights". The fundamental freedoms of speech, assembly, association, press, and religion, inherited from the United Kingdom were made part of the Constitution by the preamble of the *BNA Act*[148].

Following the overture in *Saumur*, equality of religions was addressed in *Chaput* v. *Romain*[149], where Taschereau J. (speaking for Kerwin and Estey JJ.), explained that individual liberty existed with regard to religion[150]. The Supreme Court asserted that in this light, the police were wrong to break up a meeting of Jehovah's

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[147] *Saumur*, *supra* note 132, 329 [my emphasis].

[148] As noted by Beetz J. (speaking for the majority) in *Attorney General (Canada) and Dupond* v. *City of Montréal*, [1978] 2 S.C.R. 770, 796 **[*Dupond*]**. *Dupond* is largely credited for having "killed" the doctrine of the implied Bill of Rights. The Preamble of the *BNA Act, supra* note 128, states:

"Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:"

[149] *Chaput* v. *Romain*, [1955] S.C.R. 834 **[*Chaput*]**.

[150] *Ibid*, 840: "In our country there is no state religion. All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations, enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else. It would be distressing to think that a majority might impose its religious views upon a minority, and it would also be a shocking error to believe that one serves his country or his religion by denying in one Province, to a minority, the same rights which one rightly claims for oneself in another Province."

Witnesses in an individual's house, especially when accomplished without warrants or following appropriate procedure.

Roncarelli provided the final piece of the "witnessing religion" era: although primarily a personal action, this case challenged the extent of a public officer's discretionary role. At that time, the defendant Maurice Duplessis was Attorney-General and Premier of Québec. At issue was whether an individual can be sanctioned economically for having expressed his religious views as a Jehovah's Witness. More particularly, the court examined whether a liquor license could be revoked because the individual chose to bail out his fellow believers. Once again, as noted by author Luc B. Tremblay, Justice Rand's opinion emerged and was accepted as the most important[151]. Justice Rand found that the permanent disqualification of the plaintiff from economic life was above and beyond the realm of discretionary powers held by the Premier[152]. Fundamentally, this case highlighted the historic disadvantage of religious subgroups and their often arbitrary treatment by not only greater society but also governmental actors[153].

The era prior to the enactment of the *Canadian Bill of Rights* proved to be very dark for certain minority groups in Canada. Some, such as Jehovah's Witnesses, clashed greatly with the established Catholic Church in Québec while others found ways to cohabitate more quietly. While statutes protected religious beliefs to a certain extent, dating as back as far as the pre-Confederation period[154]

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[151] Tremblay, *supra* note 142, 115.

[152] *Roncarelli*, *supra* note 140, 141 (Rand J.): "To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and *a fortiori* to the government or the respondent." [references omitted]

[153] This point was underlined by L'Heureux-Dubé J. (dissenting) in *Adler* v. *Ontario*, [1996] 3 S.C.R. 609, ¶ 80 **[*Adler*]**.

[154] As cited in *Saumur*, *supra* note 132, at 321: " […] However, an argument was advanced based upon a pre-Confederation statute of 1852 of the old Province of Canada, 14-15 Viet. e. 175, the relevant part of which provides:—
the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a

and as recently as the *Freedom of Worship Act*[155] in Québec, the "witnessing religion" era provided the observer with fractured dialogues on religious values.

1.2 Observing Religion: Under the *Canadian Bill of Rights*

The enactment of the *Canadian Bill of Rights* in 1960[156] presented Canadians with a more tangible protection of religion[157], though limited to matters within the legislative authority of the Parliament of Canada[158]. The Parliament sought, however, to make the *Canadian Bill of Rights* relevant to the society into which this law was to be introduced[159], by employing verbs such as "recognized" and "declared"[160].

The confluence of criminal law and religious freedom was once again at the forefront in *Robertson and Rosetanni* v. *R.*[161], in which the majority of the Supreme Court – under Ritchie J. – sought to emphasise the *effect* of the *Lord's Day Act* rather than its *purpose*[162]. The *Lord's Day Act* was recognised as being purely "secular and financial"[163] rather than having "abrogate[d], abridge[d], or infringe[d] or authorize[d] the abrogation, abridgment or infringement of religious freedom."[164] Therefore, it was deemed not to have contravened the *Bill of Rights*. The *Lord's Day*

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justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same."

[155] *Freedom of Worship Act*, R.S.Q. 1941, c. 307.

[156] *Canadian Bill of Rights* (1960, c. 44) **[*Canadian Bill of Rights*]**.

[157] *Ibid,* s. 1(c): "It is hereby **recognized and declared** that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
[…]
(*c*) freedom of religion" [my emphasis]

[158] *Ibid,* s. 5(2) and 5(3).

[159] As stated by Ritchie J. in *Robertson and Rosetanni* v. *R.*, [1963] S.C.R. 651 **[*Robertson and Rosetanni*]**, at p. 654-655. See also s. 5 of the *Canadian Bill of Rights.*

[160] *Robertson and Rosetanni, ibid,* 654: "It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in an abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted [...] It is therefore the "religious freedom" then existing in this country that is safe-guarded by the provisions of s. 2..."

[161] *Ibid*.

[162] *Ibid,* 567.

[163] *Ibid*, 567.

[164] *Ibid*, 568.

Act was later found to be religious in purpose under the *Charter* era, where, this time, its constitutionality was discussed rather than its application[165].

Before concluding on 'observing religion', I consider it necessary to highlight the human rights' progress made at the provincial level, showing that the country was indeed operating on two speeds of rights. While not the first province to adopt a human rights code in Canada[166], it was the breadth of protection afforded to its citizens which made Québec's *Charter of Human Rights and Freedoms*[167] singular[168]. Propitious, given the international pacts that came into force around the time of its adoption[169], the *Québec Charter* found its meaning within the leading texts on human rights[170]. The *Québec Charter* sought to protect conscience and religion, not only as fundamental freedoms[171], but also, in the case of religion, as prohibited grounds of discrimination[172], except when a distinction based on aptitudes exist[173].

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[165] *Robertson and Rosetanni, supra* note 159, 560-562. At 562, Cartwright J. stated: "Whether the imposition, under penal sanctions, of a certain standard of religious conduct on the whole population is desirable is, of course, a question for Parliament to decide. But in enacting the *Canadian Bill of Rights* Parliament has thrown upon the courts the responsibility of deciding, in each case in which the question arises, whether such an imposition infringes the freedom of religion in Canada." In *Big M. Drug Mart*, Dickson J. distinguished between the *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms*: the former was seen as declarative whereas the latter was interpreted as imperative: see *Big M Drug Mart*, supra note 67, ¶ 114-115.

[166] See: *Saskatchewan Bill of Rights Act*, 1947, S.S. 1947, c.35; *Ontario Human Rights Code S.O. 1961-62,* c.93*; Nova Scotia Human Rights Act S.N.S. 1963* c.5*; Alberta Human Rights Act* S.A. 1966, c.39 and *Individual Rights Protection Act* S.A. 1972, c.2; *New Brunswick Human Rights Act S.N.B. 1967* c. 13*; P.E.I. Human Rights Act S. P.E.I. 1968* c. 24*; Newfounland Human Rights Act S. Nfld. 1969, No. 75; British Columbia Human Rights Act S.B.C. 1969* c.10*; Manitoba Human Rights Act S.M 1970,* c.104*.*

[167] *Charter of Human Rights and Freedoms,* L.R.Q. c. C-12 (adopted on June 27th 1975, enacted in law on June 28th 1976) **[*Québec Charter*]**.

[168] Professor André Morel, in a 1987 article, referred to the Québec Charter as being of unequalled scope since 1975: see André Morel, "La Charte québécoise: un document unique dans l'histoire legislative canadienne", (1987) 21 *R.J.T.* 1, 16.

[169] *International Covenant on Civil and Political Rights*, (1976) 999 R.T.N.U. 171; *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 R.T.N.U. 3.

[170] See Michèle Rivet, « Entre stabilité et fluidité : le juge, arbitre des valeurs » in TRIBUNAL DES DROITS DE LA PERSONNE AND BARREAU DU QUÉBEC, *La Charte des droits et libertés de la personne : pour qui et jusqu'où?* (Cowansville, Éditions Yvon Blais, 2005), 1 at 5-6.

[171] *Québec Charter*, *supra* note 167, art. 3: "Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association."

[172] *Ibid*, art. 10:

"Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy,

Religion was observed, rather as a passing occurrence than addressed as a tangible concern in this section. Limited by its own legislative existence, the *Canadian Bill of Rights* only extended to the "Law of Canada" and the jurisdiction of the Parliament[174]. While its existence was recognised, religion (and by extension religious values) did not foster a constructive dialogue in constitutional law, since its meaning and scope was deemed frozen to its pre-*Canadian Bill of Rights* status.

1.3 Protecting Religion: Under the *Canadian Charter of Rights and Freedoms*

The *Charter* heralded a new era for religious freedom in Canada, namely by protecting it as a constitutionally recognised[175] fundamental freedom[176]. While it is readily acknowledged that the history of freedom of religion under the *Charter* represents a self-contained dissertation and has been addressed *in extenso* by authors[177], I have elected to use this as the backdrop of my study. The contextual study of freedom of religion will be presented in two parts: from Sunday closings to opening prayers (1.3.1) and from sincere individual beliefs to profoundly

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sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."

[173] *Québec Charter*, *supra* note 167, art. 20: "A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory."

[174] *Supra,* note 158.

[175] The primacy of the Constitution of Canada is guaranteed by s. 52(1) of the *Constitution of Canada*, which states that the Constitution of Canada is the supreme law of Canada.

[176] *Canadian Charter of Rights and Freedoms*, supra note 1, s. 2a): "Everyone has the following fundamental freedoms:
a) freedom of conscience and religion".

[177] See, for example: Paul Horowitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 *U.T. Fac. L. Rev.* 1 **[Horowitz, "Sources and Limits"]**; David M. Brown, "Freedom from or Freedom for? Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 *UBC L. Rev.* 1 **[Brown, "Religion as a Case Study"]**; José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998) 43 *McGill L.J.* 325 **[Woehrling, "L'obligation d'accommodement raisonnable"]**; Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism and the Liberal State" (2002) 17 *C.J.L.S.* 39 **[Berger, "Limits of Belief"]**; Pierre Bosset and Paul Eid, « Droit et religion : de l'accommodement raisonnable à un dialogue internormatif ? », (2007) 41 *R.J.T.* 513 **[Bosset & Eid, "Droit et religion"]**; Moon, *supra* note 4.

communitarian interests (1.3.2). While the first part spans both secular and religious Sunday closing laws up to requirements of secularism and non-sectarianism in public settings, the second part of the study will examine the development of a test on the sincerity of belief to the implications for collective beliefs.

1.3.1 From Sunday Closings to Opening Prayers

The *Lord's Day Act* has become the connecting thread between epochs of religious freedom. Viewed as having an essentially "secular and financial" purpose in *Robertson and Rosetanni*, the *Lord's Day Act* took on new meaning in *R.* v. *Big M. Drug Mart*, where "freedom of conscience and religion" was interpreted for the first time. Dickson J. – as he then was, and writing for Beetz, McIntyre, Chouinard and Lamer JJ. – explained that the aforementioned act could not be interpreted as having secular connotations[178], since it brandished its religious purpose overtly[179]. Furthermore, a holistic approach to evaluating the *Lord's Day Act* was suggested: it should be evaluated on the basis of effect *and* purpose rather than effect *or* purpose[180]. This approach also followed Justice Dickson's interpretation of s. 2(a) as a "single integrated concept"[181]. As such, the religious purpose of the *Lord's Day Act* was sufficient to demonstrate a breach of freedom of conscience and religion[182] and no s. 1 analysis was conducted. Hence, Dickson J. encapsulated the fundamental freedom as followed:

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[178] *Big M Drug Mart*, *supra* note 68, ¶ 78. Although factually similar to *Big M. Drug Mart*, *Robertson and Rosetanni* must be distinguished, since the latter case was decided on the application and not the constitutionality (and thus purpose) of the legislation: see *Big M. Drug Mart*, *supra*, ¶ 86-88. This is not to say, however, that all statutes proclaiming a common day of rest should be considered as having a religious purpose: see *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 **[*Edwards Books*]**, where the Supreme Court declared that the economic burden existed independently of the impugned legislation for the Saturday observers.

[179] As noted by Dickson J., the religious purpose of the *Lord's Day Act* had been conceded by the Attorney General for Alberta: see *Big M Drug Mart*, *supra* note 67, ¶ 79-80.

[180] In this way, Dickson J. is also rejecting the "shifting purpose" argument presented, which suggested "new appreciations" and "re-assessments" of existing legislation. See *Big M. Drug Mart*, *supra* note 67, ¶ 93: "While the effect of such legislation as the *Lord's Day Act* may be more secular today than it was in 1677 or in 1906, such a finding cannot justify a conclusion that its purpose has similarly changed. In result, therefore, the *Lord's Day Act* must be characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance."

[181] *Ibid,* ¶ 120.

[182] *Ibid,* ¶ 79-85.

> "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person**. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.** But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. **Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.**"[183]

In this way, freedom of conscience and religion – much like all other rights and freedoms contained in the *Charter* – is not an absolute right[184], but rather one that is subject to limitations, given the intrinsic coexistence of each individual's fundamental freedoms, as well as the reasonable limits imposed within a free and democratic society[185].

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[183] *Big M Drug Mart*, *supra* note 67*,* ¶ 94-95 [my emphasis].

[184] As stated in *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at ¶ 65 **[*Oakes*]**. As noted in *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772 **[*Trinity Western*]** by Iacobucci and Bastarache JJ. (writing for the majority), at ¶ 29-31, "In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. […] In addition, the *Charter* should be read as a whole, so that one right is not privileged at the expense of another." In *TWU*, the majority of the Supreme Court found that while the TWU Community Standards aimed to circumscribe the conduct of its members, one could not conclude that these measures would translate to intolerant behaviour in public schools; furthermore, the Court concluded that alternative protections existed to protect both minority practices and the population at large: see *TWU*, ¶ 32-33.

[185] The issue of reasonable limits in a free and democratic society will be discussed further on.

Thus not all Sunday closing laws can be considered religious in nature. The Supreme Court in *R.* v. *Edwards Books and Art Limited*[186], explained that the Ontario *Retail Business Holiday Act*[187], was enacted for the *secular* purpose of providing a uniform holidays for retail workers. An exemption was also provided in the act[188]. Nevertheless, while there was an admitted breach of certain shopkeepers' religious and equality rights, the violation was regarded as justified within a free and democratic society. *Edwards Books* granted the Supreme Court with a further opportunity to explain the function of s. 2(a) of the *Charter*, as articulated by Dickson C.J. (writing for Chouinard and Le Dain JJ.):

> "The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(*a*) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial"[189]

Interestingly, *Edwards Books* also distinguished freedom of conscience from freedom of religion. Dickson J. (as he was then) proffered that s. 2(a) of the *Charter* be interpreted as a "single integrated concept" in *Big M. Drug Mart* but found in *Edwards Books* that freedom of religion, unlike freedom of conscience, had both individual and collective aspects[190]. While this did not create a discrepancy in interpretation, it can be inferred that conscience and religion, as fundamental freedoms, are not in fact interchangeable. This point will be addressed in further detail later on in the study.

The issue of the insubstantial burden on religious beliefs was addressed by the Supreme Court the same year in *The Queen* v. *Jones*[191]. The appellant, Thomas

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[186] *Edwards Books, supra* note 176.
[187] *Retail Business Holidays Act,* R.S.O. 1980, c. 453, ss. 2(1), 3(4).
[188] *Ibid, s*s. 2(1), 3(4). See *Edwards Books*, *supra* note 176, ¶ 115-120, ¶ 144.
[189] *Edwards Books*, *supra* note 176, ¶ 97 [references omitted], as stated by Wilson J. (dissent.) in *R.* v. *Jones*, [1986] 2 S.C.R. 284 **[*Jones*]**, ¶ 67.
[190] *Edwards Books*, *ibid*, ¶ 144.
[191] *Jones, supra* note 189.

Larry Jones, pastor of a fundamentalist church, had taken on the education of twenty or so children under a schooling programme called "Western Baptist Academy". This case opposed the right of parents to educate their children according to their beliefs and provincial compulsory education[192]. The appellant refused to request a state permit for his private school and also refused to send his own children to public schools since, in his view, education was mandated by God and not accountable to government[193]. In this way, the appellant argued that the *Alberta School Act* infringed on his s. 2(a) and s. 7 *Charter* rights. Although both arguments ultimately failed[194], Justices McIntyre (writing for Beetz and Le Dain JJ.) and Wilson concurred that the *Alberta School Act* accommodated religious freedom. Wilson J. opined alone, however, that the appellant's s. 7 *Charter* rights were violated[195].

Moreover, the *Charter* has offered "freedom from conformity" for minority religious groups; this point was emphasised strongly not only in *Big M. Drug Mart*, but also in the so-called 'Elgin County' cases[196]. These cases concerned the funding of education of denominational schools, as formulated by s. 93 of the *BNA Act*, which reflected the political and "historical compromise" between Catholics and Protestants leading to Confederation, as noted in *Adler*[197]. Both *Zylberberg* and *CCLA* questioned whether the right to freedom of conscience and religion was breached by the school boards in question. Whereas the former decision questioned the constitutionality of

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[192] *School Act, R.S.A.* 1980, c. S-3, ss. 142(1), 143(1) **[*Alberta School Act*]**.

[193] *Jones, supra* note 189, ¶ 2-3, 19. The stalemate was niftily summed up by the trial judge in this case. See *Jones*, ¶ 6: "Section 143(1)(a) has given rise to what the trial judge has described as a standoff between "a stiff-necked parson and a stiff-necked education establishment, both demanding the other make the first move in the inquiry to determine whether the children are receiving efficient instruction outside the public or separate school system"."

[194] *Ibid*, ¶ 33, 48-49 (Laforest J., writing for the majority).

[195] Wilson J. offered a broad interpretation of the concept of liberty, though noting that this right did not give *carte blanche* on how to bring up and educate one's children: see *Ibid*, ¶ 76-77. Perhaps an intersection between freedom of conscience and religion and fundamental freedoms (in the sense of s. 7 of the *Charter*) occurs when Justice Wilson interprets the appellant's real complaint as being effects-based rather than purpose-based; although Justice Wilson concludes that the appellant failed to show a substantial impact, this approach demonstrates the place of conscience in this context: *Ibid*, ¶ 67-69.

[196] *Big M. Drug Mart*, *supra* note 67, ¶ 96; the 'Elgin County' cases are: *Zylberberg* v. *Sudbury Board of Education*, 1988 CanLII 189 (ON. CA), p. 19 **[*Zylberberg*]**; *Canadian Civil Liberties Association. v. Ontario (Minister of Education),* (1990), 71 O.R. (2d) 341 (C.A.) **[*CCLA*]**. See also *Adler, supra* note 153.

[197] *Adler, supra*, ¶ 29.

prescribed religious exercises at the beginning or end of each day in public schools, the latter case concerned the constitutionality of the regulation and curriculum of the school board in question. As stated most recently by Chief Justice McLachlin (writing for Binnie, Deschamps and Rothstein JJ., concurring) in *Hutterian Brethren of Wilson Colony*: "Canadian law reflects the fundamental proposition that the state cannot by law directly compel religious belief or practice. Thus this Court has held that if the purpose of a law is to interfere with religious practices, the law cannot be upheld […] To compel religious practice by force of law deprives the individual of the fundamental right to choose his or her mode of religious experience, or lack thereof."[198] While the Supreme Court judged it important that membership in a "discrete and insular minority" be recognised in *Adler*, s. 93 of the *BNA Act* nevertheless confered a plenary power to the province. As underlined by Justice Iacobucci (writing for Lamer C.J. and La Forest, Gonthier, Cory JJ.) one must distinguish between an *ability* and an *obligation* to pass legislation establishing and funding particular schools: "[i]f the plenary power is so insulated, then so is the proper exercise of it."[199]

Freedom of religion was further addressed in 1995 with *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto*[200], where the majority of the Supreme Court refused to develop internal limits to the scope of freedom of religion. At issue was whether parents of a premature infant could object to a blood transfusion on the basis on their religious beliefs as Jehovah's Witnesses[201]. The Supreme Court held that a broad interpretation of freedom of religion should be favoured, in order to

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[198] *Hutterian Brethren of Wilson Colony, supra* note 4, ¶ 4 [references omitted].
[199] *Adler, supra* note 153, ¶ 48; see also Wilson J. in *Reference Re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, 1198 **[*Reference Re Bill 30*]**.
[200] *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 **[*Children's Aid Society*]**.
[201] More specifically, the Supreme Court needed to determine whether "s. 19(1)(*b*)(ix) of the Ontario *Child Welfare Act* [R.S.O. 1980, c. 66 [rep. S.O. 1984, c. 55, s. 208]], which defines "child in need of protection", together with the powers in ss. 30(1)2 and 41 and the procedures in ss. 21, 27, 28(1), (10) and (12), denied parents a right to choose medical treatment for their infants, contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*, or infringed the appellants' freedom of religion as guaranteed under s. 2(*a*) of the *Charter*, and, if so, whether the infringement was justifiable under s. 1 of the *Charter*: *Children's Aid Society, ibid*, 316-317.

balance competing rights under section one of the *Charter*[202]. According to La Forest J. (writing for the majority), this approach gave necessary context as well as a broad power of judicial review[203] when addressing complex and intermingling issues of freedom of conscience and religion.

> "The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure."[204]

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[202] *Children's Aid Society, supra* note 200*,* at 383-384; see also *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 **[*Ross*]**, at ¶ 73-75.

[203] *Children's Aid Society, ibid*, at 389: "In my view, *Charter* rights should always be interpreted broadly. Apart from the fact that this brings in the full contextual picture in balancing them with other rights under s. 1, a narrower interpretation has the effect of forever narrowing the ambit of judicial review, and so limiting the scope of judicial intervention for the protection of the individual rights guaranteed under the *Charter*." Justices Iacobucci and Major, agreeing with the result reached by La Forest J., opined that an outer boundary can also be ascribed to s. 2(a) of the Charter, much like that of s. 2(d), as remarked upon in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 **[*Lavigne*]**, at 320-21 (Laforest J.). An outer boundary was explained as follows by Justice Laforest in *Lavigne* at pages 320-321: "At the very fundamental level, it could certainly not have been intended that s. 2(*d*) protect us against the association with others that is a necessary and inevitable part of membership in a democratic community, the existence of which the *Charter* clearly assumes. […] Thus I doubt that s. 2(*d*) can entitle us to be free of all legal obligations that flow from membership in a family. And the same can be said of the workplace. In short, there are certain associations which are accepted because they are integral to the very structure of society." Returning to the s. 2(a) *Charter* scope of *Children's Aid Society, supra* note 200, at 438-439), Justices Iacobucci and Major explained that "[i]f s. 2(*d*) will not encompass the right to dissociate from institutions integral to the structure of society, we conclude by analogy that neither s. 2(*a*) nor the liberty interest of s. 7 permits parents to endanger the lives of their children. Expanding the substantive rights guarantees to cover such activity would, with greatest respect, render them meaningless owing to a lack of definition. **Just because it is self-evident that a rights limitation shall be upheld as comporting with fundamental justice or s. 1 does not mean that it is necessary to proceed to this level of analysis.**"

[204] *Children's Aid Society, supra* note 200, 319. There must be a distinction, however, in the protection of children and of adolescents, since their 'best interests' differ, much like their capacity for autonomous choice. This was underscored recently by the Supreme Court in *A.C.* where the court discerned (Binnie J. dissenting) that the doctrine of the mature minor must be taken into account when faced with a decision concerning the liberty and security of the person: see *A.C., supra* note 4, ¶ 102-108 (Abella J., writing for LeBel, Deschamps and Charron JJ. concurring). This decision will be examined in depth further on in our study.

The intrinsic vulnerability of young children also highlighted the importance of the State's role, as underlined by Laforest J, as well as the amply justified restrictions on parental rights under the s. 1 *Charter* analysis[205].

Freedom *from* religious discrimination, and more specifically freedom from constraint or coercion, has also appeared as a facet of freedom of conscience and religion[206]. This aspect could be better understood, I contend, if it were examined as freedom of religion *as well as* freedom of conscience. In this way, an argument can be made for a more substantial case law for freedom of conscience, all the while clarifying the reach of freedom of religion[207]. For example, in *Freitag* v. *Penetanguishene[208],* the recital of a Christian prayer to commence a city council meeting was interpreted as imposing a Christian moral tone to the gathering[209]. Within an educational setting such as faced in *Chamberlain* v. *Surrey School District*

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[205] *Children's Aid Society, supra* note 200, 385-386. In an addendum to his analysis, La Forest J. discussed the interpretation of his opinion by his colleagues Iacobucci and Major JJ., and noted at pages 387-388 that "The sole issue before us was that raised by the parents, i.e. that their constitutional rights were infringed in the circumstances in which medical treatment was given to the child. In such a case, the parent's rights must, under s. 1, be balanced against the interests of others in a free and democratic society -- in this particular case the right of their child. In that situation, I, not surprisingly, found the parent's rights were clearly overridden. If a situation arose where it was alleged that the child's right was violated, other rights might be raised as reasonable limits, but if the right alleged was the security of the child as in the present case, then the child's right would again prevail over a parent's rights. In short the issue raised governs the form, but not the substance of the analysis. […] I am happy to see that my colleagues concede that the balancing of the competing rights could be integrated in a s. 1 analysis, since apart from specific provisions such as "fundamental justice", that is the only balancing mechanism provided under the *Charter*. The *Charter* makes no provision for directly balancing constitutional rights against one another. It is aimed rather at governmental and legislative intrusion against the protected rights; see s. 32 of the *Charter*." [emphasis in original]

[206] *Big M. Drug Mart*, *supra* note 67, ¶ 96-97.

[207] This point will be addressed in depth further on in our study.

[208] *Freitag* v. *Penetanguishene (Town),* 1999 CanLII 3786 (Ont. C.A.) **[*Freitag*]**.

[209] *Freitag, supra* note 208. The Québec Tribunal for Human Rights has arrived at similar conclusions under the *Québec Charter* : see *Québec (Commission des droits de la personne et droits de la jeunesse)* c. *Laval (Ville)*, 2006 CanLII 33156 (QC T.D.P) **[*Laval*]**. The Commission des droits de la personne et droits de la jeunesse recently appealed for a respectful discussion of diverse opinions, following a recommendation that the town of Trois-Rivières stop reciting a prayer at the beginning of their municipal council meetings and replace it with a moment of contemplation instead. See COMMISSION DES DROITS DE LA PERSONNE ET DROITS DE LA JEUNESSE, <Communiqués>, <La prière au conseil municipal de Trois-Rivières (20.01.2009)>, http://www.cdpdj.qc.ca/fr/communiques/docs-2009/COM_PriereTroisRivieres.pdf (site last accessed 31.03.2009.

No. 36[210], it was found that requirements of secularism and non-sectarianism should prevail over religious considerations, thus conferring freedom *from* religion. These cases accentuate colliding interests of vulnerable groups, minority groups and those who make up the majority: ultimately, the neutrality of the state must prevail in order to safeguard the rights of not only the minorities but also the "interests of the majority". Nevertheless, the very concept of the 'neutral state' also raises important questions in Canadian society. The notions of neutrality and freedom *from* religion, which have been traditionally articulated from the point of view of freedom of religion, would benefit from being re-examined from the perspective of freedom of conscience.

The first half of the study of case law under the *Charter* has exemplified some of the important principles of freedom of religion: the presence of a positive right and a negative obligation of religious freedom[211]; the interpretation of s. 2(a) as a 'single integrated concept'; the presence of trivial or unsubstantial burdens on freedom of religion (which do not qualify as "violations" of this freedom); the need to favour a broad interpretation of freedom of religion; and the obligation to justify State deference or intervention with regard to religious freedom under s. 1 of the *Charter*[212]. In examining Sunday closings and opening prayers, the groundwork for freedom of religion has been set down, but certainly not in stone. Questions remain, therefore, as to the religious relationship between parent and child, the balance between individual beliefs and collective interests as well as the necessary balancing of rights and values in light of the *Charter*. This will be the focus of the following section.

1.3.2 From Sincere Individual Beliefs to Profoundly Communitarian Interests

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[210] *Chamberlain* v. *Surrey School District No. 36,* 2002 CSC 86, [2002] 4 S.C.R. 710 **[*Chamberlain*]**, at ¶ 27: "The school board is the elected proxy of the collective local community, made up as it typically is of diverse subcommunities. The requirement of secularism means that the school board must consider the interests of all its constituents and not permit itself to act as the proxy of a particular religious view held by some members of the community, even if that group holds the majority of seats on the board."

[211] As previously discussed, *supra*, Chapter 1, section 2.1.

[212] For further discussion on section 1 *Charter* analysis, see *infra* section 1.4.2.

Freedom of religion became overwhelming present at the Supreme Court in 2004, developing a broad definition of religion on the one hand[213] and determining the religious neutrality of the State on the other[214].

I have elected to examine the case law unaccompanied by academic commentary in this section; the comments, criticisms and intellectual reflections of the legal community will be addressed in the final sections of my chapter when attending to unresolved issues pertaining to freedoms of conscience and religion.

As mentioned earlier, at issue in *Amselem* was whether Orthodox Jews could erect *succahs*[215] on their balconies in pursuance to their religious beliefs but contrary to the declaration of co-ownership. Whereas the appellants claimed a breach under the *Québec Charter*, the majority of the Supreme Court explained that these principles were equally applicable under the *Québec Charter* and the *Charter*[216]. All judges agreed that the right to freedom of religion is not absolute[217]. However, it is with respect to the definition and scope of freedom of religion that *Amselem* is especially interesting. Iacobucci J. (writing for himself as well as for McLachlin C.J. and Major, Arbour and Fish JJ.) first explained that while defining religion precisely might not be possible, it would be useful to distinguish between what is considered to be rooted in religion and what is outside of the protection of freedom of religion (namely secular, socially based or conscientiously held beliefs):

> "[d]efined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. **In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of**

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[213] *Amselem*, *supra* note 3.
[214] *Congrégation des témoins de Jéhovah de Saint-Jérôme-Lafontaine* v. *Lafontaine (Village),* [2004] 2 S.C.R. 650 **[*Lafontaine*]**.
[215] The *succah* is explained as follows in *Amselem*, *supra* note 5, at ¶ 5.
[216] *Amselem*, *supra* note 3, ¶ 37.
[217] This point was however strongly stressed by Bastarache J., writing for the minority: see *Amselem*, *supra*, ¶ 136. Freedom of religion under the *Charter* as well as the *Québec Charter* is subjected to reasonable limits, as established by sections 1 of the *Charter* as well as 9.1 of the *Québec Charter, supra* note 162. See also *Amselem*, *supra*, ¶ 152 with regard to the scope of action of section 9.1 of the *Québec Charter*.

> **which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith**."[218]

Beyond this 'outer' definition of religion, Iacobucci J. explained that both obligatory as well as voluntary expressions of faith should be protected by the relevant *Charters*[219]. The emphasis on the individual's subjective conception of freedom of religion resounds unmistakably[220]. Nevertheless, the right to freedom of religion will only be triggered once the individual has demonstrated the sincerity of his or her belief, which is determined according to the following test:

> "(1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. » [221]

While readily admitting that the Court should not become the arbiter of religious dogma[222], *Amselem* also acknowledged that expert testimony should not form the basis of the decision, distinguishing between what is *relevant* and what is *necessary* to satisfy the burden of proof[223].

Although the majority opinion in *Amselem* represents a new era of religious freedom claims in the *Charter* era, it would be remiss if the significant minority opinions went unaddressed (Binnie J. writing for himself[224]; Bastarache J., writing for

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[218] *Amselem*, *supra* note 3, ¶ 39 [my emphasis].
[219] *Ibid*, ¶ 47.
[220] *Ibid*, ¶ 42, where Iacobucci J. referred to Professor José Woehrling's seminal text on freedom of religion, where he explained that the subjective aspect of the believer's personal sincerity is in conformity with the established doctrine on this matter: see Woehrling, "L'obligation d'accommodement raisonnable", *supra* note 177, at 385.
[221] *Amselem*, *supra* note 3, ¶ 56
[222] *Ibid*, ¶ 50
[223] *Ibid*, ¶ 54. On this point, see also Binnie J.'s opinion at ¶ 190.
[224] Binnie J. emphasised, from the start, due to the weight placed on the "private contract voluntarily made among the parties to govern their mutual rights and obligations, including the contractual rules contained in the declaration of co-ownership, as well as on the co-owners' offer of accommodation.": see *Amselem*, *supra* note 3, ¶ 184-185. This approach is also echoed in his interpretation of the *Québec Charter*, which, in his view, is "concerned not

Deschamps and LeBel JJ.). While the approach proposed by Bastarache J. did not differ substantially[225] from that of the majority insofar as a suggesting a test based on beliefs, he endorsed a more objective test. Two other points also stand out in Justice Bastarache's interpretation of freedom of religion. First, expert testimony seemed to have been more valued[226]. Second, Bastarache J. also mentioned that the *Québec Charter* must be interpreted in harmony with the *Civil Code of Québec*[227]; in this sense, a distinction is made between the *purpose of* freedom of religion and the *right to* freedom of religion[228]. The minority opinions triangulated the wronged rights in a manner distinct from that of the majority[229] and given the framing of the issue[230], it is not surprising that the appeal would have been dismissed[231].

At issue in *Lafontaine* was the unjustified refusal of the municipality of the village of Lafontaine following repeated zoning requests from the Jehovah's Witnesses. In this way, the municipality did not satisfy its obligation of procedural fairness toward the appellants. In a once again divided Court, the majority (composed of McLachlin C.J. as well as Iacobucci, Arbour, Fish and Binnie JJ.) held that the municipality had breached its obligation and sent the matter back before the municipality for reconsideration of the application; the majority addressed the facts of this case in a purely administrative perspective, whereas LeBel J., writing for minority ventured into the obligation of state neutrality. The minority opinion was voiced by the same as in *Amselem*, namely Lebel, Bastarache and Deschamps JJ. (Major J., writing a separate opinion). The minority, as expressed by LeBel J., underlined the importance of the negative aspect of freedom of religion by asserting the duty of

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only with rights and freedoms but with a citizen's *responsibilities* to other citizens in the *exercise* of those rights and freedoms.": *Amselem*, *supra* note 3 ¶ 186.

[225] *Ibid*, ¶ 144

[226] *Ibid*, ¶ 140, 159. Bastarache J. employs "useful" to describe the input of expert testimony in discerning the fundamental precepts and practices of a religion.

[227] *Amselem, supra* note 3, ¶ 146, 165. I refer, of course, to the *Civil Code of Québec*, (L.Q., 1991, c. 64.) **[*C.c.Q.*]**.

[228] *Ibid*, ¶ 146.

[229] *Ibid*, ¶ 176: "not only is there a conflict between the right to freedom of religion and property rights, but the right to freedom of religion is also in conflict with the right to life and personal security, and with contractual rights."

[230] *Ibid*, ¶ 180.

[231] *Ibid*, ¶ 182. Binnie J. would have also dismissed the appeal at ¶ 210.

religious neutrality of the state and public authorities[232]. As such, the municipality would be breaching its obligation of neutrality by providing the appellants with further assistance[233]. LeBel J. would have dismissed the appeal on the basis that the religious beliefs and practices of the Jehovah's Witnesses do not exempt them from complying with municipal by-laws[234]. I note that LeBel J. continued his judgment in view of a hypothetical situation in which no land was available in the designated zone, alluding to potential positive obligations imposed upon the state institution on the basis of freedom of religion[235]. Finally, I mention that Major J. would agree with the result in the judgment of LeBel J., but limits himself to the findings of fact[236].

Bruker v. *Marcovitz*[237] provided further fertile terrrain for the development of freedom of religion by the Supreme Court in 2007. At issue in this case was the refusal of the husband to give his wife a *get*, a divorce under Jewish law (*Halakhic* law) after obtaining a divorce under civil law[238], and this, despite the fact that a standing agreement that had been negotiated, known as the Consent to Corollary Relief. More specifically, Clause 12 of the aforementioned agreement[239] stipulated that the parties would appear before the Jewish rabbinical court known as the Beth Din, to obtain a *get* immediately. The husband did not comply with this clause and only appeared before the Beth Din fifteen years later. The wife chose to institute civil proceedings against her husband, alledging that he had been in breach of contract and was thus liable under civil law for damages. Under Jewish law, only the husband is apt to give the *get*; without consent, the wife remains an *agunah*, or a "woman in

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[232] *Lafontaine, supra* note 214, ¶ 65.
[233] *Ibid*, ¶ 71 *in fine*.
[234] *Ibid*, ¶ 72.
[235] *Lafontaine, supra* note 214, ¶ 73-93.
[236] *Ibid*, ¶ 36.
[237] *Bruker, supra* note 4.
[238] See note 8 on the reform of the *Divorce Act*. Although article 21.1 of the *Divorce Act* provides the opportunity for either side to initiate proceedings and submit an affidavit to remove the barriers to religious remarriage, this article does not prove to be helpful in our situation, since it would have been up to Mr. Marcovitz to submit the affidavit.
[239] At issue in this case is the interpretation of paragraph 12 of the Consent to Corollary Relief found in *S.B.B. v. J.B.M.*, [2003] Q.J. No. 2896 (C.S.) (QL) **[*S.B.B.*]**: "The parties appear before the Rabbinical authorities in the City and District of Montreal for the purpose of obtaining the traditional religious Get, immediately upon a Decree Nisi of Divorce being granted." (hereinafter "the Consent")

chains" or "wife in chains"[240]. The husband argued that the agreement was not valid under civil law and that by seeking damages, his right to freedom of religion under the *Québec Charter* had been breached. Seen as a civil obligation with religious undertones by the Superior Court[241], compensation was awarded to the ex-wife, due to the long delays engendered by the husband's refusal to give the *get*. Perceived as a religious obligation with civil undercurrents by the Court of Appeal[242] – therefore not enforceable due to its nature as a moral obligation – the inferior decision was overturned, citing the principle of non-interference of the state in religious and private matters. Pitting religion against civil society obligations at the Supreme Court, Justice Abella (writing for the majority[243]) opined that "the invocation of freedom of religion does not, by itself, grant immunity from the need to weigh the assertion against competing values or harm."[244] This need for balance or reconciliation amongst

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[240] *Bruker*, *supra* note 4, ¶ 4 (Abella J.). The status of *agunah* also affects any children borne out of a subsequent civil marriage. They would be considered illegitimate (*mamzerim*) under Jewish law and would only be able to marry similarly placed people: see *Ibid,* ¶ 4, 125.

[241] *S.B.B., supra* note 239.

[242] *Marcovitz v. Bruker*, 259 D.L.R. (4th) 55, No. 500-09-013353-032 (C.A.Q.) (QL) **[*Marcovitz*]**

[243] Justice Deschamps wrote a lengthly dissenting opinion (also on behalf of Charron J.), where they concluded that it would be inappropriate "to impose on them [courts] an additional burden of sanctioning religious precepts and undertakings." (*Bruker*, *supra* note 4, ¶ 102). According to Deschamps J., one must distinguish asking the courts from considering questions of a religious nature – as was done in *Lafontaine, supra* note 9 – and asking the courts to assess the impact of the respondent's failure to consent to the *get,* therein creating a new recourse (*Bruker*, *supra* note 4, ¶ 124-125). Moreover, intervention in religious practices, according to Justice Deschamps, would defeat the point of adopting *Amselem*'s subjective standard of sincere belief (*Bruker*, *supra*, ¶ 131). Justice Deschamps concluded that the restraint shown by Canadian civil courts with regard to religious matters demonstrates the limits and maintains "a neutrality that is indispensable in a pluralistic and multicultural society." (*Bruker*, *supra*, ¶ 181, 184).

[244] *Bruker, ibid*, ¶ 73. Justice Abella articulated this point of view at the outset of her opinion as well and we believe it important to reproduce it in its entirety: "Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character. […] The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance." (*Ibid*, ¶ 1-2)

fundamental rights is reflected, according to Abella J., in article 9.1 of the *Québec Charter*[245]. The majority of the Supreme Court found that a dispute with a religious aspect can be appropriately interpreted as justiciable[246] as well as civilly viable[247] and thus legally binding[248]. Justice Abella completed her analysis by noting that she did not believe that Mr. Marcovitz objected to giving the *get* to Ms. Bruker on religious grounds[249], thereby questioning his sincerity. Moreover, when balanced with Ms. Bruker's curtailed "ability to live her life fully as a Jewish woman in Canada"[250], it was found that the breach of Mr. Marcovitz's rights was indeed inconsequential[251].

The right to freedom of religion was challenged lately in *A.C.* v. *Manitoba (Director of Child and Family Services)*[252], where a child of fourteen years and ten months objected to a blood transfusion on the basis of her religious beliefs as a Jehovah's Witness. Considered as a 'minor' since under the age of sixteen by provincial child and family services legislation standards, the "best interest of the child" was determined according to State authorities[253]. Alternatively, if a child is over sixteen, no medical treatment could be ordered by the court, unless it is satisfied that the child lacks the ability to understand the consequences of the treatment[254]. Built into that legislation is an acknowledgement of a child's capacity in the decision-making capacity over the age of sixteen. In the case at bar, A.C. refused a blood transfusion following internal bleeding due to Crohn's disease after being admitted to a hospital. Months before this incident, A.C. had completed an "advance medical directive", stating that she was not to receive a blood transfusion under any

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[245] *Québec Charter*, *supra* note 167, art. 9.1: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec." See *Bruker*, *supra* note 4, ¶ 76-82.
[246] *Bruker*, *supra* note 4, ¶ 41-43, 47.
[247] *Ibid*, ¶ 51.
[248] *Ibid*, ¶ 62-64.
[249] *Bruker*, *supra* note 4, ¶ 78-79.
[250] *Ibid*, ¶ 93.
[251] The majority did not discern any errors in the assessment of damages by the trial judge and therefore elected to leave them undisturbed: *Ibid*, ¶ 97-99. Given the minority position, damages would not have been awarded, since the issue of this case falls outside the jurisdiction of civil courts: *Ibid*, ¶ 177-180.
[252] *A.C., supra* note 4.
[253] *Child and Family Services Act,* C.C.S.M. c. C80, s. 25(8) **[*CFSA*]**.
[254] *Ibid,* s. 25(9).

circumstance[255]. In the day following A.C.'s admission to the hospital, a psychiatric assessment was performed in order to determine A.C.'s "capacity to understanding death"[256]. Shortly after experiencing further internal bleeding, A.C.'s doctors wanted to give her a blood transfusion, but she once again refused, at which point she was apprehended as a 'child in need of protection' by the Director of Child and Family Services[257]. The motions judge granted the treatment order on two grounds: first, that there were no legislated restrictions of the authority to order medical treatment in the "best interest of the child" and second, that A.C. was in immediate medical danger[258]. The treatment order was appealed by A.C. and her parents, arguing on the one hand that s. 25(8) of the *CFSA* should not have been applied to her and on the other, that ss. 25(8) and 25(9) of the *CFSA* were unconstitutional since they violated A.C.'s ss. 2(a), 7 and 15 *Charter* rights[259]. Steel J.A., for a unanimous court, summarised their conclusions as follows:

> "While this section does represent an infringement of the child's religious freedom under s. 2(a), such violation is saved by s. 1 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Medical treatment against one's wishes is also an infringement of one's liberty and right to security under s. 7 of the *Charter*. However, in this case, given the countervailing concerns of sanctity of life and protection of children, the infringement is not contrary to the principles of fundamental justice. The state does have a continuing interest in the welfare of a child, even one with capacity. Moreover, the infringement occurs in a procedurally fair manner. While children are treated differently than adults, and children under 16 are treated differently than children 16 and over, this is not discriminatory as understood by s. 15 of the *Charter*. Age-based distinctions are a common and necessary way of ordering society. Analyzing these distinctions in a contextual manner, there is a valid correspondence between the differential treatment and the increased vulnerability and varying maturity of minors in a child protection situation."[260]

The interpretation of s. 25(8) of the *CFSA* proved to be the only real source of disagreement between the majority opinion of the Supreme Court written by Justice Abella (writing for LeBel, Deschamps and Charron JJ. concurring) and the Manitoba

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[255] *A.C., supra* note 4, ¶ 6.
[256] *Ibid,* ¶ 6.
[257] *Ibid,* ¶ 7-8.
[258] *A.C., supra* note 4*,* ¶ 12. A.C. received the blood transfusions a few hours later and the treatments were successful, leading to her full recovery; following this development, the Director of Child and Family Services withdrew its application: see *Ibid,* ¶ 13.
[259] *Ibid*, ¶ 14.
[260] *Director of Child and Family Services* v. *A.C.*, 2007 MBCA 9 (CanLII), ¶ 4 **[*Director of Family Services*]**.

Court of Appeal. Justice Abella argued that one should adopt a 'sliding scale of scrutiny'[261] rather than a strict one: in this way, place is made for the doctrine of the mature minor, while all the while addressing the best interests of the child[262]. According to the common law approach to medical treatment of minors, the doctrine of the mature minor should not be understood as "dictating guaranteed outcomes, particularly when the consequences for the young person are catastrophic"[263], but rather "granting adolescents a degree of autonomy that is reflective of their evolving

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[261] *A.C., supra* note 4, ¶ 21-22. See esp. ¶ 23: "This interpretation of the "best interests" standard in s. 25(8) of the Act is not only more consistent with the actual developmental reality of young people; it is also conceptually consistent with the evolutionary development of the common law "mature minor" doctrine in both the Canadian and international jurisprudence. Under this doctrine, courts have readily accepted that an adolescent's treatment wishes should be granted a degree of deference that is reflective of his or her evolving maturity. Notably, however, they have rarely viewed this mandate as being inconsistent with their overarching responsibility to protect children from harm."

[262] Section 2(1) of the *CFSA, supra* note 253, sets out the "best interests of the child standard". While this section of the Act has been modified since the hearing before the Court (*A.C., supra* note 4, ¶ 32), I reproduce the Act as it was at the time of the hearing [emphasis in original]:

2(1) The best interests of the child shall be the paramount consideration of the director, an authority, the children's advocate, an agency and a court in all proceedings under this Act affecting a child, other than proceedings to determine whether a child is in need of protection, and in determining the best interests of the child all relevant matters shall be considered, including

(a) the child's opportunity to have a parent-child relationship as a wanted and needed member within a family structure;

(b) the mental, emotional, physical and educational needs of the child and the appropriate care or treatment, or both, to meet such needs;

(c) the child's mental, emotional and physical stage of development;

(d) the child's sense of continuity and need for permanency with the least possible disruption;

(e) the merits and the risks of any plan proposed by the agency that would be caring for the child compared with the merits and the risks of the child returning to or remaining within the family;

(f) the views and preferences of the child where they can reasonably be ascertained;

(g) the effect upon the child of any delay in the final disposition of the proceedings; and

(h) the child's cultural, linguistic, racial and religious heritage.

[263] *A.C., supra* note 4, ¶ 69.

maturity"[264]. In this way, there is no "eureka moment"[265] delineating the child from the adolescent, dividing between those who are in need of protection from harm from those who have the capacity to understand its effects[266]. The contrasting, if not to say conflicting, interpretations of A.C.'s right to freedom of religion provide ample terrain for discussion. Whereas Justice Abella argued that a commensurate approach allows for a proper balancing between interests[267], she did not even proceed to an acknowledgment of the sincerity of A.C.'s belief. This did not go unnoticed by Chief Justice McLachlin (also writing for Rothstein J.)[268] or Justice Binnie (dissenting)[269], who both agreed that s. 25(8) of the *CFSA* violated A.C.'s right to freedom of religion[270]. This is, however, where McLachlin C.J. and Binnie J. part ways, since the former opined that upon closer analysis, s. 2(a) and 7 *Charter* claims merge:

> "**Either the *Charter* requires that an ostensibly "mature" child under 16 have an unfettered right to make all medical treatment decisions, or it does not, regardless of the individual child's motivation for refusing treatment**. The fact that A.C.'s aversion to receiving a blood transfusion springs from religious conviction does not change the essential nature of the claim as one for absolute personal autonomy in medical decision-making."[271]

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[264] *A.C., supra* note 4, ¶ 69. Abella J., at ¶ 96, offered a non-exhaustive list of factors that may be of assistance in the decision-making process, but cautioned that it should not become a formulaic response to all situations.
[265] *Ibid,* ¶ 4.
[266] This approach also permits the Supreme Court to hold that A.C.'s s. 7 and 15 *Charter* rights are not violated. With respect to her liberty and security of the person under s. 7, Abella J. noted that "[i]nterpreting the best interests standard so that a young person is afforded a degree of bodily autonomy and integrity commensurate with his or her maturity navigates the tension between an adolescent's increasing entitlement to autonomy as he or she matures and society's interest in ensuring that young people who are vulnerable are protected from harm. […] The balance is thus achieved between autonomy and protection, and the provisions are, accordingly, not arbitrary." (*A.C., supra*, ¶ 108) With regard to the claim of distinction based on age, the Court noted that the Manitoba Child and Family Services Act functions on the basis of maturity level rather than an age cut-off: see *A.C., supra*, ¶ 111.
[267] *A.C., supra* note 4, ¶ 115.
[268] *Ibid,* ¶ 153.
[269] *Ibid,* ¶ 214.
[270] *Ibid,* ¶ 154 (McLachlin C.J.); ¶ 215 (Binnie J.)
[271] *Ibid,* ¶ 155 [my emphasis].

Given this either/or approach and by demonstrating that the objective of the legislation remains sound, McLachlin C.J. explained that the limit on religious practices emerges as justified under s. 1 of the *Charter*[272].

Unlike the majority opinions, Justice Binnie argued that the crux of the dispute lay in the fact that the presumption of incapacity contained in s. 25 *CFSA* remained irrebutable[273]. Therefore, beyond the violation of s. 2(a) and 7 of the *Charter*, the *CFSA* was conceptually closed to A.C. being considered a "mature minor"[274]. Amongst the divergent and convergent layers of analysis and levels of discontent, we see that *A.C.* has emerged from the hands of the Supreme Court as a "wait-and-see" approach. Although a commensurate approach is logical and the proposal of a compendium of factors furthers our understanding of how to evaluate a child's maturity, it does not sufficiently explain how one is to treat a child's religious wishes when confronted with serious issues, such as medical conditions[275].

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[272] *Ibid*, ¶ 156. McLachlin C.J. goes on to note, in the same paragraph, that given the sound objective of the *CFSA* – namely to ensure the health and safety of vulnerable people – the *CFSA* cannot be considered arbitrary for the purposes of s. 7 of the *Charter*.

[273] *Ibid,* ¶ 225, 231.

[274] *A.C., supra* note 4*,* ¶ 224.

[275] In considering the spiritual and physical consequences of choices, Professor Shauna Van Praagh wrote an opinion piece following *A.C., supra* note 4, where she suggested that one might find a fuller picture of teenage turbulence and personal autonomy by looking at the fictional world of Harry Potter, where she concluded that "All of us, including the Supreme Court, may want to stand in line for a movie ticket.": Shauna Van Praagh, "Harry Potter and the real story of A.C.", Globe and Mail (July 15th 2009), http://www.theglobeandmail.com/news/opinions/harry-potter-and-the-real-story-of-ac/article1218335/ (site last accessed 30.07.2009. On this subject, see also Shauna VAN PRAAGH, "Adolescence, autonomy and Harry Potter: the child as the decision-maker" (2005) 1(4) *Int'l J.L.C.* 335, at 369 **[Van Praagh, "Adolescence, Autonomy and Harry Potter"]**, who suggested that "the law of civil wrongs concerns itself both with recognising the agency of the individual and with protecting that individual's interests. Replacing 'individual' with 'young person' challenges us to examine more closely the promise of both recognition and protection." Christopher Bird put the question more directly when commenting *A.C., supra* note 4: "[t]he pressing question in A.C. is not specifically the constitutionality of the sections of the Child and Family Services Act; that question is a legal hobbyhorse for the real issue at stake in the case, which was "where do we draw the line when a child in a religious family wishes to essentially commit suicide by refusing treatment?"": see Christopher Bird, "A.C. v. Manitoba: Saving Pressing Questions for Later", *The Court*, http://www.thecourt.ca/2009/07/10/ac-v-manitoba-saving-pressing-questions-for-later/ (site last accessed 30.07.2009. Posing the question in this manner, I consider that freedom of conscience becomes more relevant as well as the family's role as a locus of indoctrination.

A relatively clear-cut case of freedom of religion that took an unexpected turn was brought before the Supreme Court in *Alberta* v. *Hutterian Brethren of Wilson Colony*[276]. New regulations regarding drivers' licenses[277] were instituted by the Alberta government, upsetting a careful balance that had existed with the Hutterian Colony for the last thirty years[278]. More specifically, all drivers' licenses were to be issued with photographs. The Hutterian Brethren believed that graven images, such as those obtained by the process of photography, would contravene the Second commandment[279]. Whereas the Albertan government had issued these new regulations in an effort to heighten highway safety as well as reduce identity theft, the Hutterian Brethren argued that these 'willing images' would violate their right to freedom of religion. An impasse was reached after additional measures proposed[280] by the government to alleviate the infringement on their right to freedom of religion were rejected, as was the Hutterian Brethren's counter-suggestion of a non-photo driver's license marked "not for identification purposes". Adjudication ensued on "the basis that the universal photo requirement constitute[d] a limit on the freedom of religion of Colony members who wish to obtain a driver's licence and thus infringe[d] s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*"[281].

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[276] *Hutterian Brethren of Wilson Colony*, *supra* note 4.
[277] *Supra* note 15.
[278] The Hutterian Brethren had benefited from an exemption, obtaining a Code G license: see *supra* note 16.
[279] "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4): *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 29.
[280] More specifically, the government of Alberta proposed the following measures: "first, that they have their photograph taken and printed on their licences. Each licence would then be placed in a special package which the licensee would never be required to open, preventing the licensee from ever coming into physical contact with the printed photo. The photographs would be stored in digital form in the database. The second proposal was that a photograph would be taken but not actually printed on their licences. Only the digital images would be stored in the facial recognition database." (*Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 122 (Abella J., diss.). See also *Ibid*, ¶ 12 (McLachlin C.J.).
[281] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 3 (McLachlin C.J., for majority). We note that the Hutterites argued that the new regulations discriminated on the basis of religion and thus invoked a second argument based on s. 15 of the *Charter*. This claim was dismissed by McLachlin C.J. (at ¶ 108) and was not addressed in the minority opinions.

Whereas both lower courts ruled in favour of the Hutterian Brethren of Wilson Colony[282] and despite the Albertan government's admission of its infringement of their rights, the majority of the Supreme Court (Abella, LeBel and Fish JJ. dissenting) found that "the Charter guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion."[283]

Although the sincerity of the Hutterites' belief was not challenged[284] and its nexus with religion had been conceded by the province, the weight of the incurred burden was contentious, since this point had not been admitted by the province. According to McLachlin C.J. (writing for Binnie, Deschamps and Rothstein JJ), the lower courts seemed to have proceeded on the assumption that the universal photo requirement constituted a burden "capable of interfering with the religious belief or practice" and continued by examining whether this burden constituted a reasonable limit.[285]. Moreover, it was acknowledged by McLachlin C.J. that freedom of religion can pose a particular challenge to the universality of many regulatory programs[286]. In this way, rights must be balanced and limits justified within a free and democratic society: this is the purpose of the *Oakes*' test. The province's primary objective was to ensure traffic safety; identity theft was seen as a collateral problem to the existing traffic safety system[287]. This interpretation was thus considered a 'measure prescribed by law' and constituted a substantial and pressing objective[288], according to the majority. The rational connexion between the universal photo requirement and the goal of protecting the integrity of the driver's licensing system was established as

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[282] See *Hutterian Brethern of Wilson Colony* v. *Alberta*, 2006 ABQB 338 (CanLII), *Hutterian Brethren of Wilson Colony* v. *Alberta*, 2007 ABCA 160 (CanLII). Slatter J.A. would have allowed the appeal, since further accommodations by the province, according to him, "would require it to significantly compromise a central feature of the security of the licensing system, and would amount to undue hardship." (*Hutterian Brethren of Wilson Colony* v. *Alberta*, 2007 ABCA 160 (CanLII), ¶ 124).
[283] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 95.
[284] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 7, 33.
[285] *Ibid*, ¶ 34 citing *Edwards Books, supra* note 176, at 759.
[286] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 36. McLachlin C.J. also explained that regulations are the "life blood" of the administrative state and do not imperil the rule of law. One should therefore not distinguish between law and regulation in this case: *Ibid*, ¶ 41. McLachlin C.J. also explains that freedom of religion cases, such as this one, often present an "all or nothing dilemma": see *Ibid*, ¶ 61.
[287] *Ibid*, ¶ 45.
[288] *Ibid*, ¶ 47.

well as preventing it from being used for the purposes of identity theft[289]. Indeed, while the objective and rational connexion of the regulation were generally accepted, the condition of minimal impairment proved to be decisive as well as divisive for the Supreme Court. Chief Justice McLachlin concluded that the measure presented by the Albertan government proved to be the least intrusive given the goal of maintaining the *integrity* of the driver's licensing system[290]. While debates and litigation about freedom of religion often prove to be multifaceted as well as laden, I believe that it was essential for McLachlin C.J. to have clarified the uses and misuses of the *Oakes*' test and that of the analysis of reasonable accommodation as a result of the approach used by the lower courts[291]. As such, she held that:

> "where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis based on the methodology of *Oakes*. Where the government has passed a measure into law, the provisions of s. 1 apply. **The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects**."[292]

This represents a significant divergence from the result in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*[293], insofar as a difference is established between legislative and general standards.

In the final step of balancing the salutary and deleterious effects, McLachlin C.J. distinguished speculative risk from real risk as well as the impact in terms of *Charter* values. Although the risk cannot be qualified as "definite", McLachlin C.J.

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[289] *Ibid*, ¶ 52.
[290] *Ibid*, ¶ 63. McLachlin C.J. rejects Abella J.'s casting of the situation, noting that the risk should be evaluated not on the basis of the comparison of a "few religious dissenters" versus over 700 000 unlicensed Albertans, but rather whether permitting *any* exceptions pose a real risk to the integrity of the licensing system: see *Ibid*, ¶ 63, 64.
[291] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 65.
[292] *Ibid*, ¶ 71 [my emphasis].
[293] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 **[*Meiorin*]**. McLachlin C.J., for the Court, found that not only the Government's aerobic standard was *prima facie* discriminatory but also that the Government's standard did not establish that it was a *bona fide* occupational requirement (BFOR). Whereas the onus was on the government to prove that it was a BFOR previously, it now only has to establish that the measure meet the s. 1 *Charter* test, namely a rational goal, minimal impairment and proportionality. The onus of demonstrating a "legislatively embedded" accommodation is therefore removed from the government, creating an alternate interpretation of responsibility.

argued that waiting for "proof positive" would decrease the number of laws passed as well as make public interest suffer[294]. However, in saying that one cannot wait for "proof positive", McLachlin C.J. is herself speculating on the certainty of the risk. It is difficult to comprehend how this could constitute a firm argument, when the risk remains physically unquantifiable. In examining the deleterious effects of such legislation, McLachlin C.J. admitted that there is no "magic barometer" to measure the implication of a particular limit on a religious practice: "[r]eligion is a matter of faith, intermingled with culture."[295] Just as one must distinguish between speculative and real risk, one must also discern between incidental effects and meaningful choices to one's religious practice: according to the majority of the Supreme Court and based on the evidence submitted, the Hutterian claimants were not deprived of this capacity[296]. Although it was acknowledged that the universal photo requirement curtailed the claimants' right to freedom of religion, the majority of the Supreme Court concluded that limit imposed was justified under s. 1 of the *Charter*[297].

Justice Abella's dissenting opinion has provided the reader with certain facets that deserve particular attention when balancing majority and minority rights. While it has already been acknowledged that the majority and minority opinions parted ways on the condition of minimal impairment[298], I believe that Justice Abella's use of freedom of religion case law from the European Court of Human Rights proved to be at the same time "novel and inconsistent", to borrow her own words[299] and

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[294] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 85.
[295] *Ibid*, ¶ 89, 90.
[296] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 94-96. At ¶ 97, McLachlin C.J. noted that the claimants' affidavit does not explain why they can devise or obtain alternate transport. In her view, there is no evidence that this alternative would be prohibitive. Moreover, at ¶ 98, it is noted that driving automobiles on highways is not a right but a privilege; this point is contested by Abella J. at ¶ 171, who argued that the majority's approach was at the same time novel and inconsistent with the principle enunciated in *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
[297] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 104. The s. 15 *Charter* claim was not treated at any length by the majority and the universal photo requirement was justified as follows at ¶ 108: "Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice." The s. 15 *Charter* claim in *A.C.* was similarly dismissed: see *A.C.*, *supra* note 4, ¶ 111.
[298] *Ibid*, ¶ 143 (Abella J.).
[299] *Ibid*, ¶ 171 (Abella J.). To my knowledge, this also constituted the first time that ECtHR case law was used for freedom of religion.

dangerous, to add my own[300]. Indeed, there are unmistakable similarities between the constitutional systems, such as the existence of a comparable principle of proportionality, as well as similar rights to freedom of religion. Nevertheless, one must be aware of the inherent differences between national and supranational constitutional systems of law as well as the context from which these cases emerge. Despite her relatively short tenure thus far at the Supreme Court, Justice Abella has emerged as a conscientious interpreter of tensions involved in claims of freedom of religion[301] and although this case does not break pattern, the justifications employed are contentious, to say the least. Abella J. began her opinion by contrasting the necessary balance that must occur between the benefits sought and the harm imposed by new measures and the fate of minorities living in a world of majority law[302]. In her view, the absence of an exemption to the universal photo requirement

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[300] Given the European Court of Human Rights' most recent ruling on freedom of religion, which included an unprecedented discussion on that topic, it seems as though the ECtHR is turning a page and proceeding to a more sensitive analysis of freedom of religion. While no decisions have been rendered by the Supreme Court on this topic since its release, it will be interesting to see how (or if) it handles the ECtHR's nascent ouverture on religion, and religious difference. One cannot lose sight of the fact that *Lautsi* c. *Italie*, decision of 3 November 2009, App. No. 30814/06 **[*Lautsi*]**, took place in the very particular context of public schools, and thus public institutions, compounded by the vulnerability of children. The ECtHR was "unable to grasp how the display, in classrooms in State schools, of a symbol that could reasonably be associated with Catholicism (the majority religion in Italy) could serve the educational pluralism that was essential to the preservation of a "democratic society" as that was conceived by the Convention, a pluralism that was recognised by the Italian Constitutional Court.": see *Lautsi*, ¶ 56-57 and European Court of Human Rights, Press Release Issued by the Registrar of the Chamber judgment in *Lautsi* c. *Italie*, "Crucifix in Classrooms: Contrary to Parents' Right to Educate their Children in Line with Their Convictions and To Children's Right to Freedom of Religion", online: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=857732&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (site last accessed 25.11.2009)

[301] See, for example: *Bruker, supra* note 4; *A.C.*, *supra* note 4. I note that Justice Abella did not engage in an examination of the sincerity of A.C.'s beliefs, however: see *A.C., supra* note 4, ¶ 153.

[302] Abella J. quotes a passage from author Martha C. Nussbaum's *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York, Basic Books, 2008) at ¶ 110, but does not share the entire sentence, which betrays, in my view, Abella J.'s actual opinion of the harm to the constitutional rights of the Hutterians. I believe it is therefore important to reproduce the sentence in full: "Some such burdens to religion may have to be borne, if the peace and safety of the state are really at stake, or if there is some other extremely strong state interest. But it seems deeply wrong for the state to put citizens in such a tragic position needlessly, or in matters of less weight. And often matters lying behind laws of general applicability are not so weighty**; sometimes they come down to the mere desire for homogeneity and an unexamined reluctance to delve into the details of a little known**

proved to be *dramatic*[303] for the Hutterian colony members, both in terms of ramifications on our multicultural society, as well as curtailing the autonomous nature of certain religious communities.

Freedom of religion, according to Justice Abella, should be understood as not only personal rights, but also as forming a collective conscience of 'permissible beliefs'; these values were emphasised in *Big M Drug Mart* as well as *Edwards Books*[304]. Justice Abella goes on to say that the ECtHR has espoused a similar liberal conception of freedom of religion in *Kokkinakis* and *Şahin*[305]. I cannot adopt that view, however, for two reasons. Firstly, freedom of religion was only examined in a substantive manner by the ECtHR for the first time some fifty years after the enactment of the *European Convention on Human Rights*. As a point of comparison, *Big M Drug Mart* was released three years following the enactment of the *Charter*; since then, the case law on freedom of religion has developed greatly. In this way, it seems as though one might be moving at two different speeds and discrediting progress and discussion in Canada. Second, the definitions of freedom of religion set forward in the aforementioned cases are done without consideration to context. At issue in *Kokkinakis* was the criminal prosecution of a Jehovah's Witness for proselytising; at issue in *Şahin* was the prohibition of students wearing headscarves in universities in Turkey. Whereas the former dealt with the clash of a minority religious group with the 'recognised dominant religion'[306], the later dealt with the collision between the manifestation of religious beliefs and the established secular (l*aik*) State[307]. In both cases, the national constitution entrenched the relationship with the State with regards to religion; in both cases, the *European Convention on Human Rights* was found to be at odds with the established national regimes. The

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or unpopular religion.": M.C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York, Basic Books, 2008), p. 117 [my emphasis]

[303] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 114 (Abella J.) [my emphasis].

[304] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 127 (Abella J.), citing *Big M Drug Mart, supra* note 67, at 759 and *Edwards Books, supra* note 176 at 346.

[305] *Supra,* notes 113 and 115.

[306] Article 3 of the 1975 Constitution (Greece).

[307] Article 2 of the 1982 Constitution (Turkey). For an enlightening discussion on the re-invention of secularism in Turkey, see Amélie Barras, "A rights-based discourse to contest the boundaries of state secularism? The case of the headscarf bans in France and Turkey" (2009) 16(6) *Democratization* 1237.

foundation of a "democratic society" was employed by the ECtHR to demonstrate a breach in M. Kokkinakis' rights as well as defend national policies in *Şahin*. These 'liberal conceptions' of freedom of religion espoused by the ECtHR must be understood as the other side of the rights pendulum, often used to accord deference to national orders rather than defences to particular claimants through the doctrine of the "national margin of appreciation". While comparative law in general and the recognition of pluralistic societies in particular has served the Supreme Court of Canada well, it is necessary to acknowledge the differing motivations of the states and individuals.

Although the emphasis on the individual's subjective conception of freedom of religion has been clearly resounding since *Amselem*, the implication of profoundly communitarian interests, as experienced by the Hutterites, has been emphasised of late by Abella J.. In this manner, her appreciation of both individual and collective aspects of religion is welcomed, since religion is not only about performed rites and individual beliefs, but also the interface with the greater community.

The use of *Metropolitan Church of Bessarabia and Others* v. *Moldova*[308] to illustrate the communitarian appeal of religion should be mitigated, however, since the respective state objectives differ greatly, as do their consequences. At issue in this case was Moldova's refusal to recognise the Metropolitan Church of Bessarabia; the State's refusal, it was argued, constituted an infringement to their right of freedom of religion (article 9 ECHR) and amounted to discrimination on the grounds of religion (article 14 ECHR). By not proceeding to its recognition, the Metropolitan Church of Bessarabia remained without rights under the *Religious Denominations Act*[309], and this, despite the fact that freedom of religion (without regard to denomination) was recognised in Article 31 of the Moldovan Constitution of 1994[310]. The government argued that the case concerned an ecclesiastical conflict and that

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[308] *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, ECHR 2001-XII **[*Metropolitan Church of Bessarabia*]**

[309] *Religious Denominations Act*, (Law no. 979-XII of 24 March 1992) as cited in *Metropolitan Church of Bessarabia, supra* note 19, ¶ 13. The Metropolitan Church of Bessarabia could therefore not operate or practice as a church: see *Ibid,* ¶ 104-105.

[310] *Ibid,* ¶ 89.

any recognition of the Metropolitan Church of Bessabaria would provoke conflict within the Orthodox Church[311]. Before the ECtHR, while it was agreed that public order could constitute a legitimate aim, it must remain proportional. The State's outright refusal of recognition the Metropolitan Church of Bessarabia could not be considered proportionate[312]. While *Metropolitan Church of Bessarabia* rightly illustrated that not all state objectives are created equal, it remains clear that further attention needs to be placed on context. As previously stated, it is important to recognise the individual as well as collective components of religion[313]. Nevertheless, I believe it imprudent to employ the conclusions on freedom of religion in *Metropolitan Church of Bessarabia* in *Hutterian Brethren of Wilson Colony* without closer attention to the facts that gave rise to the case. The costs of not recognising a church or religion by the authorities cannot be equated with the consequences of a universal photo requirement for drivers' licenses. First, by refusing to recognise a particular group, such as the Metropolitan Church of Bessarabia, their legal voice and powers of representation are rendered nil before the State institutions. By enforcing a universal photo requirement, the State may be seen as curtailing certain

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[311] *Ibid,* ¶ 23, 98. Moldova had achieved independence only in 1991 and the government argued that one factor conducive to stability was religion, since the majority of Moldovans were of Greek Orthodox faith (*Ibid,* ¶ 111); this reasoning did not, however, stop the government from recognising other religions, however: see *ibid,* ¶ 30. The Moldovan Court of Appeal dismissed the State's arguments, noting that the term denomination should not be restricted to the meanings of Catholicism or Orthodoxy and therefore constituted an unfounded breach to the right of freedom of religion: see *Ibid,* ¶ 24.

[312] *Metropolitan Church of Bessarabia, supra* note 308*,* ¶ 130. The Court noted at ¶ 118-119 that while a certain margin of appreciation is left to the member states by the ECHR, it should not go unchecked. In this sense, by refusing to recognise the Metropolitan Church of Bessarabia, the State contravened other rights, such as the right of association and the right to a fair trial. Moreover, the ECtHR noted that the arguments related to discrimination on the basis of religion amounted to a repetition of the freedom of religion claim and there was no need to examine them separately: see *Metropolitan Church of Bessarabia, supra* note 19*,* ¶ 134. Lebel J. explained that both the ECHR and the Oakes' test belong to Thomas Aquinas' philosophical tradition, namely that proportionate burdens should be imposed on citizens: see *Hutterian Brethren of Wilson Colony, supra* note 4*,* ¶ 184.

[313] Perhaps LeBel J., in his dissent, framed the issue as well as the context in a more comprehensive fashion, since according to him, "[t]hat decision reflects the complex and highly textured nature of freedom of religion. […] Religion is about religious beliefs, but also about religious relationships. The present appeal signals the importance of this aspect. It raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations." See *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 181-182.

habits, but is not impeding their legal voice. Second, by refusing to legally recognise the existence of a particular group, such as the Metropolitan Church of Bessarabia, a perception or aura of illegitimacy cloaks the group. By enforcing a universal photo requirement, the civil rights of the Hutterites' remain intact, though perhaps a little bruised. Indeed, Justice Abella was right to point out that the Hutterites rely on their self-sufficiency and that aspect must be taken into account when understanding the consequences of one's free choice and personal autonomy[314]. In conclusion, Abella J. (Lebel and Fish JJ. agreeing) would have dismissed the appeal, but suspend a declaration of invalidity for one year in order to give the Albertan government an opportunity to fashion a responsive amendment[315]. While this case considered the right to freedom of religion in particular, it demonstrated that more attention should be heeded to the rights of particular groups and their relationship with the State.

Justice LeBel's reference to freedom of religion as "highly textured"[316] in *Hutterian Brethren of Wilson Colony* eloquently illustrates the complexity in handling such a fundamental freedom in the *Charter* era. The texture of freedom of religion – if one can use such a term – can differ according to the feel, surface, quality, consistency and grain. In examining sincere individual beliefs to profoundly communitarian interests of religion, a subtle shift in paradigm can be observed. Whereas *Amselem* defined both religion and sincere beliefs, the focus has shifted to the impact of competing beliefs, veiled under the discourse on *Charter* values[317]. Thus, the reluctant juncture between the subjective functional and substantive content approaches is acknowledged when defining religion in law in Canadian constitutional setting. The consequences of such a conjunction will be discussed further on in the study.

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[314] See *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 165, where *Hofer* v. *Hofer*, [1970] S.C.R. 958 **[*Hofer*]** illustrated the community's self-sufficiency.
[315] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 177.
[316] *Ibid,* ¶ 181.
[317] On the rise of "Charter values" and their significance, see *supra* note 128.

1.4 Violation of Freedom of Religion: The Duty to Reasonably Accommodate Religion and Proportionality under the *Oakes'* Test

As seen previously in *Hutterian Brethren of Wilson Colony*[318], claims of freedom of religion can be treated in one of two ways, depending on whether it is the validity of the law that is at stake or that of a government action or administrative practice. While the former employs the s. 1 justification analysis better known as the *Oakes*' test, the latter draws on the doctrine of reasonable accommodation. The remedies also vary, according to the path chosen: if the law is found to be unconstitutional, remedy lies under s. 52 of the *Charter* whereas if the government action or administrative practice violates *Charter* rights, the remedy is found under s. 24(1) of the *Charter*[319]. With these distinctions in mind, I will proceed to a short overview of reasonable accommodation (1.4.1) and revisit proportionality under the *Oakes*' test (1.4.2.).

1.4.1 The Duty to Reasonably Accommodate Religion

1.4.1.1 The Case Law of Reasonable Accommodation

Much has been written on the subject of reasonable accommodation of religion in the last ten years[320] and even more so since the *Bouchard-Taylor Report* in Québec in 2007[321]. Reasonable accommodation should remain, however, a legal

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[318] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 66-67. McLachlin C.J. also adds, at ¶ 68-69, that minimal impairment and reasonable accommodation are conceptually distinct, since the former deals with laws of general application and the latter must tailor their relationships by respecting the existing human rights' legislation.

[319] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 66-67.

[320] See, for example: Woehrling, « L'obligation d'accommodement raisonnable », *supra* note 177; Christian Brunelle, *Discrimination et obligation d'accommodement raisonnable en milieu de travail syndiqué* (Cowansville, Éditions Yvon Blais, 2001); Myriam Jézéquel, ed., *La justice à l'épreuve de la diversité culturelle* (Cowansville, Éditions Yvon Blais, 2006).

[321] See, for example: Jézéquel, *supra* note 71; Stéphane Bernatchez, « Les enjeux juridiques du débat québécois sur les accommodements raisonnables », (2007) 38 *R.D.U.S.* 233 **[Bernatchez, « Enjeux juridiques »]**; Bosset & Eid, « Droit et religion », *supra* note 177; José Woehrling, « La place de la religion à l'école publique » (2007) 41 *R.J.T.* 651 **[Woehrling, « Religion à l'école »]**; Sébastien Grammond, « Conceptions canadienne et québécoise des droits fondamentaux et de la religion : convergence ou conflit? » (2009) 43 *R.J.T.* 83 **[Grammond, « Conceptions canadienne et québécoise»]**; Jean-François Gaudreault-Desbiens, ed., *Le droit, la religion et le « raisonnable »* (Montréal, Les Éditions Thémis, 2009); Paul Eid, Pierre Bosset, Micheline Milot and Sébastien Lebel-Grenier, eds.,

obligation rather than a political tool to address public opinion[322]. The objective here is not to provide an in depth-analysis of the reasonable accommodation of religion, but rather a synopsis of relevant principles as applied under the *Charter* era.

In its earliest inception, reasonable accommodation sought to find balance with the rights of others in order to preserve a society's social structure[323]; it was not (and is not) seen as an absolute right. While first utilised to counter discriminatory practices found in employer-employee relations, the framework of reasonable accommodation has since been expanded into other areas of civil rights. Reasonable accommodation, therefore, was defined by the Supreme Court in *O'Malley* as

> "[t]he duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer."[324]

An ultimate aspect of undue hardship was developed later in *Central Okanagan School District No. 23* v. *Renaud*[325] and *Commission scolaire de Chambly* v. *Bergevin*[326], as noted by Bosset and Eid[327], whereby the duty to accommodate one employee should not come at the expense of another employee's rights, nor should it affect their morale. The Supreme Court, when faced with a collision between an employer's requirements and an employee's religious beliefs, explained that "*bona fide* occupational qualification and *bona fide* occupational requirement are equivalent and

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Appartenances religieuses, appartenance citoyenne : un équilibre en tension (Québec, Les Presses de l'Université Laval, 2009).

[322] On that subject, see Pauline Côté, "Québec and Reasonable Accommodation: Uses and Misuses of Public Consultation" in Lori G. Beaman and Peter Beyer, eds., *Religion and Diversity in Canada* (Leiden, Koninklijke Brill NV, 2008), 41-65.

[323] *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears*, [1985] 2 S.C.R. 536, ¶ 22 **[*O'Malley*]**.

[324] *Ibid,* ¶ 23.

[325] *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970 **[*Central Okanagan School District*]**.

[326] *Commission scolaire de Chambly* v. *Bergevin*, [1994] 2 S.C.R. 525 **[*Bergevin*]**.

[327] Bosset & Eid, « Droit et religion », supra note 177, ¶ 13.

co-extensive terms."[328] Nevertheless, reasonable accommodation has been employed beyond the realm of *bona fide* occupational requirements since *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*[329] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*[330], thus extending the duty to accommodate to all persons governed by human rights legislation. *Meorin* also signalled the end of a lengthy controversy between doctrine and jurisprudence, according to José Woehrling, on the question of whether reasonable accommodation should extend to both direct and indirect discrimination[331]. Hence, certain conditions must be met in order to obtain an accommodation on the basis of freedom of religion, according to Professor Woehrling: first, they must be substantive moral or religious convictions; second, not only must these religious convictions exist, they must also be sincere; finally, the claimant must demonstrate that the restriction on his or her freedom of religion is serious[332].

The minority of the Supreme Court in *Amselem* opined that the duty of reasonable accommodation could not be imported to rights other than equality rights. Unlike *Aubry* v. *Éditions Vice-Versa inc.*[333] and *Prud'homme* v. *Prud'homme*[334], where two fundamental freedoms were balanced under the proviso of s. 9.1 of the *Québec Charter*[335], the minority in Amselem held it inapplicable due to the impossible balancing

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[328] *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 [emphasis in original] **[*Alberta Dairy Pool*]**. This approach effectively overruled *Bhinder* v. *C.N.R.*, [1985] 2 S.C.R. 561 **[*Bhinder*]**, where the majority of the Supreme Court distinguished *O'Malley* from *Bhinder*, since the latter was concerned by the presence of s. 14(*a*) in the *Canadian Human Rights Act* (which explicitly created a *bona fide* occupational requirement defence) whereas the former was governed by provisions of the *Ontario Human Rights Code*: see *Bhinder*, ¶ 41.

[329] *Meiorin*, *supra* note 293, as cited in *Multani* v. *Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256 **[*Multani*]**, at ¶ 130.

[330] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 **[*Grismer*]**, as cited in *Multani, supra* note 329, at ¶ 130.

[331] See *Meiorin*, *supra* note 293, at 32 as cited by Woehrling, « Religion à l'école », *supra* note 321, 668 and footnote 33.

[332] Woehrling, «L'obligation d'accommodement raisonnable », *supra* note 177, 384-398.

[333] *Aubry* v. *Éditions Vice-Versa inc.,* [1998] 1 S.C.R. 591 **[*Aubry*]**.

[334] *Prud'homme* v. *Prud'homme*, [2002] 4 S.C.R. 663 **[*Prud'homme*]**.

[335] *Québec Charter, supra* note 167, art. 9.1: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law."

of rights and further complicated by the subjective nature of the test at hand[336]. While Stéphane Bernatchez treated this point as an unresolved question, which is disputed by some[337], I have elected to address it under the lens of case-law since it represents a question mark in the evolution of the duty to reasonably accommodate.

More recently, the distinction between reasonable accommodation and minimal impairment has wavered, as seen in *Multani* v. *Commission scolaire Marguerite-Bourgeoys*[338]. At issue was whether an orthodox Sikh boy could be allowed to wear his kirpan to school, which was in conformity with his religious beliefs but in seeming contradiction with the school board's code of conduct. While essentially an administrative law decision, *Multani* was re-framed as a case of religious freedom rather than one base on the validity of an administrative decision. Although the majority observed the correspondence between the concepts of reasonable accommodation and minimal impairment[339], Justices Deschamps and Abella JJ., in a concurring opinion, viewed that they belonged to two different analytical categories[340]. This

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[336] *Amselem*, *supra* note 3, ¶ 154, citing *Devine* v. *Québec (Attorney General)*, [1988] 2 S.C.R. 790, 818 **[*Devine*]**.

[337] See Bernatchez, « Enjeux juridiques », *supra* note 321, ¶ 37-38. According to Bernatchez, authors José Woehrling and Christian Brunelle maintain instead that an infringement of the right to freedom of religion could create a duty of reasonable accommodation: see Christian Brunelle, « La sécurité et l'égalité en conflit » in TRIBUNAL DES DROITS DE LA PERSONNE AND BARREAU DU QUÉBEC, *supra* note 170, 343 at 357-359; Woehrling, «L'obligation d'accommodement raisonnable », *supra* note 177, 357 and following.

[338] *Multani, supra* note 329.

[339] *Ibid,* ¶ 53. Quoting Professor Woehrling, « Celui qui veut repousser l'obligation d'accommodement doit démontrer que l'application intégrale de la norme, sans les exceptions réclamées par le demandeur, est nécessaire pour atteindre un objectif législatif légitime et important. Plus précisément, sous l'empire de l'article 1 de la *Charte canadienne*, en appliquant le test de l'arrêt *R.* c. *Oakes*, il faudra démontrer successivement que l'application entière de la norme constitue un moyen rationnel d'atteindre l'objectif législatif; qu'il n'existe pas de moyens d'y parvenir qui soient moins attentatoires aux droits en cause (critère de l'atteinte minimale); enfin, qu'il y a proportionnalité entre les effets bénéfiques de la mesure et ses effets restrictifs. En fait, le critère de l'atteinte minimale, qui est au cœur du test de l'article 1, correspond en grande partie, pour ce qui est des concepts, à la défense de contrainte excessive qui permet de s'opposer à l'obligation d'accommodement raisonnable dans le cadre des lois sur les droits de la personne. C'est ce qui ressort du jugement de la Cour suprême dans l'affaire *Edwards Books*, où l'application du critère de l'atteinte minimale amène la Cour à se demander si le législateur ontarien, en interdisant l'ouverture des magasins le dimanche et en prévoyant certaines exceptions pour ceux qui ferment déjà le samedi, a suffisamment fait d'efforts pour accommoder les commerçants qui, pour des raisons religieuses, doivent respecter un jour de repos autre que le dimanche. » : Woehrling, «L'obligation d'accommodement raisonnable », *supra* note 177, 360.

[340] *Multani, supra* note 329, ¶ 129.

intellectual quandary over whether there should be correspondence or dissonance between reasonable accommodation and minimal impairment raises further concerns about the boundaries of reasonable accommodation, and more importantly, about freedom of religion. As seen below, a jurisdictional line is drawn between these concepts on the basis of the remedy sought.

Reasonable accommodation and minimal impairment were conceptually distinguished most recently in *Hutterian Brethren of Wilson Colony*. As discussed earlier, the obligation of a universal photo for drivers' licenses resulted in questions related to the limits of freedom of religion and that of the doctrine of reasonable accommodation. On this point, the majority of the Supreme Court noted that "a distinction must be maintained between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1 justification analysis that applies to a claim that a law infringes the Charter."[341] As mentioned previously, it is therefore not the outcome (namely the fact that there is a *Charter* violation) but rather the source of the infringement that determines the jurisdictional remedy. If a government action or administrative practice infringes on *Charter* rights, remedy is sought under s. 24(1) of the *Charter*; if the validity of the law is at stake – and is not justified under the Oakes' test – then remedy is found under s. 52 of the *Constitutional Act*[342]. The scope of judicial accountability varies, therefore, according to the form of action sought: while the relationship between employer and employee can be envisaged as dynamic[343], the same cannot be said about the application of general laws. Although the relationship between a legislature and the people subject to its laws should not be understood as static (as opposed to dynamic), the majority of the Court explains that

> "[b]y their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe *Charter* rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the

[341] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 66.
[342] *Ibid*, ¶ 66-67.
[343] *Ibid*, ¶ 67-68.

> court. The broader societal context in which the law operates must inform the s. 1 justification analysis. "[344]

In conceiving that no legal obligation exists between the legislature and the individual, the majority of the Court was effectively stating that a law does not have to be *a priori* facially neutral before the citizen. This approach to the responsibility and accountability of the legislature is worrisome, since it handily provides an exit strategy or *carte blanche* to the legislature under the auspices of a "societal perspective"[345].

While the following cases do not deal with the reasonable accommodation of religion, *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*[346] and *Hydro-Québec* v. *Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*[347], heralded, in my view, the shift in the burden of demonstration of the State found in *Hutterian Brethren of Wilson Colony*. In both *McGill Health Centre* and *Hydro-Québec*, the employer had authorized absences that were not provided for in the collective agreement[348]. In *Hydro-Québec*, the interpretation and application of the undue hardship standard constituted the central question[349], whereas the application of a termination employment clause was pivotal in *McGill Health Centre*[350]. Both cases converged on the issue of the employer's obligation: "the employer's duty to accommodate ends where the employee is no

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[344] *Ibid*, ¶ 69 [my emphasis].
[345] *Ibid*, ¶ 70-71.
[346] *McGill University Health Centre (Montreal General Hospital)* v. *Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161 **[*McGill Health Centre*]**.
[347] *Hydro-Québec* v. *Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* [2008] 2 S.C.R. 561 **[*Hydro-Québec*]**.
[348] *McGill Health Centre*, *supra* note 346, ¶ 32; *Hydro-Québec*, *ibid,* ¶ 17.
[349] *Hydro-Québec*, *ibid*, ¶ 9. The test for undue hardship was described as follows at paragraph 18 of *Hydro-Québec*: "Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory." The Supreme Court in McGill Health Centre stressed that "[u]ndue hardship resulting from the employee's absence must be assessed globally starting from the beginning of the absence, not from the expiry of the three-year period."
[350] *McGill Health Centre*, *supra* note 346, ¶ 10, 25.

longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future."[351] Undue hardship, therefore, should benefit from a global analysis, which commences at the time that the first instance occurred, rather than be addressed as an afterthought to the situation[352]. Both *McGill Health Centre* and *Hydro-Québec* demonstrated that despite the employer's measures of accommodation, the employee was incapable of resuming their duties; the employer was therefore discharged of his duty of accommodation. Shifting to *Hutterian Brethren of Wilson Colony*, the majority of the Court opined that the *Charter* does not indemnify practitioners against all incidental costs related to the practice of religion, even though freedom of religion is guaranteed[353].

This approach signals that unaddressed criticisms and shortfalls of the doctrine of reasonable accommodation, as applied to freedom of religion, persist. In the following section, I will attempt to address the concerns raised by authors.

1.4.1.2 The Doctrine of Reasonable Accommodation

The legal framework of reasonable accommodation as applied to freedom of religion has endured as a subject of pointed criticism by authors. In the aftermath of the *Bouchard-Taylor Report*, many of these legal question marks were addressed, though certain answers remain unclear and at times unsatisfactory.

As seen most recently in *Hutterian Brethren of Wilson Colony*, the very application of legal framework of reasonable accommodation to the constitutional context – and in our case freedom of religion – has elicited questions. While the concepts of reasonable accommodation and minimal impairment were reasonably

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[351] *Hydro-Québec*, *supra* note 347, ¶ 19; see also *McGill Health Centre*, *ibid,* ¶ 37-38.
[352] *McGill Health Centre*, *ibid*, ¶ 33.
[353] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 95-96. In *Lavallée* c. *Commission scolaire des Chênes*, 2009 QCCS 3875 at ¶ 36 **[*Lavallée*]**, it became possible to discount perceived injustices by attempting to rely only on hard and proven facts. However, *Hutterian Brethren of Wilson Colony* was not treated under the same angle as *Lavallée*, since the former was interested by the justification of the law under s. 1 of the *Charter*, whereas the latter was focused on the qualification of the harm.

associated in *Multani*, these concepts were intellectually distinguished in *Hutterian Brethren of Wilson Colony*. This about-face on the cabal between reasonable accommodation and minimal impairment goes a long way in addressing the concerns expressed by various authors since *Multani*. As expressed by Jean-François Gaudreault-DesBiens, when referring with approval to Justices Deschamps and Abella's minority opinion in *Multani*, a *qualitative difference* reigns between these concepts[354]. The importance of conceiving of these legal concepts as intellectually distinct is crucial, since it should oblige the adjudicator to pay close attention to the context in which these demands are made. This point, however, should not be taken for granted, as seen below.

In its current state, according to authors Bosset and Eid, the legal framework of reasonable accommodation does not accurately reflect the vocation and responsibilities held by a public institution, since the obligation of reasonable accommodation and the criterion of excessive burden have been used almost exclusively in the particular employer-employee relationship[355]. This comment was made in reaction to *Multani*, since it dealt with a school environment where there was marked relationship of unequal forces. The cost-benefit analysis will differ, therefore, according to the nature of the relationship, as well as the implications of such an accommodation in a particular environment[356]. A further example demonstrating the difficulty of transposing the framework of reasonable accommodation to public institutions is Québec's now-obscured Bill 16, entitled *Loi favorisant l'action de l'Administration à l'égard de la*

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[354] Gaudreault-Desbiens, « Quelques angles morts », *supra* note 71, 241 at 272. See also Bernatchez, « Enjeux juridiques », *supra* note 321, ¶ 40-42.

[355] Bosset & Eid, « Droit et religion », *supra* note 177, ¶ 14. The authors offer the example of a school, which has a different vocation and environment than that of an employer: see *Multani*, *supra* note 329, ¶ 53, 65. See also Bernatchez, « Enjeux juridiques », *supra* note 321, ¶ 40-42.

[356] For a specific discussion on the implications of different actors requesting a reasonable accommodation of freedom of religion in schools, see Woehrling, « Religion à l'école », *supra* note 321; Bergman Fleury, "Obligation d'accommodements et services publics au Québec" in Christian Brunelle and Patrick A. Molinari, eds., *Reasonable Accommodation and the Role of the State : A Democratic Challenge/Accommodements raisonnables et rôle de l'État : un défi démocratique*, coll. Canadian Institute for the Administration of Justice/Institut canadien d'administration de la justice, 2008, at pages 339-361.

diversité culturelle[357]. In an effort to better respond to the cultural diversity of immigrants and their religious practices in particular, the government had tabled a bill to enable government organisations to adopt directives to fight against discrimination. The fate of this bill has become uncertain given the politically charged atmosphere surrounding these debates in Québec.

The balance between the demands of reasonable accommodation and the other values enshrined by a charter of rights provides a third point of contention for the legal framework of reasonable accommodation. More particularly, when a request for reasonable accommodation of religious practices affronts another underlying value of the charter of rights, the legitimacy of the solution comes into question[358]. In an effort to remedy this possible clash of values, the Québec government, following the *Bouchard-Taylor Report*, instituted changes to the *Québec Charter* in order to reflect this new hierarchy of principles. According to the *Québec Charter*, the rights and freedoms declared are explicitly equally guaranteed to women and men[359].

The doctrine of reasonable accommodation, as applied to claims of religious freedom, must proceed with caution, as illustrated through our brief overview. It must also take into account the context in which the accommodation is asserted, the rights and implications for the various actors involved and the consequential management of multiple rights.

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[357] *Loi favorisant l'action de l'Administration à l'égard de la diversité culturelle*, Bill n°16 (Specific consultations – 07-08.10.2009), 1st Sess., 39th Legis., (Qc). According to sources, says journalist Denis Lessard, the controversial Bill 16 will simply not follow the usual path at the National Assembly, launching it into the realm of obscurity: Denis Lessard, "Accommodements raisonnables: le projet de loi 16 jeté aux oubliettes", *La Presse* (October 22, 2009), online: http://www.cyberpresse.ca/actualites/quebec-canada/politique-quebecoise/200910/22/01-913792-accomodements-raisonnables-le-projet-de-loi-16-jete-aux-oubliettes.php (site last accessed 22.10.2009)

[358] Bosset & Eid, « Droit et religion », *supra* note 177, ¶ 15. The authors add, at the same paragraph : « Pour ce motif, il arrive que la légitimité des solutions juridiques fondées sur l'accommodement raisonnable soit remise en question. Cela semble être le cas, en particulier, lorsque l'égalité des sexes est un élément essentiel du débat. » See also Bernatchez, « Enjeux juridiques », *supra* note 321, ¶ 35-36.

[359] See *Québec Charter*, *supra* note 167, Preamble and art. 50.1.

Balancing rights and obligations can be accomplished under the doctrine of reasonable accommodation, but also under the proportionality test, know as the *Oakes'* test. I now turn to this form of managing multiple rights.

1.4.2 Proportionality under the Charter: Oakes' Test Revisited

R. v. *Oakes*[360] set out the appropriate standard of proof to adopt under s. 1 of the *Charter*[361]. The *Oakes*' test represented the second step in determining an infringement of rights: firstly, one must demonstrate that a *Charter* right or freedom was breached; secondly, one must determine whether this breach represented a reasonable limit within a free and democratic society. Two central criteria must therefore be satisfied to answer whether the limit is reasonable and demonstrably justified in a free and democratic society:

> "First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom""
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. […] First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".[362]

Applied to cases where freedom of religion is threatened, as explained by Chief Justice Dickson (writing for Chouinard and Le Dain JJ.) in *Edwards Books*, "[i]t matters not […] whether a coercive burden is direct or indirect, intentional or unintentional,

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[360] *Oakes*, *supra* note 184.

[361] Section 1 of the *Canadian Charter of Rights and Freedoms, supra* note 1, establishes the following: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such **reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society**." [my emphasis]. A similar limit is imposed by s. 9(1) of the *Québec Charter*, *supra* note 167, which reads that "[i]n exercising his fundamental freedoms and rights, **a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec**." [my emphasis]

[362] *Oakes*, *supra* note 184, ¶ 69-70.

foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(*a*)."[363] This should not be interpreted, however, as warns Chief Justice Dickson, to mean any and all burdens on religious practices: a difference thus reigns between costs that are considered substantial and those that are considered trivial[364]. Nevertheless, as stated in *Hutterian Brethren of Wilson Colony*, no "magic barometer" exists to measure the seriousness of a particular limit on a religious practice[365]; every case must be evaluated on its own merits and implications. While the implications of the incidental and unintended consequences in *Edwards Books* and *Multani* led to a curtailment of 'meaningful choices', the notion of social good prevailed over that of religious practice in *Hutterian Brethren of Wilson Colony*, according to the majority[366]. Achieving balance between the salutary and deleterious effects under the ambit of s. 1 *Charter* analysis also compels us to consider the underlying *Charter* values in this equation, such as liberty, human dignity, equality, autonomy and the enhancement of democracy[367].

When invoked, the *Oakes*' test obliges us to find balance between individual and collective rights but also asks us to manage the concrete and underlying discourses in the *Charter*[368]. In so doing, one attempts to balance on one side while accommodating on the other, all the while paying heed to the underlying discourse of *Charter* values. Given the result in *Hutterian Brethren of Wilson Colony*, I believe that

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[363] *Edwards Books*, *supra* note 176, ¶ 96.

[364] *Ibid*, ¶ 97. Dickson C.J. provided necessary insight into the tenets of freedom of religion, as well as the balancing act that must occur between this fundamental freedom and other rights protected: "The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(*a*) it must be capable of interfering with religious belief or practice." (*Ibid*, ¶ 97)

[365] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 89.

[366] *Ibid,* ¶ 96.

[367] *Thomson Newspapers Co.* v. *Canada (Attorney General)*, [1998] 1 S.C.R. 877, ¶ 125 **[*Thomson Newspapers*]** and *Health Services and Support – Facilities Subsector Bargaining Association* v. *British Columbia*, [2007] 2 S.C.R. 391, ¶ 81 **[*Health Services and Support*]**, as cited in *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 88.

[368] See Benjamin L. Berger, « Moral Judgment, Criminal Law and the Constitutional Protection of Religion » (2008) 40 *Sup. Ct. L. Rev.* (2d) 513, 534 **[Berger, "Moral Judgment"]**.

claims related to freedom of religion will increasingly be treated under the banner of proportionality, rather than that of accommodation.

2. Unresolved Issues Pertaining to Freedom of Religion in Canada

As the title indicates, I will proceed to a discussion of the unresolved issues pertaining to freedom of religion in Canada; freedom of conscience, in its various interpretations, will be addressed in the following section. I have elected to focus on three interrelated points that have not reached consensus in the legal community: the sincerity of the belief and the individual (2.1), the place of expert evidence and the impact on community views of religion (2.2) and a child's right to freedom of conscience and religion (2.3). In closing, I will offer a brief conclusion on freedom of religion in Canada (2.4).

2.1 The Sincerity of the Belief and the Individual

In establishing a test based on the sincerity of a claimant's beliefs[369], the majority of the Supreme Court in *Amselem* effectively offered a "hypersubjective definition of religion"[370]. While this approach can be applauded for bestowing unparalleled flexibility to a customarily formalistic subject, it has also been criticised for painting (and subsequently endorsing) a reductionist view of religion and beliefs in law. The sincerity of belief test will be addressed from three different yet

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[369] *Amselem*, *supra* note 3, ¶ 53: "Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony, as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. A person's connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious obligation emanating from such a relationship, may well change and evolve over time. Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom."

[370] Solange Lefebvre, "Between Law and Public Opinion" in Beaman & Beyer, *supra* note 322, 175 at 194.

interrelated points: the very notion of "sincerity"; the public implications of private beliefs; and the paradigmatic shift from these public implications to cultural identity.

Being "sincere" generally implies "proceeding from or characterized by genuine feelings; free from deceit" according to the Compact Oxford English Dictionary[371]. Applied to the context of freedom of religion and sincerely held beliefs, sincerity requires the good faith of the claimant[372]. As articulated by Benjamin Berger, "[v]eracity is for the public, sincerity is for the private, and all that the law requires of religion is sincerity of belief."[373] A distinction is therefore established between what constitutes good faith and what is factually correct, which falls in line with the Supreme Court's approach not to challenge the character of the belief. Beyond this initial point on the semantics of sincerity, a more serious argument is made against the actual construction of the sincerity test. The Supreme Court's justification of the existence of the "sincerity test" before *Amselem* has irked authors Margaret Ogilvie and Lori Beaman, who argue that such a construction is unfounded[374]. In both *R.* v. *Jones*[375] and *Attis* v. *New Brunswick School District No. 15*[376], claims of subjective sincerity were simply accepted or assumed[377]. This differs from the actual language used by the Supreme Court, who implied a historical use of a subjective test. Although subjective claims were accepted in aforementioned cases, Ogilivie also points to *Bruker*[378] where the Supreme Court doubted the sincerity of the husband's beliefs for the first time. She notes that "*Bruker* demonstrates how the subjective sincerity test for s. 2(a) has the potential to bring the courts into disrepute by appearing to be taking sides in a religious dispute."[379] To this example, I add that of *Hutterian Brethren of Wilson Colony*, where sincerity of

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[371] COMPACT OXFORD ENGLISH DICTIONARY "sincere", *supra* note 2, http://www.askoxford.com/concise_oed/sincere?view=uk (site last accessed 05.11.2009).
[372] *Amselem*, *supra* note 3, ¶ 51.
[373] Berger, "Law's Religion", *supra* note 20, 308.
[374] *Amselem*, *supra* note 3, ¶ 44, 51.
[375] *Jones*, *supra* note 189, at 295.
[376] *Ross, supra* note 202.
[377] Margaret H. Ogilvie, "*Bruker v. Marcovitz*: (Get)ting Over Freedoms (Like Contract and Religion) in Canada, (2008/2009) 24 *N.J.C.L.* 173, 187 **[Ogilvie, "(Get)ting Over Freedoms"]**; Beaman, "Defining Religion", *supra* note 4, 205.
[378] *Bruker*, *supra* note 4, ¶ 68-69.
[379] Ogilvie, "(Get)ting Over Freedoms", *supra* note 377, 187-188. This was also suggested by Berger, "Law's Religion", *supra* note 20, 303.

belief was acknowledged, but the majority of the Supreme Court cautioned that this alone did not guarantee protection[380]. Nevertheless, it is not so much the issue of "taking sides", since by nature that is what courts are meant to do as adjudicators. Rather, the problem is offering strong reasons in support of taking one side and not the other, in my opinion. Perhaps the most vocal critic of the subjective sincerity test, Margaret Ogilvie has not minced words when expressing her distaste for the avenue chosen by the Supreme Court, calling it a "flimsy and unstable basis for protecting religion."[381]

When engaging in a test of sincerely-held beliefs, it is becomes difficult to ignore that "[r]eligious beliefs or values have public implications."[382] Solange Lefebvre noted that it is important to reflect on the "reasonable" interval within which the sincerity of the belief should be located[383]. She adds that although an individual can seek emancipation from religious constraints, an individual can alternatively also reaffirm conformity to religious orthodoxy[384]. The consequences of private beliefs underscore the general ambiguity of where religious beliefs should be situated on a societal scale. More specifically, the consequences of private beliefs on public spheres of activity in Canadian constitutional law illustrate the awkward silence between individual and "collective dimension of religious life"[385]. Benjamin Berger has referred to this as the "deafness to the centrality of the community."[386] Nevertheless, this approach reflects the individual's choice and personal autonomy vis-à-vis that of the community and more generally, the political culture of liberalism,

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[380] *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 8, 69.
[381] Margaret H. Ogilvie, "And Then There was One: Freedom of Religion in Canada – the Incredibly Shrinking Concept" (2008) 10 *Eccl. L.J.* 197, 203 **[Ogilvie, "Incredibly Shrinking Concept"]**; Ogilvie, "(Get)ting Over Freedoms", *supra* note 377, 187. M.H. Ogilvie also remarked that "[a]pparently, it is easier to determine whether a claimant sincerely believes a self-defined belief than the content of, say, the Nicene creed!": Ogilvie, "Incredibly Shrinking Concept", *ibid*, at 199.
[382] Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms" (2002-2003) 41 *Brandeis L.J.* 563, 571 **[Moon, "Liberty, Neturality and Inclusion"]**; Richard Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 *Sup. Ct. L. Rev.* (2d) 201, 219 **[Moon, "Religious Commitment and Identity]**.
[383] Solange Lefebvre, "La liberté religieuse modelée par les effets paradoxaux de la modernité" in Gaudreault-Desbiens, *supra* note 321, 195 at 211.
[384] *Ibid*, 202-203.
[385] Berger, "Law's Religion", *supra* note 20, 290.
[386] *Ibid*, 290.

argues Berger[387]. Moreover, he has suggested that the community is essential to determining what inevitably can be considered religion[388]. Seen from a different perspective, although the beliefs espoused by the individual might not be those of the 'community' at the end of the day, there is an undeniable role played by the community as actor and reactor to the opinions of the members[389].

More recently, the justification of the protection of freedom of conscience and religion has been re-branded as a question of (cultural) identity rather than (personal) autonomy[390]. One needs only to turn to the opening sentences of *Bruker* to feel this operational shift[391]. While this "partial or ambiguous shift" has been

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[387] *Ibid*, 283. The author concludes, at page 314, that "[m]ore profoundly, there is a fundamental, though eminently explicable, shortfall at the core of liberal legal discourse. Religion is not only what law imagines it to be. Law is blind to critical aspects of religion as culture."

[388] Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005) 29 *Sup. Ct. L. Rev.* (2d) 169, 197 **[Ryder, "State Neutrality"]**: "Without any demonstrated religious connection apart from the claimant's asserted sincere belief, is it possible to determine when personal opinions become "religious"?"; see also Rosalie Jukier and Shauna Van Praagh, "Civil Law and Religion in the Supreme Court of Canada: What Should We *Get* out of *Bruker v. Marcovitz*?" (2008) 43 *Sup. Ct. L. Rev.* (2d) 381 **[Jukier & Van Praagh, "Civil Law and Religion"]**. On the relationship between the individual's beliefs and the religious community in the specific realm of a child's rights, see Shauna Van Praagh, "Faith, Belonging, and the Protection of "Our Children"" (1999) 17 *Windsor Y.B. Access Just.* 154 **[Van Praagh, "Protection of "Our" Children"]**.

[389] Richard Moon speaks of the importance of the community in shaping religious opinions and perspectives of the individual and providing a "moral framework" for the individual: see Moon, "Religious Commitment and Identity", *supra* note 382, 234; Richard Moon, "*Bruker v. Marcovitz*": Divorce and the Marriage of Law and Religion (2008) 42 *Sup. Ct. L. Rev.* (2d) 37, 58 **[Moon, "Marriage of Law and Religion"]**.

[390] While this has been treated previously in the discussion on freedom of conscience (section 2), I will address the shift from the perspective of freedom of religion.

[391] *Bruker*, *supra* note 4, ¶ 1-2:

"[1] Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.

[2] The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright- line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance."

observed by Moon, it can be attributed in part due to a rise of secularism but also be understood through the courts' ambiguous view of religion and its value[392]. Interestingly, while Berger concedes the appeal of the logic of equality and its natural note in law's understanding of religion, he ultimately concludes that the overarching liberal tone is always one of choice and autonomy[393], as reflected by *Law* v. *Canada (Minister of Employment and Immigration)*[394]. However, he remarked that "perhaps the most contentious current point of debate is the relationship between culture *itself* and choice."[395] While I agree that this reformulation of the problem focuses on culture's understanding of 'voluntariness and free will'[396], I consider that this ultimately remains a question of how one goes about defining religion in law. I draw on Richard Moon to support my conclusion on this point. As expressed by Moon, "to regard a religious community as an association that members join and quit at will, is to miss both the value of religious association and its potential to limit and sometimes even oppress its members."[397] Beyond my scope of study but of deep interest, the interweaving of exit theory and minority rights, especially when coupled with religion, merits further analysis within the Canadian constitutional context. Given the prior analysis, I consider that a more contextual approach to religion in law will enable a better appreciation of the unequivocal cultural component of religion and perhaps lessen the focus on political liberalism and by extension, the 'autonomous' individual.

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[392] Richard Moon, "Government Support for Religious Practice" in Moon, *supra* note 4, 217 at 218-219.

[393] Berger, "Law's Religion", *supra* note 20, 298; Benjamin Berger, "Law's Religion" in Moon, *supra* note 4, 264 at 276. The author continues at the same page in his *Osgoode Hall Law Journal* article: "[t]hat there has been some legal statement made about the value of your identity gets you in the section 15 door; once there, however, the analytic force of the identity judgment is largely spent."

[394] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter "*Law*"]

[395] Berger, "Law's Religion", *supra* note 20, 299-300 (footnote 83). On the pull between culture itself and choice, Berger refers to Natasha Bakht's recent study for the National Association of Women and the Law in 2005 entitled *Arbitration, Religion and Family Law: Private Justice on the Backs of Women*, available online: <National Association of Women and the Law>, <Publications>, <Reseach and Working Papers>, http://www.nawl.ca/ns/en/documents/Pub_Report_ReligArb05_en.pdf (site last accessed 05.11.2009), especially pages 17-20.

[396] To borrow Natasha Bakht's terminology, *supra*, at 17-18.

[397] Moon, "Marriage of Law and Religion", *supra* note 389, 62. See also Beaman, "Defining Religion", *supra* note 4, 206.

2.2 The Place of Expert Evidence and the Impact on Community Views of Religion

In devising a test based on the sincerity of beliefs, the Supreme Court in *Amselem* discouraged recourse to expert testimony. The consequences of the Court's positioning were twofold: First, the use of expert evidence testimony to circumscribe the content of a religion was set aside; second, the importance of "community religious views as determinate aspects of religion"[398] was also abandoned. The majority view of the Supreme Court's choice was explained as follows:

> "[a] claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. **While such evidence may be relevant to a demonstration of sincerity, it is not necessary.** Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. **An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are.** Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect."[399]

This position is comprehensible since it follows the Court's choice not to become the arbiter of religious dogma[400]; it is regrettable, since it restricts the terms of the debate on components of religion. In light of *Amselem*, Lori Beaman distinguishes between an expert providing evidence about the sincerity of belief ("individual experiences") and giving evidence about the content of a particular religion ("essences")[401]. This push-and-pull between experiences and essences becomes another expression of the dilemma of defining religion in law. The case-law has since vacillated on this point, causing one to question how the issue of expert testimony should be dealt with when faced with claims of religious freedom. *Multani* presented an example of

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[398] Berger, "Law's Religion", *supra* note 20, 286 (at footnote 29).
[399] *Amselem*, *supra* note 3, ¶ 54 [my emphasis].
[400] *Ibid*, ¶ 50.
[401] Beaman, "Defining Religion", *supra* note 4, 202.

drawing on both individual experiences and essences[402], leading to inconsistent interpretations as to the weight attributed to evidence in religious claims[403]. According to Mahmud Jamal, *Multani* provided an interesting approach to finding creative (and economical) sources *in lieu* of expert evidence[404]. The public domain of religion as addressed in *Multani* – also explained as a surgical approach to constructing an evidentiary record, according to the author[405] - warrants closer examination. The source of affidavits explaining the tenets of Sikhism remains religious, since they were offered by Sikh chaplains: although no "expert testimony" was presented, 'expert' religious opinions were offered on a code of belief. At best, the line between direct approbation of the existence of a religion and that of its religious expression becomes conceptually hazy. The evidence in *Multani* was interpreted in a different way by Solange Lefebvre, who considered that recourse to Sikh chaplains signalled that religious experts' opinions could be taken into account in judgments[406]. The question now becomes whether this religious opinion evidence should be part of the foreground or background of a judgment. While the question of expert testimony is seemingly innocuous at the outset, it points to a deeper question of how law views the place of religion within the public or private sphere[407].

This approach was not followed, however, in the next pre-eminent case on freedom of religion at the Supreme Court. In *Bruker*, it was inferred by the Supreme Court that Mass J. of the Québec Superior Court came to a conclusion on whether the *get* should be granted immediately based on the expert evidence presented[408].

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[402] *Ibid*.
[403] *Multani*, *supra* note 329, ¶ 36.
[404] Mahmud Jamal, "Freedom of Religion in the Supreme Court: Some Lessons from *Multani*" (2006/2007) 21 *N.J.C.L.* 291, 306 **[Jamal, "Some Lessons from *Multani*"]**. The evidentiary record was relatively modest, according to the author at the same page, consisting of affidavit evidence explaining the tenets of Sikhism; documents relating to the interaction with school authorities and several newspaper articles filed with the courts below on the experiences of other school boards' across Canada in accommodating the kirpan.
[405] *Ibid*, 306.
[406] Lefebvre, « Liberté religieuse modelée » in Gaudreault-DesBiens, *supra* note 321, 195 at 208.
[407] See Ogilvie, "Incredibly Shrinking Concept", *supra* note 381, 202; Berger, "Law's Religion", *supra* note 20, 286; Ogilvie, "(Get)ting Over Freedoms", *supra* note 377, 183-188; Beaman, "Defining Religion", *supra* note 4, 202; Moon, "Religious Commitment and Identity", *supra* note 382, 218.
[408] *Bruker*, *supra* note 4, ¶ 33.

More recently, expert opinion evidence was employed to demonstrate the religious beliefs and attitudes in relation to gay marriage[409]. More particularly, Dr. Bryan Hillis testified in the case of an appeal of a complaint made to the Saskatchewan Human Rights Commission, which had found that the marriage commissioner had discriminated against the complainant when he refused to perform a marriage on the basis of discrimination on the grounds of sexual orientation. According to the expert evidence, no marked difference exists in attitudes between Christianity and other religions that mariage is a sacred act[410]. McMurty J., for the Queen's Bench, found that the marriage commissioner's personal religious beliefs should ultimately be set aside given his role as a government official[411].

Interestingly, expert evidence has also been used to demonstrate that Falun Gong should be recognised as a *creed* within the meaning of the *Ontario Human Rights Code*[412]. Indeed, while the evidence was used to demonstrate the existence of a creed or religion, it had to do so by relying on the practices that constitute Falun Gong. This creates a strange standard for Falun Gong, since it is "legitimised" by western standards but "vilified" as a cult where practioners face persecution in China.

Just as expert evidence has been used to adduce the existence of certain religious practices or religions, expert evidence can also serve to discredit or render religious claims suspect in the eyes of the law. The issue of "spirituality" when addressing Aboriginal claims illustrates the dischord between ancestral rights and interpretation of freedom of religion. For example, although the *Charter* was not enacted when *Jack and Charlie* v. *The Queen*[413] was brought before the courts, the decision remains central in understanding how the parcelling of identity can occur, according to Lori Beaman[414]. According to Jean Leclair, the Aboriginal world is one

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[409] *Nichols* v. *M.J.*, 2009 SKQB 299 **[*Nichols*]**, ¶ 17.
[410] *Ibid*, ¶ 17.
[411] *Ibid*, ¶ 76.
[412] *Huang* v. *1233065 Ontario Inc. (Ottawa Senior Chinese Cultural Association)*, 2006 HRTO 1 (CanLII), ¶ 55, 66.
[413] *Jack and Charlie* v. *The Queen*, [1985] 2 S.C.R. 332 **[*Jack and Charlie*]**.
[414] Lori G. Beaman, "Aboriginal Spirituality and the Legal Construction of Freedom of Religion" in Lori G. Beaman (ed.), *Religion and Canadian Society: Traditions, Transitions,*

where the sacred and the profane coincide[415]. By conceiving of *space* in a different manner, it is not surprising that Aboriginal claims are not often addressed within the discourse on freedom of religion, but rather framed as issues pertaining to treaty rights or title rights[416]. In doing so, rarely are claims assessed on an individual basis but rather in terms of group rights and according to the pre-existence of aboriginal societies[417], the latter known as "autochtonité" according to Ghislain Otis[418]. The

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and Innovations, Toronto, Canadian Scholars' Press Inc., 2006, p. 229 at page 233-234 **[Beaman, "Aboriginal Spirituality"]**. In *Jack and Charlie*, the Court opined that the killing of a deer was not an integral part of the sacred ceremony. This rejoins Ghislain Otis' comment when wondering if "[l]a plus haute juridiction canadienne ne s'érige-t-elle pas en grand tribunal religieux lorsqu'elle s'arroge l'autorité de décréter quelles coutumes ou pratiques religieuses d'origine précoloniale peuvent être reconnues comme des « caractéristiques déterminantes de la culture distinctive » d'une collectivité autochtone? » : see Ghislain Otis, "Revendications foncières, "autochtonité" et liberté de religion au Canada" (1999) 40 *C. de D.* 741, 764 [references omitted] **[Otis, « Autochtonité »]**.

[415] Jean Leclair, "Le droit et le sacré ou la recherche d'un point d'appui absolu" in Gaudreault-Desbiens, *supra* note 321, 475 at 481.

[416] Beaman, "Aboriginal Spirituality", *supra* note 414, at 234, 238; Otis, « Autochtonité », *supra* note 414, 772.

[417] See *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 **[*Van der Peet*]**, ¶ 30-31 as cited by Otis, « Autochtonité », *supra* note 414, 750 (footnote 21). The case of *Thomas* v. *Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.) **[*Thomas*]**, as cited and discussed by Jean-François Gaudreault-DesBiens and Diane Labrèche in *Le contexte social du droit dans le Québec contemporain: l'intelligence culturelle dans la pratique des juristes* (Cowansville, Éditions Yvon Blais, 2009), at pages 121-124, represents an exception to individual claims and religious rights. At issue was whether non-pecuniary aggravated, punitive and special damages should be awarded to plaintiff after having endured, according to him, assault, battery and false imprisonment during the "Spirit Dancing" tradition. David Thomas, the plaintiff, was considered an "Indian" within the meaning of the *Indian Act*, 1985 R.S.C. (1985), c. 1-5, yet had been brought up off the Reserve and had very little to do with and interest in that culture over the years. Amongst defenses provided, the defendants claimed that they had a legal right to initiate the plaintiff, "pursuant to their constitutionally protected right to exercise an existing aboriginal right within the meaning of s. 35 of the Constitution Act, 1982. The aboriginal right claimed by the defendants is their right to carry on and exercise the Tradition, which is called the Coast Salish Spirit Dance." (*Thomas*, *supra*, 3-4). According to Mr. Justice Hood, "s. 35(1) is not applicable in the case at bar. Assuming that spirit dancing was an aboriginal right, and that it existed and was practised prior to the assertion of British sovereignty over Vancouver Island, and the imposition of English law, in my opinion those aspects of it which were contrary to English common law, such as the use of force, assault, battery and wrongful imprisonment, did not survive the coming into force of that law, which occurred on Vancouver Island in 1846 or, at the latest, in 1866, when the two colonies of Vancouver Island and British Columbia were merged." (*Thomas*, *supra,* 24) A distinction is also drawn between a right and a freedom by the judge, noting that the former is not absolute in the case and does not include civil immunity from unlawful tortious conduct (*Thomas, supra*, 25). Nonpecuniary damages, including exemplary damages, were ultimately awarded to the plaintiff for pain and suffering during his ordeal (*Thomas, supra*, 26-27).

[418] Ghislain Otis warns that "autochtonité" should only be understood as a source of *sui generis* religious rights due to their exclusive constitutional status (through s. 35 of the 1982

coupling of religious freedom with the pre-existence of aboriginal rights warrants a discussion in and of itself; my purpose here is only to highlight the difficulty of resolving such a dispute in the face of conflicting 'expert' views of the individual and the community.

The weight of expert evidence testimony in cases of religious freedom should also be considered in light of the doctrine of judicial notice. In 2005, the judicial notice of social facts was clarified by Justice Binnie in *R.* v. *Spence*[419]. While the Supreme Court said that recourse to expert testimony was unnecessary in *Amselem* in 2004, it found that legislative and "social facts" should be established by expert testimony in *Spence* in 2005[420].

At issue in *Spence* was whether the trial judge was right in refusing to permit the following question that was directed to the jury: "[w]ould your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man charged with robbing an East Indian person?"[421] As such, did the trial judge's refusal constitute an infringement on the accused's right to an impartial jury and therefore a fair trial? Justice Binnie stipulates that judicial notice of facts should be done on a sliding scale: the more central the fact is to the case, the more stringent the test of judicial notice, whereas if a fact is of reference or background, it is more likely to be admitted. This method reflects the approach

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Constitutional Act) and not as a bearer of freedom of religion, which presupposes the absence of constraint: see Otis, "Autochtonité", *supra* note 414, 762.

[419] *R.* v. *Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 **[*Spence*]**. The section on judicial notice and *R.* v. *Spence* was originally written as part of a paper entitled "Speaking (Out?) in Tongues: The Impact of *R.* v. *R.D.S.*", submitted to Professor Danielle Pinard in partial fulfilment of requirements for "Droit constitutionnel avancé" (DRT 6845A) given at the Faculty of Law of Université de Montréal (Fall 2006 term).

[420] *Spence*, *supra,* ¶ 68: "The suggestion that even legislative and social "facts" should be established by expert testimony rather than reliance on judicial notice was also made in cases as different from one another as *Find*, *Moysa*, *Danson*, at p. 1101, *Symes v. Canada*, [1993] 4 S.C.R. 695, *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, at pp. 472-73, *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at pp. 549-50, *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 881-82, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357. *Litigants who disregard the suggestion proceed at some risk*."

[421] *Spence, supra* note 419, ¶ 1. It should be noted that the question draws from *R.* v. *Parks*, (1993), 84 C.C.C. (3rd) 353 (Ont. C.A.), 353, where the question was: "[w]ould your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is … black … and the deceased is a white man?"

favoured by author K.C. Davis, where "the permissible scope of judicial notice should vary according to the nature of the issue under consideration."[422] Therefore, according to Binnie J.,

> "When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy."[423]

Justice Binnie is suggesting the creation of a mid-level test for judicially noticing facts that lie in between the centre and the extreme periphery of the case[424]. One could imagine such a test of judicial notice as being represented by a funnel. By introducing the requirement of the 'reasonable person', an additional burden is put on said person, since it is no longer the test of a reasonable person placed in the same circumstances, but rather, a reasonable person, placed in the same circumstances, and also having gone to the trouble of informing themselves on the topic at bar. The additional criterion of information on the case at bar would serve as a safeguard to insure the reliability and trustworthiness of the reasonable person. I am of the opinion that although the creation of such a test is necessary to consider and judicially notice certain facts, it creates a substantial burden on the reasonable person.

For the Court, Binnie J. surmises that the submissions put forth by the ACLC [African Canadian Legal Clinic] and the respondent represent a shift that would be too fundamental, and declines to take judicial notice of different aspects of racism. In

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[422] *Spence, supra* note 419, ¶ 60. It should be noted that paragraph 60 of *R.* v. *Spence* is treated and cited in Professor Danielle Pinard's outline entitled "La connaissance d'office en matière factuelle: pistes de réflexion" (20.11.2006), p.17.

[423] *Ibid*, ¶ 65 [my emphasis]. It should be noted that paragraph 65 of *R.* v. *Spence* is treated and cited in Professor Danielle Pinard's outline entitled "La connaissance d'office en matière factuelle: pistes de réflexion" (20.11.2006), p.19.

[424] It should be noted that this point was brought up by the author of this paper and Professor Danielle Pinard, in the context of her class on constitutional proof.

closing, he adds a comment that has the potential to forever change the face of judicial notice of social science facts evidence:

> "The suggestion that even legislative and social "facts" should be established by expert testimony rather than reliance on judicial notice was also made in cases as different from one another as *Find*, *Moysa*, *Danson*, at p. 1101, *Symes v. Canada*, [1993] 4 S.C.R. 695, *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, at pp. 472-73, *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at pp. 549-50, *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 881-82, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357. *Litigants who disregard the suggestion proceed at some risk*."[425]

Justice Binnie admits that this approach would disadvantage certain litigants, but determines that considerations related to trial fairness should be dealt with separately in order to avoid diluting the doctrine of judicial notice[426]. This attempt at regulation of the doctrine of judicial notice is thorny, as certain authors have admitted[427], though the parameters are far from finalised. Given the slightly disjointed nature of the classification of facts in *R.* v. *Spence*, with legislative facts – derived from the Davis model – on one side, and "social facts" – stemming from the Monahan and Walker model – on the other, I consider that a further attempt should be made in understanding the doctrine of judicial notice in order to not weaken it by misrepresentation.

Although the issue of expert evidence and the impact on community views of religion is addressed in a secondary manner by the Supreme Court in *Amselem*, it is clear that it is essential to a better understanding of religion *in* law. Insofar as the

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[425] *Spence*, *supra* note 419, ¶ 68 [my emphasis]. It should be noted that paragraph 68 of *R.* v. *Spence* is treated and cited in Professor Danielle Pinard's outline entitled "La connaissance d'office en matière factuelle: pistes de réflexion" (20.11.2006), p.19-20.

[426] *Spence*, *supra* note 419, ¶ 69. In conclusion, at paragraph 77: "But in this case, with respect, I do not think fairness to the accused or the vitally necessary *appearance* of fairness was compromised. The only issue of importance to the defence was identification. Neither the race of the complainant nor his testimony of what happened shed any light on identification. In the circumstances of this case, the trial judge did not think that leaving the "interracial" element out of the *Parks* question was unfair. That is a determination he was entitled to make. We should not interfere simply because we might have concluded in his place that greater reassurance might have been given to the accused had the full *Parks* question been put." [my emphasis]. It should be noted that paragraph 69 of *R.* v. *Spence* is treated and cited in Professor Danielle Pinard's outline entitled "La connaissance d'office en matière factuelle: pistes de réflexion" (20.11.2006), p.20.

[427] Robert G. Richards, « Some thoughts on Appellate Advocacy in Constitutional Cases », (2006) 34 *Sup. Ct. L. Rev.* (2d) 19, 27.

opinions of experts should be carefully assessed and appreciated, as noted by the courts, one must distinguish between protecting a community practice at the expense of an individual's beliefs and protecting a community practice in the interests of preserving a religious tradition.

2.3 A Child's Right to Freedom of Conscience and Religion

Although children are recognised as rights holders by the Supreme Court of Canada[428], their right to freedom of religion has posed a particular challenged when coupled with their "best interest", since judgment must be passed in the absence of a "eureka moment"[429] determining a child's competency. Recent issues such as a child's right to refuse a blood transfusion for religious reasons in Manitoba[430] and British Columbia[431], the wearing of religious symbols in schools in Québec[432], a parent's right to remove a child from ethics and religious culture class in Québec[433] or exempt a child from religious "instruction or exercise" in Alberta[434] as well as funding of religious schools in Ontario[435] demonstrate that a child's right to freedom of religion is anything but clear-cut in Canada in 2009. Decisions on a child's right to freedom of religion require not only an evaluation of the child's rights but also those of the parents. The religious community - whose perpetuation can hang in the balance - has also emerged as an under-examined site of influence[436]. Moreover, the Canadian Coalition for the Rights of the Child has argued, in its 2009 report, that the

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[428] *Children's Aid Society, supra* note 200, ¶ 217.
[429] *A.C., supra* note 4, ¶ 4.
[430] *A.C., supra* note 4, ¶ 4.
[431] *S.J.B. (Litigation Guardian of)* v. *British Columbia (Director of Child, Family and Community Service)*, (2005) 42 B.C.L.R. (4th) 321 **[*S.J.B.*]**.
[432] *Multani*, *supra* note 329.
[433] *Lavallée, supra* note 353; see also *Loyola High School and John Zucchi* c. *Ministre de l'Éducation, du Loisir et du Sport du Québec*, no. 500-17-04-5278-085.
[434] *Human Rights, Citizenship and Multiculturalism Amendment Act*, S.A. 2009 c. 26, amending R.S.A. 2000, c. H-14.
[435] This was a central issue for the Conservatives in the last Ontario election held in September 2007. The Conservatives ultimately lost the election and the contested issue of funding of religious schools was cast aside by the Ontario Liberals. See Jennifer Wilson, "Faith-Based Schools", online: < http://www.cbc.ca/ontariovotes2007/features/features-faith.html> (site last accessed 28.10.2009).
[436] See Cheryl Milne, "Religious Freedom: At What Age?" (2008/2009) 25 *N.J.C.L.* 71, 79-80 **[Milne, "Religious Freedom"]**; Van Praagh, "Adolescence, Autonomy and Harry Potter", *supra* note 275, 369; and Van Praagh, "Protection of "Our" Children", *supra* note 388, at 174-175.

best interest of the child can be instrumentalised in one of two ways with regard to religious practices. First, religious practices either ignore or are given priority over any consideration of the child's interest. Second, religious beliefs are used to justify actions that run counter to the provisions of the *Convention* [*on the Rights of the Child*][437]. By playing on the variable geometry of the best interest of the child, it can be argued that both the State and parents aim to regulate the extent of a child's religious beliefs. Nevertheless, the subtle and direct influences of the religious community must also enter into this equation.

The recent case of *A.C.* embodies the difficulty in identifying whether a proper age exists at which a child's beliefs should be upheld in a court of law. Framed as a question of "competing values" between a child's interests and that of society 'legitimate' interest, the shift toward "values" is unmistakable[438]. While sliding scales to determine maturity provide a certain amount of manoeuvring room for the adjudicator, it can nonetheless diminish this fundamental freedom to a checklist before the law, albeit a contextualised one. A question worthy of further exploration is whether such emphasis should be placed on autonomy and free choice, at the expense, it seems, of the relationship between the child, parents and the religious community. Indeed, this question has been raised both within[439] and outside[440] of the

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[437] CANADIAN COALITION FOR THE RIGHTS OF CHILDREN, *The Best Interests of the Child: Meaning and Application in Canada* (Report June 25th 2009), online: http://www.law.utoronto.ca/documents/conferences/BestInterestsChild-Report_en.pdf (site last accessed 23.09.2009), pp. 18-19.

[438] See Robert Leckey, "Language and Judgment's Reach: Reflecting on Limits on Rights" (October 30, 2009). *University of Toronto Law Journal*, Vol. 60, 2010 **[Leckey, "Language and Judgment's Reach"]**. Available at SSRN: http://ssrn.com/abstract=1496884 (site last accessed 23.12.2009), who suggests at page 6 (footnote 15) that Mark Antaki ["The Turn to "Values" in Canadian Constitutional Law", *supra* note 128] provides a lens for reading the Court's recent Charter jurisprudence, especially *A.C.* v. *Manitoba (Director of Child and Family Services)*, 2009 SCC 30 "in which the Court rejected a minor's (and Jehovah's Witness') challenge to the scheme empowering a judge to order care contrary to the wishes of a child under sixteen and her parents. Justice Abella referred to 'competing *values*,' holding together 'a child's *interest* in exercising his or her autonomy' and 'society's legitimate *interest* in protecting him or her from harm' (ibid. at para. 106 [emphasis added]). Compare Binnie J.'s dissent ('entitlement' to autonomy and Charter 'rights'; ibid. at para. 192). "

[439] See Milne, "Religious Freedom", *supra* note 436, 79-80; Van Praagh, "Adolescence, Autonomy and Harry Potter", *supra* note 275 and Van Praagh, "Protection of "Our" Children", *supra* note 388, at 174-175.

Canadian context. This approach could also provide a counterargument to those who suggest that a child's right to freedom of religion carries little weight moral weight and does not constitute, strictly speaking, a fundamental right within the Canadian context[441]. This suggestion is mitigated by the fact that freedom of religion could be used as a guise to secure non-religious interests, such as the relationship between the child, the parents and the community; such crafting of a relationship could be interpreted as opportunistic. Moreover, the question of children's right to religious freedom is not limited to the scope of medical decisions, education-related cases, but also questions child custody and access, as seen in *Young* v. *Young*[442] and *P. (D.)* v. *S. (C.)*[443], where the Supreme Court had confirmed both decisions on the basis on the best interests test[444]. While this study has only touched upon the issue of a child's right to freedom of religion in its broadest sense, this multifaceted subject would benefit greatly from further discussion and exchanges in a constitutional law setting.

2.4 Conclusion on Freedom of Religion in Canada

"You say I took the name in vain
I don't even know the name
But if I did, well really, what's it to you?
There's a blaze of light
In every word
It doesn't matter which you heard

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[440] See Sylvie Langlaude, "Children and Religion under Article 14 UNCRC: A Critical Analysis" (2008) 16 *Int'l J. Child. Rts.* 475, 502 **[Langlaude, "Children and Religion under Article 14 UNCRC"]**.

[441] See Luc B. Tremblay, « Les signes religieux à l'école : réflexions sur le Rapport Stasi et les accommodements raisonnables » (2004) 48 *Arch. Phil. Dr.* 169, 179-180 **[Tremblay, "Signes religieux à l'école"]**, who argued at the same pages, that freedom of religion presupposes a certain maturity illustrating a person's capacity of critical and autonomous judgment. Moreover, this opinion is accepted in the legal and political tradition of liberalism, drawing on Locke and Mill's conceptions of liberty, tolerance and the harm principle.

[442] *Young* v. *Young*, [1993] 4 S.C.R. 3 **[*Young*]**.

[443] *P. (D.)* v. *S. (C.)*, [1993] 4 S.C.R. 141 **[*P. (D.)*]**.

[444] Milne, "Religious Freedom", *supra* note 436, 76. On the delicate nature of a child's best interest when coupled with their fundamental rights, see Julie Laliberté, who argued that recourse to the Oakes' test is unnecessary if we determine what are truly the interests and fundamental freedoms of the non-autonomous child: Julie Laliberté, *La liberté de religion et les intérêts de l'enfant au Canada,* Master's thesis, Montréal, Faculté des études supérieures, Université de Montréal, 2004, 171.

The holy or the broken Hallelujah"

- Leonard Cohen, *Hallelujah*

While poet and singer Leonard Cohen will not strike many (if any) as a leading expert in the field of freedom of religion, his crafting of ideas remains unparalleled. Within the lyrics of *Hallelujah*, we uncover the individual and the community, the believed and the perceived, and the crafting of public and private space.

This study of freedom of religion in Canada has led us from a time where religious freedoms were marginally protected to recognition as a fundamental freedom. In a first section, freedom of religion was examined in three waves, in order to arrive at our current constitutional standing. The period before the enactment of the *Canadian Bill of Rights* proved itself to be a very dark era for certain minority groups; in this way, "witnessing" religion provided the observer with fractured dialogues on religious values. The enactment of the *Canadian Bill of Rights* offered latent or passive protection of religion, simply "observed" in by the legislation, without conferring concrete safeguards. The *Canadian Charter of Rights and Freedoms* was heralded, since it marked a "contextualised" approach to freedom of religion and was entrenched as a fundamental freedom. While the framework established by the Supreme Court in *Big M Drug Mart* still stands, having adduced a positive and negative freedom, freedom of religion has emerged further as a multifaceted, multilayered and complex right, engaging the State, the individual and the community in a heady constitutional discourse. From Sunday closings to opening prayers, the significance of the individual becomes clear, as does the need to balance competing views. From sincere individual beliefs to profoundly communitarian interests, nevertheless, freedom of religion is confronted by the reluctant juncture of definitions of religion and sincerely held beliefs. This intersection engenders a re-positioning of individual and community interests with regard to freedom of religion. Moreover, this juncture points to unresolved issues pertaining to freedom of religion. In an effort to address how claims of freedom of religion are addressed, the duty to accommodate religion as well as the proportional exercise

under *Oakes* was also briefly considered. Exiting our study of freedom of religion, it remains clear that the content of that freedom is variable, illustrating the changeable ebb and flow of commitments between the individual and the community, on the one hand, and the adjustable nature of beliefs, on the other.

The unresolved issues pertaining to freedom of religion in Canada were addressed in a second section. First, the sincerity of the belief of the individual provided a heated legal literature discussion on the importance of individual views as well as the many drawbacks implicated in this approach, namely the conscious choice of ignoring the importance of the community. Second, the place of expert evidence and the impact on community views of religion actually conceal a deeper problem of how to handle official religion within the legal discourse. While the courts do (and should) not want to become arbiters of religious dogma, it becomes difficult to distinguish the line between arbiter and adjudicator. Moreover, the issue of expert testimony also points to who is considered apt to demarcate these public and private zones of importance, effectively redefining of public and private space. A question of judicial notice also enters this discussion, since what constitutes social facts is no longer clear-cut[445]. Lastly, a child's right to freedom of conscience and religion has been highlighted as a further issue of discussion and exchange in Canada. The variable geometry of the best interest of the child invites a re-imagining of belonging[446] and therefore a greater attribution of credence to a community's vision.

Conceptualising the freedoms of religion and conscience in law calls for, I believe, a re-examination of the quality of the elements composing the belief as well as a more profound acknowledgement of the implications of political liberalism in constitutional discourse.

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[445] The very question of admitting "social facts" and "social framework facts" *as per* Monahan and Walker is challengeable and constitutes another subject of study.

[446] Playing on and with apologies to James Tully's "Reimagining Belonging in Circumstances of Cultural Diversity: A Citizen Approach" in Ulf Hedtoft and Mette Hjort, eds., *The Postnational Self: Belonging and Identity* (Minneapolis (MN), University of Minnesota Press, 2002), 152-177.

Chapter III. Whither Conscience? The Place of "Freedom of Conscience" in "Freedom of Conscience and Religion"

Deconstructing the concept of freedom of conscience can be akin to peeling back the layers of an onion. It can be a tedious, sometimes teary job, with nary an end in sight. Conscience, like many other concepts in law, can be conceptualised in religious[447], philosophical[448] and sociological terms[449], amongst others. The concept of conscience (and thus by extension freedom of conscience) is therefore permeable to other disciplines, prompting unexpected consequences and taking on unwanted meanings. Within the scope of law in Canada, freedom of conscience can be seen as a broad moral order; it can also be seen as an expression of one's moral

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[447] See Michel Desplant, "Conscience" in Lindsay Jones, ed., *Encyclopedia of Religion,* 2nd ed. (Detroit, MacMillan Reference USA, 2005), 1939-1946.

[448] See Nicholas Dent, « Conscience » in Craig, *supra* note 23. Retrieved November 11, 2008, from http://www.rep.routledge.com/article/L012

[449] See Robert Cipriani, « Conscience » in William H. Swatos, Jr., ed., *Encyclopedia of Religion and Society* (Walnut Creek, CA, AltaMira Press, 1998). Retrieved November 13th, 2008, from http://hirr.hartsem.edu/ency/conscience.htm. Sociologist Émile Durkheim referred to collective or communal conscience in a variety of settings. In *De la division du travail,* Durkeim explained that conscience call be conceived in collective or communal manner ("*conscience collective ou commune*") and that it should be distinguished from what he termed "individual conscience" so as to avoid confusion. We note, however, that Durkheim chose not to enter into the specifics of this discussion, preferring rather to designate the totality of social similarities ("*similitudes sociales*"). Collective conscience, for Durkheim, is defined according to what it ignites. More specifically, an act is defined as criminal when it offends the collective conscience. See Émile Durkheim, *De la division du travail,* 8th ed. (Paris, Les Presses Universitaires de France, 1967). Online: http://classiques.uqac.ca/classiques/Durkheim_emile/division_du_travail/division_travail_1.pdf (site last accessed 27.05.2009), p. 81-82. Durkeim also spoke of conscience when explaining the collective state that gives rise to religion, referring to the "communion of consciences" ("*la communion des consciences*"). See Émile Durkheim, "Le problème religieux et la dualité de la nature humaine", (1913) as reproduced in Émile Durkheim, *Textes. 2. Religion, morale, anomie*, coll. Le sens commun (Paris, Éditions de Minuit, 1975). Online: http://classiques.uqac.ca/classiques/Durkheim_emile/textes_2/textes_2_01/probleme_religieux.pdf (site last accessed 27.05.2009), p. 17. Within *Les formes élémentaires de la vie religieuse*, Durkeim acknowledged that society cannot solely exist by and within individual conscience: « Car la force collective ne nous est pas tout entière extérieure ; elle ne nous meut pas toute du dehors ; mais, puisque la société ne peut exister que dans les consciences individuelles et par elles, il faut bien qu'elle pénètre et s'organise en nous ; elle devient ainsi partie intégrante de notre être et, par cela même, elle l'élève et le grandit. » : see Émile Durkheim, *Les formes élémentaires de la vie religieuse*, 5th ed., Paris, Les Presses universitaires de France, 1968, Livre 2. Online: http://classiques.uqac.ca/classiques/Durkheim_emile/formes_vie_religieuse/formes_elementaires_2.pdf (site last accessed 01.06.2009), p. 206 (and footnote 468).

convictions. Very often coupled with its sister provision of freedom of religion, freedom of conscience takes on a secondary – one could say perfunctory – role.

On the one hand, freedom of conscience has been at times portrayed as the freedom from which freedom of religion is derived; this approach was retained by the authors of the recent *Bouchard-Taylor Report*. Accordingly, freedom of religion *is but an aspect of freedom of conscience*[450]. On the other hand, freedom of conscience has also been depicted as "freedom *from* religion"; in that sense, freedom of conscience is described as protecting the right to abstain from religion or refuse it. Discussions on freedom of conscience can appeal to individual right and foster a sense of a moral discourse. Despite the encompassing nature of freedom of conscience, it suffers from an inherent problem: although often invoked within the greater protection of "freedom of conscience and religion", it is rarely explained. It is in this perspective that I propose a study of freedom of conscience, in order to lay the groundwork for future claims of conscience.

Two main reasons justify this analysis of freedom of conscience in Canada and open the door to a comparative approach. First, freedom of conscience provides a different viewpoint to freedom of religion; although conscience does not infer neutrality, it offers a view that is not *per se* religious (though not to say a-religious). Second, and flowing from the first reason, the study of freedom of conscience can provide a new point of reference for understanding the relationship between the individual and the State and thus between public and private spheres of action in society.

I will therefore examine how freedom of conscience has been framed within the Canadian constitutional debate, exemplifying freedom of conscience as related to free choice and personal autonomy on the one hand (1.1) and on the other, the

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[450] Gérard Bouchard and Charles Taylor, *Building for the Future: A Time for Reconciliation: Report*, Québec: Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, 2008, http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf, 144. Authors Rex Ahdar and Ian Leigh also put this point forward: "Religious conscience is often viewed as part of a larger respect for freedom of conscience." See Ahdar & Leigh, *supra* note 4, 59.

absence of autonomy of freedom of conscience in the interpretation of "freedom of conscience and religion" (1.2). An examination of the legal literature surrounding freedom of conscience will then be addressed, where freedom of conscience is discerned as lesser than, equivalent to or broader than freedom of religion (2.1.1, 2.1.2, 2.1.3). Finally, the future of freedom of conscience is discussed, where I posit that although freedom of conscience as *broader than* freedom of religion represents the ideal standard, since it makes no a priori judgments about beliefs, so long as they are deep seated, the most realistic standard would be to interpret freedom of conscience as *equivalent to* freedom of religion. Freedom of conscience should be interpreted as regrouping all deep-seated beliefs within the Canadian constitutional context (3).

1. The Theoretical Framework of Freedom of Conscience as seen through the Case Law on Freedom of Conscience in Canada

"Freedom of conscience", as defined by Canadian legal dictionaries, does not seem to merit its own entry. Rather, one finds a standalone concept of "conscience"[451] or it is lumped into the catchall proviso of "freedom of conscience and religion"[452].

The definition of "conscience" in the previously mentioned dictionaries of Canadian law was provided for in the context of *MacKay* v. *Manitoba*[453]. At issue was whether certain provisions of the *Elections Finances Act*[454] were inconsistent with section 2 of the *Canadian Charter of Rights and Freedoms*, and more specifically,

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[451] See "conscience" in Daphne Dukelow, *Pocket Dictionary of Canadian Law,* 4th ed. (Toronto, Thomson Carswell, 2006), 103 and Daphne Dukelow, *The Dictionary of Canadian Law,* 3rd ed. (Toronto, Thomson Carswell, 2004), 242.

[452] See "freedom of conscience and religion" in Dukelow, *Pocket Dictionary of Canadian Law*, *supra*, at 206 and Dukelow, *The Dictionary of Canadian Law, supra*, at 508. "Freedom of religion" does however, merit its own entry.

[453] *MacKay* v. *Manitoba*, 1985 CanLII 128 (MB C.A.), p. 5 **[*Mackay*]** as cited in Dukelow, *Dictionary of Canadian Law, supra* note 451, at 103 and Dukelow, *The Dictionary of Canadian Law, supra* note 451, at 242: "[S]elf-judgment [sic] on the moral quality of one's conduct or the lack of it …"

[454] *Election Finances Act,* C.C.S.M. chap. E32, sec. 71(2), 71(3), 72(1), 72(2), 72(3), 73(1), 75 and 76.

with the freedoms of conscience, religion, thought, belief, opinion and expression. The *Elections Finances Act* provided reimbursement, out of the Consolidated Fund, of a portion of expenses incurred by certain candidates for membership in the legislative assembly and by registered political parties. To qualify for monetary support, the candidate must have obtained, individually or in the aggregate, 10% of the votes cast in the electoral division in question or the province[455]. The appellants argued that this extended form of financing by the *Elections Finances Act* curbed their freedom of thought as well as restricted expression of their own views. More particularly, the *Elections Finances Act* was argued to be constitutionally objectionable by the appellants on the basis that "(i) they require citizens "... to make compulsory contributions ..."; (ii) they involve support of political parties which may espouse Communism, Fascism, or other forms of totalitarianism which are inimicable (sic) to citizens ...".[456] This conceptualisation of the violation of freedom of conscience by the appellants ultimately led to their downfall, since the majority of the Manitoba Court of Appeal, Twaddle J.A. (Philp J.A. concurring), noted that a citizen's conscience cannot be offended by this form of governmental action and that "[d]isproval of the thoughts or conduct of another person is not a matter of conscience."[457]

The definition of "freedom of conscience and religion" in the earlier mentioned dictionaries of Canadian law drew from the cases of *Big M Drug Mart* and *Morgentaler* as follows:

> "…[B]roadly construed to extend to consciously-held beliefs, whether grounded in religion or in a secular morality…." […] [W]hatever else freedom of conscience [in s. 2(a) of the Charter] may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose …. Freedom from compulsory religious observance."[458]

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[455] *MacKay, supra* note 453, 3.
[456] *Ibid*, 7.
[457] *Ibid,* 5. The Supreme Court ultimately dismissed the appeal as well, citing that the absence of a factual base should be considered a fatal flaw rather than a technicality: Mackay v. Manitoba, [1989] 2 S.C.R. 357. Moreover, it should also be noted that the appeal to the Supreme Court was only crafted as a violation of freedom of expression; in this way, the right to freedom of conscience was dropped by the appellants.
[458] Dukelow, *supra* note 452 [references omitted].

Whether intentional or not, this lends itself to both secular and religious beliefs. A tension exists incontrovertibly between concepts of conscience and religion, perhaps due to a definitional breakdown. While premature to speculate on the cause of this tension, "freedom of conscience" is rarely addressed as a separate entity from "freedom of conscience and religion". This approach is detrimental to freedom of conscience, since it lends itself to a categorical approach to content of both freedom of religion and freedom of conscience.

I will now explore the main issues related to the case law and legal literature of freedom of conscience. I will focus on two problems in the first section: the absence of autonomy of freedom of conscience in the interpretation of "freedom of conscience and religion" (1.1.); and freedom of conscience as related to free choice and personal autonomy (1.2). In a second section, I will examine the significance of freedom of conscience in Canadian legal literature (2.1.). I will then conclude with a discussion on the future of freedom of conscience in Canada (3).

1.1 The Absence of Autonomy of Freedom of Conscience in the Interpretation of "Freedom of Conscience and Religion"

As previously stated, freedom of conscience is rarely addressed independently from freedom of religion when interpreting the scope of "freedom of conscience and religion". This signifies that freedom of conscience is seldom referred to in a non-religious manner and thus lacks definitional clarity. Adding to this sense of vagueness within the greater scheme of "freedom of conscience and religion" is the referral by the court to both "religious conscience" [459] as opposed to "secular conscience". The question therefore is raised as to the independent character of "freedom of conscience" in "freedom of conscience and religion".

Freedom of non-religious conscience has rarely been invoked on its own. Although defined by Chief Justice Dickson (as he was then) in *R.* v. *Big M Drug*

[459] The reader is directed most recently to *Bruker, supra* note 4.

Mart[460], the concept of freedom of conscience remained (and remains) elusive in Canadian jurisprudence. In its seminal decision on Sunday closing laws, the Supreme Court described 'non-religious' beliefs and opinions as also being protected by the *Charter*:

> "Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter.*"[461]

In this way, conscientiously-held beliefs and manifestations were afforded analogous protection to that of religious beliefs. This approach followed the will of the Supreme Court to interpret religion and conscience as a 'single integrated concept'[462]. This approach was again taken by Chief Justice Dickson in *R.* v. *Edwards Books and Art Ltd*.[463]. The *Retail Business Holiday Act*[464] of Ontario required that retail businesses close on Sundays, so as to ensure a 'common day of pause'. Nevertheless, this secular day of rest imposed a burden on those who, for religious reasons, closed their business on Saturdays; section 3(4) of the *Retail Business Holiday Act* provided a partial exemption, however. The Supreme Court – though Justice Wilson dissented in part – determined that the limitations imposed on Saturday observers were reasonable and within the limits of a free and democratic society. Invoking both *Big M Drug Mart* and section 27 of the *Canadian Charter of Rights and Freedoms*, Chief Justice Dickson noted that no difference should be made between direct and indirect coercive burdens on religious beliefs[465]. In addition, *Edwards Books* addressed the issue of freedom *from* religion, as stemming from an analogy drawn between the *Retail Business Holiday Act* and the *Lord's Day Act* (and generally Sunday closing

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[460] *Big M Drug Mart*, *supra* note 67.
[461] *Ibid*, ¶ 123.
[462] *Ibid*, ¶ 120.
[463] *Edwards Books*, *supra* note 176, ¶ 97: "The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."
[464] *Retail Business Holiday Act,* R.S.O. 1980, c. 453.
[465] *Edwards Books, supra* note 176, ¶ 96.

legislation). Longo Brothers, one of the appellants, argued that the *Retail Business Holiday Act* required retailers to conform to religious practices of dominant Christian sects[466]. Nevertheless, as stated by Chief Justice Dickson, there was no evidentiary foundation to substantiate that claim; alleged coercion contrary to freedom *from* religion was not established[467]. The *Retail Business Holiday Act* was ultimately upheld by the Supreme Court. Chief Justice Dickson also provided additional insight on the scope of those two freedoms, remarking that "[i]n this context, I note that freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects."[468] Freedom *from* religion, I believe, constitutes more accurately an aspect of freedom of conscience rather than an aspect of freedom of religion. Nevertheless, freedom *from* religion is routinely presented as an aspect of freedom of religion. In my view, an important element of freedom of conscience is recognised therein but it is wrongly considered as having arisen only from freedom of religion. As such, freedom of religion does imply the right to refuse religion.

Freedom of conscience was also examined in *R.* v. *Morgentaler*[469], where Justice Wilson spoke of conscience in two spheres: as a necessary component of personal choice as related to "liberty" and "security of the person" under s. 7 of the *Charter* and as pertaining to the "freedom of conscience and religion". The former point will be addressed later on. At issue in *Morgentaler* was whether *Criminal Code* provisions prohibiting abortion[470] could infringe on the rights protected under sections 2(a), 7, 12, 15, 27 and 28 of the *Charter.* More specifically, a strict administrative procedure was set out if a therapeutic abortion was sought; failing to respect the

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[466] *Edwards Books, supra* note 176, ¶ 98.
[467] *Ibid,* ¶ 101.
[468] *Ibid*, ¶ 145.
[469] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 **[*Morgentaler*]**.
[470] At issue in *Morgentaler* was s. 251 of the *Criminal Code*, which considered abortion an indictable offence for both the pregnant woman as well as the medical practitioner. The article set out the exceptions to the rule but circumscribed the provider as well as the hospital to strict requirements. Therefore, the hospital had to be accredited according to the Canadian Council on Hospital Accreditation and the permit given by a committee, the Therapeutic Abortion Committee (TAC), which was comprised of not less than three members, each of whom is a qualified medical practitioner, appointed by the board of that hospital with the purpose of considering and determining questions related to terminations of pregnancy within that hospital. A written certificate had to be obtained, stating clearly that the continuation of the pregnancy would or would likely result in endangering her life or health. A copy of this certificate had to be given to the qualified medical practitioner.

criteria resulted in criminal charges. By a majority of 5 to 2 (McIntyre and La Forest JJ. dissenting), the Supreme Court stated that s. 251 of the *Criminal Code* infringed upon s. 7 of the *Canadian Charter of Rights and Freedoms*. On the question of whether section 251 upon of the *Criminal Code* infringed section 2(a) of the *Charter*, Justice Wilson, speaking only for herself, sought to broaden the notion of *conscience* and as such, insisted in the following way on the autonomous status of freedom of conscience, as distinguished from freedom of religion:

> "It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, *as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning*."[471]

Justice Wilson had thus opened the door to all conscientiously-held beliefs[472].

Although *Morgentaler* struck down certain *Criminal Code* provisions, the abortion debate continues on to this day; in this context, "freedom of conscience" has been interpreted as pertaining to a "moral or ethical decision" in recent cases[473]. Most interestingly, it has been advocated under a collective banner, more precisely, a class-action lawsuit. At issue in *Jane Doe 1 and Jane Doe 2* v. *Manitoba (The Government of)*[474], was the constitutionality of certain sections of the *Manitoba Regulation 46/93* and the *Health Services Act,* R.S.M. H-35*,* which allegedly infringed rights under section 2(a), 7 and 15 of the *Charter*. According to Jane Doe 1 and Jane Doe 2, the existing legislative structure made it impossible to carry out their choice. If a woman wished to have an abortion, her choice of where to go was restricted by a conscripted list of hospitals[475]. By seeking treatment outside of

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[471] *Morgentaler*, *supra* note 469, ¶ 222 [my emphasis].

[472] This broader approach to freedom of conscience was endorsed by Justice LaForest, writing for a plurality, in *Children's Aid Society*, *supra* note 200, ¶ 80-81. I specify that this endorsement was made in the context of Justice Wilson's opinion of "liberty" under section 7 of the Charter rather than "freedom of conscience". This point will be discussed in depth further on.

[473] See *Jane Doe 1 and Jane Doe 2* v. *Manitoba (The Government of)*, 2008 MBQB 217 (CanLII) [***Jane Doe 1 and Jane Doe 2***].

[474] *Jane Doe 1 and Jane Doe 2* v. *Manitoba (The Government of),* 2004 MBQB 285 (CanLII).

[475] For a detailed background of this action, the reader is referred to *Doe et al*. v. *The Government of Manitoba*, 2004 MBQB 285 **[*Doe et al.*]** (Oliphant J.), at ¶ 18-19. Oliphant J.

publicly-funded health care system, severe emotional stress and increased physical risk was incurred. The Court initially found in their favour, but the summary conviction was reversed on appeal and further appeal to the Supreme Court of Canada was refused[476]. However, a class action lawsuit has since been certified[477]. Jane Doe 1 and Jane Doe 2 argued that their right to freedom of conscience under section 2(a) of the *Charter* had been violated, "by the impugned legislation […] That is because the impugned legislation interferes with a woman's ability to make a moral or ethical decision as to whether or not she wishes to terminate a pregnancy."[478] One must however question if the 'severe emotional stress and increased physical risk' was engendered by a violation of their freedom of conscience or better yet, as a result of modalities in obtaining an abortion[479]. While this case has yet to be decided, this class-action lawsuit will provide a notable opportunity for freedom of conscience to be re-examined.

Objections of conscience were also considered in *Roach* v. *Canada (Minister of State for Multiculturalism and Citizenship)*[480], where the Court had to establish whether the oath of allegiance contained in the *Citizenship Act*[481] was unconstitutional since Roach claimed that his right to freedom of conscience was infringed by the oath. Containing a pledge of allegiance to her Majesty the Queen as

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dismissed the Government's motion and allowed the plaintiffs to proceed. See *Jane Doe 1 and Jane Doe 2, supra* note 473, ¶ 2.

[476] *Jane Doe 1 and Jane Doe 2* v. *Manitoba*, 2005 MBCA 109, *Jane Doe 1 and Jane Doe 2* v. *Manitoba*, [2005] SCCA 513. See *Jane Doe 1 and Jane Doe 2, supra* note 473, ¶ 2.

[477] The Court of Appeal defined the class as being "pregnant women who were insured persons pursuant to The Health Services Act, C.C.S.M., c. H35, and who paid for or were indebted for an abortion service performed at a private clinic in Manitoba before November 15, 2005.": *Jane Doe 1 and Jane Doe 2, supra* note 473, ¶ 3.

[478] *Doe et al.*, *supra* note 475, ¶ 39. The plaintiffs also argued that the impugned legislation also violated their right to security of the person, as guaranteed by section 7 of the Charter: *Ibid*, ¶ 34.

[479] This situation differs from *Morgentaler*, where the question was one of criminal law. The stakes were much higher, therefore, since the terms of the choice were contingent on an evaluation of the culpability of the individual.

[480] *Roach* v. *Canada (Minister of State for Multiculturalism and Citizenship,* [1994] CanLII 3453 (F.C.A.) **[*Roach*]**. The respondent has re-litigated the matter recently and the Ontario Court of Appeal has confirmed the trial judge's findings on the preliminary motion: *Roach* v. *Canada (Secretary of State)*, 2008 ONCA 124 (CanLII), ¶ 2 **[*Roach 2*]**. To consult the class action lawsuit, see Canadians for a Canadian Republic, http://www.canadian-republic.ca/pdf_files/Charles_Roach-Class_Action_2005.pdf (site last consulted 25.11.2008).

[481] *Citizenship Act,* R.S.C., 1985, c. C-29, ss. 2, 5 (as am. by R.S.C., 1985 (3rd Supp.), c. 44, s. 1), 10, 12(3), 24.

well as to all heirs and successors[482], this ran counter to his republican views. Although the appeal was ultimately dismissed, Justice Linden (dissenting in part) provided an interesting definition of freedom of conscience: "[t]he latter [freedom of religion] relates more to religious views derived from established religious institutions, whereas the former [freedom of conscience] is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles."[483] Herein lies an element of definition for freedom of conscience, essentially based on a moral stance of what constitutes right and wrong. Charles Roach has since undertaken the re-litigation of his case and cause. As it stands, no decision has been rendered in the class-action lawsuit brought against the Minister of State for Multiculturalism and Citizenship. It will be interesting to see whether the right to freedom of conscience is given a more specific definition fifteen years later.

In the setting of correctional services, freedom of conscience has been upheld in *Maurice* v. *Canada*[484]*.* At issue was the refusal of Correctional Services Canada (CSC) to recognise that vegetarianism could be seen as validly claimed on the basis of non-religious beliefs; after leaving the Hare Krishna faith, Jack Maurice elected to pursue his vegetarian diet. He did not "eat meat, fish, eggs, poultry, onions, mushrooms and garlic because of his conscientiously held belief that eating those food items is "morally reprehensible and poisonous to society as a whole""[485]. According to Campbell J., an inconsistency reigned between the CSC's *legal duty to facilitate* freedom of religion and that of freedom of conscience and criticised the CSC's piecemeal approach to s. 2(a) of the *Charter*[486]. Vegetarianism, as freedom of conscience, was explained as followed by Campbell J.:

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[482] The Oath of Citizenship, available on the Citizenship and Immigration Canada website, reads as follows: "*I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.*": CITIZENSHIP AND IMMIGRATION CANADA, <Home>, <Applying for citizenship>, <The citizenship ceremony>, online: http://www.cic.gc.ca/English/citizenship/cit-ceremony.asp#oath (site last accessed 20.01.2010).
[483] *Roach*, *supra* note 480, ¶ 45.
[484] *Maurice* v. *Canada (Attorney-General)*, 2002 FC 69 **[*Maurice*]**.
[485] *Ibid*, ¶ 1.
[486] *Ibid*, ¶ 8.

> "Vegetarianism is a dietary choice, which is founded in a belief that consumption of animal products is morally wrong. Motivation for practising vegetarianism may vary, but, in my opinion, its underlying belief system may fall under an expression of "conscience".
>
> […]
>
> Therefore, in my opinion, just as the entitlement for a religious diet may be found in s. 2(a) of the *Charter*, a similar entitlement for a vegetarian diet exists based on the right to freedom of conscience."[487]

The Court recognised that vegetarianism, even if not based on religious beliefs, was a conscientious choice[488], referring to Article 18 of the *Universal Declaration of Human Rights* to buttress its position[489]. Although Campbell J. ordered that Mr. Maurice be allowed to follow his conscientious beliefs, religious and conscientious claims were depicted as similar[490], framing the quest for freedom of conscience as pursuit of a *just* moral order. While the recognition of freedom of conscience cannot be faulted in this case, the moral approach of what constitutes a just moral order reduces the discourse to black and white, while most issues related to consciously-held beliefs would be considered as part of the grey zone.

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[487] *Maurice, supra* note 484, ¶ 9, 11.

[488] The CSC has since published a handbook on *Religious and Spiritual Accommodation in CSC Institutions:* CORRECTIONAL SERVICE CANADA, *Religious and Spiritual Accommodation in CSC Institutions* (last updated November 2006), http://www.csc-scc.gc.ca/text/prgrm/chap/chaplaincy/chaplaincy_e.pdf (last consulted 27.08.2008). As well, the Québec Human Rights Commission published a report on dietary restrictions in prisons in 1991. See COMMISSION DES DROITS DE LA PERSONNE ET DROITS DE LA JEUNESSE, *Le régime alimentaire des détenus de foi hébraïque : obligations des autorités carcérales*, Cat. 2.113.2.4 (Mai 1991), Online : http://www.cdpdj.qc.ca/fr/publications/docs/aliments_hebraique.pdf (site last accessed 12.08.2009). In *R.* v. *Chan*, 2005 ABQB 615 (CanLII) **[*Chan*]**, the Calgary Remand Centre (CRC) was also criticised for refusing to recognise religious conversions; the case at bar dealt with a conversion to Buddhism, which required a change in diet, as well as accessories to prayer. The issue of Mr. Chan's vegetarian diet was resolved and the initial refusal did not arise from any specific malice directed at Mr. Chan, according to McIntyre J. of the Queen's Bench. As such, the remedy should not be sought under s. 24(2) of the *Charter*, but rather by giving him extra credit for pre-sentence custody. See *Chan*, ¶ 208-209, 223.

[489] *Maurice*, *supra* note 484, ¶ 6. This point was highlighted recently by author J. Kent Donlevy, "Catholic Schools and Freedom of Conscience in the Canadian Charter of Rights and Freedoms", (2008) 47 *J. Cath. Legal Stud.* 69, at 76 **[Donlevy, "Catholic Schools and Freedom of Conscience"]**.

[490] *Maurice*, *supra* note 484, ¶ 11.

Connected to freedom of conscience by way of a discussion on freedom of religion, the Supreme Court has agreed that it must not become the "arbiter of religious dogma"[491]. It is with this in mind that Justice Iacobucci crafted a subjective test for the sincerity of the religious belief. In this light, it was acknowledged that religious beliefs are deeply individual, subject to change and should not be measured against official religious teachings, but that should retain a nexus with religion. One could question whether the Court would want to become the arbiter of any dogma, religious or other[492]? In this perspective, if an individual is able to establish that his or her beliefs are sincere and can demonstrate a binding force to a particular doctrine, freedom of conscience could also benefit from the subjective approach adopted by the Court. It is perhaps this precise reason why courts have seemed reticent thus far in vigorously applying freedom of conscience. Sincerely-held beliefs must retain a nexus with religion in order to be claimed under freedom of religion. However, a similar nexus with conscience could be established on the basis of moral ideas of right and wrong, ultimately creating the necessary connecting link.

Freedom of conscience, in closing, remains an underused freedom in my opinion. Nevertheless, it is unclear whether this stems from judges' reluctance in using the provision or whether it reflects the small number of cases where freedom of conscience is invoked by the claimants. The difficulty of defining that freedom on the basis on its own merit has also been witnessed. Freedom of conscience has been framed, in my study, as a question of morality or moral order, though not founded on religious beliefs. Interpreted in this manner, freedom of conscience can be seen under a different hue: questions relating to town prayers before the opening of municipal meetings[493] as well as schools prayers[494] could now be conceptualised

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[491] *Amselem*, *supra* note 3, ¶ 50: "In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."

[492] Can it not be said that freedom of conscience is implicitly or partially recognised by the Court in *Amselem*? See *Amselem*, *supra* note 3, ¶ 40: "This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom."

[493] See *Laval, supra* note 209; *Freitag, supra* note 208.

under the banner of freedom of conscience, i.e. freedom *from* religion. This approach would also force a better conceptualisation of relations between the State and the individual and challenge us to finding equilibrium between freedom of conscience and religion, in order to fully embrace the 'single integrated concept'. Finally, measuring freedom of conscience in this manner leaves the door ajar between concepts of freedom *of* religion and freedom *from* religion. I note, however, that freedom *from* religion does not constitute the only aspect of freedom of conscience. Rather, there exists a positive content, namely the right to invoke an accommodation for non-religious convictions, as seen in *Maurice* as well as countless examples emanating from military conscious-objector cases. The latter issue of conscious-objector status to military service for non religious convictions is accepted almost in all States governed by the rule of law[495]. Nonetheless, this previously mentioned positive content is principally defined by analogy with religious convictions, rather than in an autonomous manner. This statement permits me to segue into freedom of conscience as related to free choice and personal autonomy.

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[494] See: *Zylberberg, supra* note 196; *Bal* v. *Ontario (Attorney General)*, 1994 CanLII7363 (On. S.C.) **[*Bal*]**.

[495] See, for example: UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, "Conscientious objection to military service", Commission on Human Rights Resolution 1998/77, online: http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/5bc5759a53f36ab380256671004b643a?Opendocument (site last accessed 28.05.2009). A recent decision of the Federal Court of Canada stated that the issue of conscientious objection still raises a host of outstanding issues. The case at bar dealt with the refusal to serve in wars condemned by the international community when applying for refugee status: see *Lebedev* v. *Canada (Minister of Citizenship and Immigration)*, 2007 CF 728. De Montigny J. suggested that although he was mindful that paragraph 172 of the UNHCR spoke of "religious" convictions, he believed that this notion should be expanded to recognise that moral principles may also be, for a number of people, sufficiently compelling to ground and organise their lives. This approach is also consistent with the interpretation that has been given to the right of freedom of religion by the Supreme Court of Canada in *Amselem*, *Big M Drug Mart* and *Edwards Books*: see *Lebedev, supra*, ¶ 46. On the subject of the increase in demand of conscientious exemptions from both individuals and groups, author Yossi Nehushtan argues that there are three main reasons: "Firstly, the fact that the modern state regulates the public and private spheres more than ever; secondly, increasing sensitivity to the discourse of human rights and the increasing use of it amongst individuals, organisations and communities; and thirdly, the great movement in Western democracies from the cultural model of a relatively homogenous nation state to a far more heterogeneous, multicultural one." See Yossi Nehushtan, "Secular and religious conscientious exemptions: between tolerance and equality" in Peter Cane, Carolyn Evans and Zoë Robinson, eds, *Law and Religion in the Theoretical and Historical Context,* (Cambridge, Cambridge University Press, 2008), 243 at page 246 **[Nehushtan, "Conscientious Exemptions"]**

1.2 Freedom of Conscience as Related to Free Choice and Personal Autonomy

The open texture of the concept of the conscience is revealed when designated as a question of "free choice" or "personal autonomy"[496]. Without delving into the philosophical ramifications of John Stuart Mill's interpretation of conscience[497], which merits (and has merited) its own analysis[498], the focus on the individual is marked.

Within the scope of Canadian case law, conscience as choice and/or autonomy has achieved an enviable position; nevertheless, one must differentiate "liberty" from "freedom", and consequently section 2(a) from section 7 of the *Charter*. While "freedom" has generally been defined as the absence of constraint[499], "liberty"

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[496] Author Joel Feinberg speaks of these two terms being mostly philosophically interchangeable; however, when distinguishing these concepts, freedom usually refers to "autonomy", whereas liberty connotes "optionality": Joel Feinberg, "Freedom and liberty" in Craig, *supra* note 23. Retrieved November 17, 2008, from http://www.rep.routledge.com/article/S026: "There are at least two basic ideas in the conceptual complex we call 'freedom'; namely, **rightful self-government (autonomy)**, and **the overall ability to do, choose or achieve things**, which can be called 'optionality' and **defined as the possession of open options**. To be autonomous is to be free in the sense of 'self-governing' and 'independent', in a manner analogous to that in which sovereign nation states are free. Optionality is when a person has an open option in respect to some possible action, *x*, when nothing in the objective circumstances prevents them from doing *x* should they choose to do so, and nothing requires them to do *x* should they choose not to. One has freedom of action when one can do what one wills, but in order to have the full benefit of optionality, it must be supplemented by freedom of choice (free will), which consists in being able to will what one wants to will, free of internal psychological impediments. Autonomy and optionality can vary independently of one another. A great deal of one can coexist with very little of the other." [our emphasis] Feinberg's approach rejoins that of author Isaih Berlin, in "Two concepts of liberty", who explained positive freedom as essentially being "not freedom from, but freedom to – to lead one's prescribed form of life": see Isaiah Berlin, *Four Essays on Liberty* (Oxford, Oxford University Press, 1969), 131.

[497] See John Stuart Mill, *On Liberty and Other Essays* (Oxford, Oxford University Press, 1998) at page 16, where conscience (and consciousness) is described as the "most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological."

[498] On this subject, see Christian Brunelle, "L'interprétation des droits constitutionnels par le recours aux philosophes" (1990) 50(2) *R. du B.* 353; Robert Yalden, « Liberalism and Canadian Constitutional Law: Tensions in an Evolving Vision of Liberty » (1988) 47 U. *of T. Fac. L. Rev.* 132.

[499] See Chief Justice Dickson in *Big M Drug Mart*, *supra* note 67, at 336-337, as quoted by Justice La Forest in *Children's Aid Society, supra* note 200, ¶ 79: "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have

cannot be defined as the "unconstrained freedom [or] freedom from physical restraint"[500], according to Justice La Forest in *Children's Aid Society*. Conscience was effectively construed in this case both as a *concept* and as a *sign* of personal autonomy. As previously mentioned, the parents of a premature baby wanted medical treatment that was in line with the tenets of their faith as Jehovah's Witnesses; as such, they argued that the Ontario *Child Welfare Act*[501] infringed on their rights[502]. Blood transfusions, which constituted the very medical treatment that had been refused by the parents, could have been accepted if the premature baby was considered a "child in need of protection". The question was therefore to determine whether the "child in need of protection" standard, as indicated by the *Child Welfare Act*, could effectively allow for the override of the parents' right to choose medical treatment for their children and in doing so, infringe on their sections 7 and 2(a) *Charter* rights. The majority of the Court held that the life and security of the child prevailed over the religious beliefs of the parents. When addressing the claim of breach of s. 2(a) of the *Charter*, Justice La Forest noted that a liberal interpretation must be given with a view to satisfying its purpose[503]. Although questions of fundamental personal importance warrant particular interest, it is in my view necessary to dissociate the *freedom of conscious choice* and the *freedom of conscience*. Whereas the former indicates cognisant decision-making, the latter points to an existing right and freedom. Furthermore, I consider that the juxtaposition of liberty and freedom of conscience diminishes the individual strength of each concept, and posits a false notion of both. It is suggested here that liberty and freedom of conscience have their own independent content; liberty denotes a state of mind as well as a political statement whereas freedom of conscience refers to a

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chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

[500] *Children's Aid Society, supra* note 200, ¶ 80.
[501] *Child Welfare Act*, R.S.O. 1980, c. 66.
[502] *Children's Aid Society, supra* note 200, ¶ 42.
[503] *Ibid,* ¶ 104.

protected right. Chief Justice Lamer, writing for himself, agreed with Justice La Forest on the distinction between "liberty" and "freedom" and thought that this use is by no means accidental and that the meaning should be determined by the context. Accordingly,

> "With due respect for the contrary opinion, I am of the opinion that the fact that two different expressions are used in the English version is neither meaningless nor accidental. The expression "freedom" refers to a concept that is related to but distinct from the expression "liberty", but it has no equivalent in French, where the two dimensions are expressed in one single word: "*liberté*". The meaning is then determined by the context."[504]

Although *Children's Aid Society* was a case about fundamental freedoms, as well as the freedom of conscience and religion, it has become clear that it is first and foremost a decision about personal autonomy.

Returning to Chief Justice Dickson's opinion in *Big M Drug Mart*, individual conscience takes on a symbolic task, that of upholding democracy. In that respect,

> "It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. **It is because of the centrality of the rights associated with freedom of individual conscience** both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*."[505]

Individual conscience, therefore, represents the intersection of rights and freedoms and by that token, illustrates the ebb and flow of individual rights and societal obligations. The right to choice demonstrates the first step within the right to freedom of religion. In that sense, we can conceive of religion being but an aspect of freedom of conscience.

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[504] *Children's Aid Society, supra* note 200, ¶ 34 and 36.
[505] *Big M Drug Mart*, *supra* note 67, ¶ 122 [my emphasis].

In a similar vein to *Children's Aid Society*, the right of parents to educate their children was juxtaposed with provincial compulsory education[506] in *Jones*[507]. As mentioned before, Thomas Larry Jones, the appellant, was a pastor of a fundamentalist church and had taken on the education of twenty or so children under a schooling programme called "Western Baptist Academy". The appellant refused to request a state permit for his private school and also refused to send his own children to public schools since, in his view, education was mandated by God and not accountable to government[508]. In this way, the appellant argued that the *Alberta School Act* infringed on his s. 2(a) and s. 7 *Charter* rights. Although both arguments ultimately failed[509], the interference with liberty argument provides for an interesting discussion. Justice Wilson, writing alone in dissent, argued that on the one hand, the *Alberta School Act* accommodated religious freedom (McIntyre J., writing for Beetz and Le Dain, concurring) and on the other hand, opined that the appellant's s. 7 *Charter* rights were violated. In this manner, Justice Wilson was pointing to the dual aspects of many institutions in Canada. Therefore, "[a] person's belief in the religious aspect does not free him of his obligation to comply with the civil aspect." [510] The appellant's claim was therefore interpreted as being effects-based rather than purpose-based by Justice Wilson. In practical terms, the impugned legislation defered to the beliefs of the parents, concluding therefore that the appellant failed to show a substantial impact on his rights[511]. Moreover, Justice Wilson offered a broad interpretation of the concept of liberty[512], though noting that this right did not give

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[506] *School Act, R.S.A.* 1980, c. S-3, ss. 142(1), 143(1) [hereinafter "*Alberta School Act*"]
[507] *Jones*, *supra* note 189.
[508] *Ibid*, ¶ 2-3, 19. The stalemate was niftily summed up by the trial judge in this case. See at ¶ 6: "Section 143(1)(a) has given rise to what the trial judge has described as a standoff between "a stiff-necked parson and a stiff-necked education establishment, both demanding the other make the first move in the inquiry to determine whether the children are receiving efficient instruction outside the public or separate school system"."
[509] *Jones*, *supra* note 189, ¶ 33, 48-49 (Laforest J., writing for the majority).
[510] *Ibid*, ¶ 67-69.
[511] *Ibid*, ¶ 67-69. *A fortiori* at ¶ 69: "If the statutory machinery has any impact at all on the appellant's freedom of conscience and religion which, for the reasons I have given, I doubt, it is an extremely formalistic and technical one. I do not believe, therefore, that it gives rise to a violation of s. 2(*a*) of the *Charter*."
[512] *Ibid*, ¶ 76 (Wilson J.): "I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in today's parlance, "his own person" and accountable as such. John

carte blanche on how to bring up and educate one's children, since that would be considered too extravagant a claim[513]. In her view, the appellant had the right to raise his children in accordance with his conscientious beliefs."[514] The question of conformity, which acted at once as the backbone of the appellant's argumentation as well as his causing his ultimate failure, illustrates the link between freedom of conscience and fundamental freedoms. According to Justice Wilson, while the impugned legislation did not violate the appellant's right to freedom of conscience and religion, it did breach his right to liberty as a fundamental freedom. Fundamentally, this case (and Justice Wilson's opinion in particular, bearing in mind that she is part of the minority opinion) broached the issue of the limits of one's personal beliefs when faced with "statutory machinery for certification"[515].

As noted previously, "conscience" was treated as a necessary component of liberty as well as pertaining to "freedom of conscience and religion" by Justice Wilson in *Morgentaler*. Returning briefly to this seminal case, the right of individual choice represented, according to Justice Wilson, the foundation of liberty in society[516]. This position exemplified John Stuart Mill's harm principle, wherein the individual should be free, so long as his or her beliefs do not infringe other people's same liberty. Justice Wilson's comments on liberty in *Morgentaler* were made within the context of section 2(a) of the *Charter*. As such, my previous comments on the dichotomy between liberty and freedom resonate within this delicate framework and help demonstrate that one's conscience and one's right to freedom of conscience are not one and the same.

Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it"." Justice Wilson's opinion of "liberty" should be contrasted with the narrower interpretation of liberty given by Lamer J. (as he was then) speaking for himself in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at 1177-1178, as cited by La Forest J. in *Children's Aid Society*, *supra* note 200, ¶ 75.

[513] *Jones, supra* note 189, ¶ 77.

[514] *Ibid*, ¶ 79.

[515] *Ibid,* ¶ 68.

[516] *Morgentaler*, *supra 469*, ¶ 228: "Liberty, as was noted in *Singh,* is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance." In this same way, see Justice Wilson's opinion in *Jones*, *supra* note 189, at 318-319.

The common foundation of choice and personal control was further addressed in *Rodriguez* v. *British Columbia (Attorney General)*[517]. At issue was the *choice* of suicide. Suffering from a terminal illness, Ms. Rodriguez was seeking assistance to commit suicide at the time of her choice. The appellant argued that s. 241(b) of the *Criminal Code*, which prohibited physician-assisted suicide, invoked the infringement of her s. 7, 12 and 15(1) *Charter* rights. However, freedom of conscience, addressed within the framework of choice by Justice Sopinka (writing for the majority), referred to the scope of security of the person and the general theory of inviolability[518]. Chief Justice Lamer, dissenting in this case, addressed the crux of this case through the right to equality rather than that of fundamental freedoms, unlike the majority[519] and Justice McLachlin's minority opinion (writing for L'Heureux-Dubé J.)[520]. Weaving personal autonomy into the discourse of equal rights, Lamer C.J. explained that the *Criminal Code* provision created a disadvantage based on a personal characteristic[521], namely a physical disability[522]. Freedom of conscience was channelled in order to provide a legal (and secular) platform for this case, rather than a moral perspective on the value of suicide.

Disentangling "freedom" from "liberty" is akin to separating *choice* from the *freedom of choice*. While related, as noted previously by Lamer C.J. in *Children's Aid Society*, these concepts should not be seen as interchangeable. Moreover, Justice Wilson's oftentimes solitary opinions on this fundamental freedom further illustrate her unwavering endorsement of classical liberalism[523]. Indeed, while sections 2(a)

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[517] *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 **[*Rodriguez*]**.
[518] Within the context of the *Québec Charter*, Judge Audet ascertained most recently in *Commission des droits de la personne et des droits de la jeunesse* c. *Hôpital général juif Sir Mortimer B. Davis*, 2007 QCTDP 29 (CanLII), at ¶ 143: "Accordingly, it may be concluded that section 1 of the Charter does not protect only the *physical* aspect of inviolability, but also its psychological, moral and social aspects." [emphasis in the original]
[519] *Rodriguez, supra* note 517, 78-92.
[520] *Ibid*, 116-123. Justice Cory concurred with the reasons given by both Lamer C.J. and McLachlin J. in this case.
[521] *Rodriguez, supra* note 517, 45.
[522] *Ibid*, 46-47. Lamer C.J. found that s. 241(b) of the Criminal Code infringed the right to equality guaranteed through s. 15(1) of the *Charter* and could not be saved under s. 1 of the *Charter*: *Ibid*, 49-62. A constitutional exemption was set out for Ms. Rodriguez; the conditions were summarised at pages 73-75 of the judgment.
[523] On this subject, see Kent Roach, "Justice Bertha Wilson : A Classically Liberal Judge" in Jamie Cameron, ed, *Reflections on the Legacy of Justice Bertha Wilson* (Canada,

and 7 of the *Charter* intersect in the sense that they are both fundamental freedoms and thus share a common foundation of what one could call small "l" liberalism, this intersecting approach should be dissuaded, since it invites an unwarranted expansion of concepts beyond their natural limit and limit the overarching efficiency of provisions.

1.3 Conclusion on the Canadian Case Law on Freedom of Conscience

Freedom of conscience has generally been subject to two interpretations in Canadian jurisprudence. On the one hand, freedom of conscience has rarely been invoked on its own and retains little independent content vis-à-vis its sister protection of freedom of religion. Nevertheless, in an increasingly secular society, where the role of the individual and the State is in continual motion and redefinition, it is highly possible that freedom of conscience finds its place on the *Charter* mantelpiece as deeply-held beliefs about the good life may not always be religious in nature. On the other hand, freedom of conscience has also been equated with free choice and personal autonomy: in this way, freedom of conscience is brought into the larger discourse on the philosophical notion of "freedom" and "liberty". Thus freedom of conscience, as a fundamental freedom, has yet to find its own voice in the constitutional discourse on freedom of conscience *and* religion.

2. The Significance of Freedom of Conscience in Legal Literature

Pierre-Basile Migneault once referred to freedom of conscience as being a fundamental principle of the social order[524]. This comment was made in the context

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LexisNexis, 2008), 193-223. Although Kent Roach examined Justice Wilson's seminal opinion in *Morgentaler* at pages 195-199 (and especially at page 198), he did not, unfortunately, address the principle of individual conscience in detail, but chose rather to frame the tension between liberalism and feminism. I consider that a closer study of her conception of freedom of conscience would have strengthened his overall study of Justice Wilson as a classically liberal judge.

[524] Pierre-Basile Migneault, *Droit civil canadien*, t. 4 (1899), p. 14 as cited by COMMISSION DES DROITS DE LA PERSONNE DU QUÉBEC, *Droit pour une infirmière en milieu hospitalier de refuser de participer à des avortements pour des raisons de conscience ou de religion*, Cat. 113-002B, Montréal, 1987, Online : http://www.cdpdj.qc.ca/fr/publications/docs/droit_infirmiere.pdf (site last accessed 06.04.2009) p. 5. This opinion was written after the Syndicat professionnel des infirmières et

of the civil law in Québec being a valuable tool for the protection of human rights. However, one can wonder whether freedom of conscience, taken on its own, can deliver adequate protection. Given the prior case law analysis of freedom of conscience, it becomes clear that the waters are muddied around this concept. I propose therefore to seek out what has been said by authors on the subject of freedom of conscience, in an effort to provide a coherent approach to a concept that has been left wanting.

As a precursor to our two-step dance on freedom of conscience and freedom of religion, Archie Bahm's "Theories of Conscience", continues in my view to clearly expose conscience's quandary. This author touched upon a nerve when he stated that although everyone knows intuitively what conscience is, it has become increasingly difficult to explain[525] and this, despite its multiple scientific and

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infirmiers de Trois-Rivières asked the Commission whether, within the context of her duties, a nurse holding a position in an operating room in a hospital must assist doctors who are performing operations, including abortions, even though she has clearly stated that abortions go against her freedom of conscience and religion. The Commission des droits de la personne du Québec noted that there are multiple interests and therefore rights at play: equilibrium must be found between competing rights. On the one hand, a professional's right to freedom of conscience and religion and on the other hand, the mother's right to life and integrity of her person. Furthermore, the right to assistance, as provided by s. 2 of the *Québec Charter* offers a solution to this moral dilemma, since the obligation resides in bringing forth help or rescue; aid can be offered either directly or by an intermediary. A similar option is provided by the *Code of Ethics of Nurses* (R.R.Q. 1981, c. I-8, r. 4, art. 4.01.01; this regulation has since been repealed and replaced in 2003 with the *Code of Ethics of Nurses*, R.R.Q., 1981, c. I-8, r. 4.1, art. 2), which allows a nurse to refuse treatment if he or she can reasonably ensure competent relief. After careful analysis of the situation, both under the right of freedom of conscience and religion as well as the right to equality, the Commission des droits de la personne du Québec concluded that the obligation to ensure competent relief is the determinant criterion. The beliefs (and rights) of the nurse can only pass after the health and well-being of the woman have been assured: see p. 9, 12.

[525] Archie Bahm, "Theories of Conscience", (1965) 75(2) *Ethics* 128 **[Bahm, "Theories of Conscience"]**. This sentiment is echoed recently by Hammer, *supra* note 85, at 107, where he acknowledged that the various approaches to conscience demonstrate that from a phenomenological standpoint, it is virtually impossible to adequately define the meaning or the implications of conscience. The issue of innate or acquired conscience as conceptualised by Bahm is exemplified by Hammer's use of Hannah Arendt's approach to conscience as 'emotive based'. However this is one understanding of conscience amidst many and space precludes us from delving into all the conceptualisations of conscience offered by Hammer. In "Thinking and Moral Considerations", the faculties of judgment (tangible) and thinking (intangible) are distinct, as discovered by Kant and acknowledged by Arendt: these spheres of distinctiveness occur as well in conscience, permitting conscience to retain independent, though interconnected, meaning to consciousness. In this way, "[i]f thinking, the two-in-one of the soundless dialogue, actualizes the difference within our identity as given in

philosophical justifications. In an effort to classify existing theories of conscience along the innate or acquired divide, eight theories of conscience are proposed by Archie Bahm. In a first group, theories of conscience are depicted as *innate*; in this sense, conscience can be seen as the product of biological evolution, the proof of a higher being by theological implantation[526], or the result of being axiologically inherent[527]. A second set of theories of conscience were portrayed as being *acquired*; therefore, conscience could be acquired naturally, socially and intellectually[528]. These six theories are considered to be *organistic* by the author[529]: thus, Bahm recognises that conscience is made up of many different – though fundamentally connected – factors[530]. Rather than multiply the reasons for the debate on the place of freedom of conscience in society, Archie Bahm presents a coherent portrait of the different forces at work when one speaks of 'conscience'.

Without proceeding to a definition of conscience in absolute terms, I believe that it is preferable to understand conscience as being a process of inner thought and outer morality. By framing conscience as both innate *and* acquired as opposed to innate *or* acquired, conscience can be understood as drawing on both individual and collective morals. In this way, conscience can understood in the organistic framework proposed by Bahm. While conscience has been raised with more frequency in religious claims, I do not believe that this eliminates the claim of non-

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consciousness and thereby results in conscience as its by-product of the liberating effect of thinking, makes it manifest in the world of appearances, where I am never alone and always much too busy to be able to think.": Hannah Arendt, "Thinking and Moral Considerations" (1971) 38(3) *Social Research* 417, 446.

[526] The author explained the 'theological implantation of conscience' as essentially moralistic: "God created man and placed within him a sense of right and wrong. Conscience is sometimes spoken of as "the voice of God" somehow dwelling within each person. If one will listen to, and heed, its commands, he will act rightly. Sometimes it is only "a still small voice"; sometimes it overwhelms one with frightening fear or feelings of shame. One who habitually attends to other things may lose his ability to hear it; but one may deliberately cultivate his ability to listen to it, just as he develops his other senses and ways of knowing.": Bahm, "Theories of Conscience", *supra* note 525, 128.

[527] *Ibid*, 128-129.

[528] *Ibid*, 129-130.

[529] *Ibid*, 131.

[530] *Ibid*, 130-131. Although the theory of interdependent models of conscience is favoured by the author, a theory asserting the reciprocal independence of acquired and innate conscience is also proposed. In this way, acquired and innate theories of conscience are credited with autonomous growth, rather than a contextual approach.

religious conscience. In this manner, the tension between competing claims to conscience surfaces: can conscience retain distinct meaning from religion, or is conscience destined to be synonymous with religion? Freedom of conscience, as addressed in Canadian legal literature, will now be examined.

2.1 Freedom of Conscience as Analysed in Canadian Legal Literature

Perhaps a first indication of the misunderstood nature of freedom of conscience emerges from the proceedings from the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada leading up to the adoption of the *Canadian Charter of Rights and Freedoms*. Freedom of conscience, unlike freedom of religion, received very little independent consideration from policy makers and social actors alike[531]. Afforded modestly more interest by authors recently, I suggest that freedom of conscience can be understood on a scale: it can be interpreted as being *lesser than*, *equivalent to* or *broader than* freedom of religion.

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[531] Freedom of conscience was infrequently discussed in the debates of the Senate Special Committee leading up to the repatriation of the Constitution. Representatives of the Mennonite Central Community underscored the importance of freedom of conscience in the context of providing alternatives to military service. Furthermore, the Mennonite Central Committee believed that the inclusion of a clause in the constitution that would recognize the right of conscience that would lead one to abstain from the taking of a human life (1st Session, 32nd Parliament, (1980-1981), 12:47). Freedom of conscience was also signalled by the Chief Metro Toronto Police, John Ackroyd, representative for the Canadian Association of Chiefs of Police, who stated that "[t[he [Canadian Association of Chiefs of Police] Association is of the opinion that the words "of conscience" [freedom of conscience and religion] are vague, and unnecessary, in that there is a real risk that the word "conscience" could be given so broad an interpretation by the courts as to make various sections of the criminal law inoperative, for example, those sections relating to morals and drug offences. We are also concerned with what these words may mean in relation to different cults that are operating in our country." (1st Session, 32nd Parliament (1980-1981),14:7) While Chief Ackroyd questioned the location and even existence of "conscience" later on in his testimony before the Senate Special Committee, he was challenged by Mr. McGrath (MP in the House of Commons at the time of the proceedings), who framed the importance of 'conscience' in terms of being necessary in a western democracy (1st Session, 32nd Parliament (1980-1981), 14:13). Finally, freedom of conscience was briefly addressed in the context of the debate on abortion; however, as long as the right of choice is guaranteed, it was discerned that freedom of conscience was inconsequential to the terms of that debate (1st Session, 32nd Parliament (1980-1981), 24:107). I refer the reader to : CANADA, SENATE AND CANADA, HOUSE OF COMMONS, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,* 1st Session, 32nd Parliament, Issue n° 12 (November 25th 1980), 09h45 (M. Ross Nigh); Issue n° 14 (November 27th 1980), 09h40 (M. John Ackroyd) and Issue n° 24 (December 11th 1980), 21h20 (M. John Ackroyd and M. McGrath).

By understanding freedom conscience as being *lesser than* freedom of religion, authors argue that religion remains omnipresent in the framing of freedom of conscience. Recognising freedom of conscience as *equivalent to* freedom of religion leads others to distinguish the former from the latter. Finally, by considering freedom of conscience as *broader than* freedom of religion, religion becomes but an aspect of freedom of conscience[532]. I will propose that constructing freedom of conscience as *equivalent to* freedom of religion constitutes its optimal recognition in the Canadian constitutional context. The analysis will proceed accordingly.

2.1.1 Freedom of Conscience as Lesser Than Freedom of Religion

The most vocal and articulated view of freedom of conscience as being *lesser than* freedom of religion has been proposed by author Jeremy Webber, who has acknowledged the presence of conscience but has argued that religion remains ubiquitous in the discourse on freedom of conscience and religion. In "The Irreducibly Religious Content of Freedom of Religion", Webber examines the incoherence and instability associated with a secularised definition of freedom of religion. Arguing that "if freedom of religion is genuinely concerned with religion's protection rather than its active discouragement (which I will assume rather than argue), and if freedom of religion extends beyond the protection of one's inmost thoughts to include any dimension of religious practice, then freedom cannot be separated from the affirmative valuing of religious beliefs."[533] This inevitably leads to privileging freedom of religion over other freedoms or rights. The author asserts that definitions of freedom of conscience rely too heavily on adjectives, offering little direction and even fewer examples[534]. While Webber admits the undeniable appeal

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[532] As stated by the authors of the Bouchard-Taylor Report on reasonable accommodations in Québec: Bouchard & Taylor, *supra* note 450, 144.

[533] Jeremy Webber, "The Irreducibly Religious Content of Freedom of Religion" in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada*, (Vancouver, UBC Press, 2006), 178 at 178 [references omitted] **[Webber, "Irreducibly Religion Content 1"]**. At page 194, Jeremy Webber concludes by stating that "[f]reedom of religion does not require, then, that the state remain indifferent to religion. Two motives drive the rights: (1) an acknowledgment of the importance of religion, and (2) a realization of religion's diversity, ultimately resulting in an attempt to generalize respect for religion so that all members benefit from equivalent protection, no matter their beliefs."

[534] Webber, "Irreducibly Religious Content 1", *supra* note 533, at 187-188: "the "fundamental principles of an individual (*Big M Drug Mart 1983*, 136, per Laycraft J.A.); "profound moral

of an approach to "freedom of religion which would require not only neutrality between religions, but also between religion and irreligion"[535], he also demonstrates that one cannot be neutral about freedom of religion since it often carries "a much richer set of normative judgments than is often recognized"[536]. Moreover, as stated elsewhere by Webber, even if secular beliefs are recognised and thus worth protection, "one is still faced with the difficult problems of weighing and sifting identified in the case of religious neutrality."[537] Put differently, Webber admits that religion must remain experiential and concludes that religion remains the incontrovertible gravitational force in law. Indeed, as Webber unravels his own proposal for a definition of conscience, it becomes apparent that religion must remain experiential and concludes that religion remains the incontrovertible gravitational force in law[538]. Freedom of conscience is defined as follows by Webber:

> "[t]he best candidates for a definition of "conscience" that is not dependent on a religious analogy are those that focus on obedience to moral injunctions as the object of the guarantee. […] In any case, a definition of conscience focused on morality would not be sufficient to subsume freedom of religion, at least not without severely distorting the latter. Moral injunctions are a dimension of many religions, but religion includes elements that are not contained within morality, such as prayer, methods of worship, communal institutions, and what to a believer is knowledge of the divine."[539]

This definitional approach to conscience also confirms the title of Webber's chapter: even if freedom of conscience is considered to be the essential right[540], it becomes impossible to define belief (and thus morality) without religion, even when we are not speaking *of* religion. Despite the courts' best efforts to provide freedom of conscience with autonomous content it remains "parasitic", according to Webber, on

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and ethical beliefs" (*Roach* v. *Canada*, para. 45, per Linden J.A.); or "profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being" (*R.* v. *Edwards Books and Art Ltd*., para. 97, per Dickson C.J.C.)."

[535] Webber, "Irreducibly Religious Content 1", *supra* note 533, 182.

[536] *Ibid*. Webber explains, at page 193, that we keep on reaching back into tradition and historical elements in an effort to better understand others' faiths.

[537] Jeremy Webber, "The Separation of Church from State" in Leslie A. Kenny, *Clashing Fundamentalisms: When Rival Truth Claims Meet Head-On*, Victoria, Victoria Centre for Studies in Religion and Society, University of Victoria, 2008, online: http://www.law.uvic.ca/jwebber/documents/SeparationofChurchWebber_offprint.pdf (site last accessed 09.04.2009), p. 58 at p. 74 **[Webber, "Separation of Church from State"]**.

[538] Webber, "Irreducibly Religious Content 1", *supra* note 533, 189.

[539] *Ibid*, 188.

[540] *Ibid*, 182.

freedom of religion[541]. That said, however, even if freedom of conscience could be characterised as the "generic freedom" and freedom of religion as the "specific freedom", Webber contends that this would only be feasible if freedom of religion was treated as nothing more than an aspect of the freedom of our inmost thoughts. Nevertheless, to be able to define the motives of belief and manifestation requires us to confront the experience of religion, he argues[542].

Webber's interpretation of the pervasiveness of religion should not be understood in antagonistic terms however; rather, I regard Webber's approach as one that pays heed to the historical interpretation and implications of the discourse of freedom of religion. Moreover, a parallel could be drawn, I believe, between Webber's belief and manifestation of religion and the ECHR's approach to freedom of religion in terms of the *forum internum* and *forum externum*. Although both are afforded protection, the breadth of the protection differs greatly. Thus the interdependency of the freedoms of conscience and religion continues asymmetrically, compounding at once the task of defining both religion and conscience but also confirming religion's upper-hand[543].

Although authors Iain T. Benson and Timothy Macklem do not advocate the *lesser* nature of conscience *per se*, Benson contends that all people have some form of belief system while Macklem maintains that there must be an added value to religious belief in order for it to be seen as legitimate and interpreted as fair[544]. In this light, while not proposing the outright pre-eminence of religion, these authors are admitting – and thus validating – the ever-present nature of religion.

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[541] Webber, "Irreducibly Religious Content 1", *supra* note 533, 186 and also 188. For example, according to Webber at page 188, conscientious objector status was first recognised on the basis of religious grounds.
[542] *Ibid*, 188-189.
[543] Jeremy Webber furthers his argument based on the irreducibly religious content of freedom of religion in "Understanding the Religion in Freedom of Religion" in Cane, Evans & Robinson, *supra* note 495, 26 at 38-39 **[Webber, "Understanding the Religion"]**, where he advocates for an open, engaged and reflexive approach to religion in order to preserve a space for religion.
[544] See *infra*.

While Benson has been recognised principally for his approach to secularism, the author has recently embarked on a new vision of the religious-secular divide. By acknowledging that religion exists in both State and society[545], Benson has most recently advocated the "cooperating of Church and State": "[c]o-operation, rather than separation, suggests *both* a necessary jurisdictional *distinction* (the "church" and state have different roles and Canada is not a theocracy) and a *functional relationship* rather than strict separation."[546] Moreover, Benson has campaigned repeatedly for a redefinition of terms according to a trans-disciplinary approach[547], in hopes of preventing false or confusing dichotomies[548]. In his view, it is imperative to use legal vocabulary appropriately, while taking the broader context into account. The author is not endorsing a paralleled approach between religion and conscience; rather he is advocating that these concepts be drawn on and from each other. Although he has gone to great pains to define "secular" and all its permutations and even reprimands those who haven't 'gone the distance'[549] in his earlier texts, he sets

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[545] Benson explains that "secular" and "secularism" inevitably take on the position of the anti-religious (as opposed to the religious) and has sought a new way to discuss the nature of the public realm: "The opposite of religious is non-religious, and if we are looking to discuss the relationship between religion and other aspects of society we must be careful to avoid setting up false dichotomies. Religion discussed *in relation to* the state or *within* the state is a far cry from the frequently used "religion and the state". When we use the "state" to mean the order of government and the law and "society" to mean citizens at large, including both religious and non-religious citizens, we must remember that religion, in some sense, is within both, since religious and non-religious citizens make up both the state and society. This use of terms is simpler and less ideologically loaded than continuing to employ terms such as "secular" and "secularism", which often contain conceptions foreign to our intentions in using them or that bury anti-religious categorizations often implicit in their use.": Iain T. Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities", (2007) 21 *Emory Int'l L.R.* 111, 155 **[Benson, "Challenges and Opportunities"]**.

[546] Iain T. Benson, *Taking a Fresh Look at Religion and Public Policy in Canada: the Need for a Paradigm Shift*, 2008, online: <Centre for Cultural Renewal>, <Archives>, <Articles & Papers>, http://www.culturalrenewal.ca/downloads/sb_culturalrenewal/Benson-PRIeditsBensonFinalEditsApril32008-1.pdf (site last accessed 11.11.2009), p.1-2 **[Benson, "Fresh Look at Religion"]**.

[547] Iain T. Benson, *"Notes Towards a (Re)Definition of the "Secular""*, (1999-2000) 33 *U.B.C. L. Rev.* 519, 548-549 **[Benson, "(Re) Definition of the Secular"]**.

[548] Benson, "Challenges and Opportunities", *supra* note 545, 154-155 (and footnote 203). Examples of false dichotomies would be: religious/non-religious. Benson disagreed with Justice Winkler's interpretation of secularism as being "neutral" and "a protection for minority rights" in *Bal, supra* note 494, 705. According to Benson, the term "secularism" was underdeveloped and its history and meaning were, in fact, misused.

[549] Benson, "Challenges and Opportunities", *supra* note 545, 154-155 (esp. footnotes 202 and 205).

it aside to bring to the forefront that all human beings are believers[550]. Benson proposes, in a recent text, to look at religion *in the state* and religion *within society* so as to avoid the historically ideologically loaded terminology, all the while finding inclusion for both religious and non-religious citizens[551]. In this manner, Benson is advocating for a new terminological era in order to explain freedom of conscience and religion: in doing so, he is suggesting a more comprehensive approach to the relationship between law and religion by admitting the existence of religion in both state and society. While I agree that "secularism" and "secular" are ideologically-laden terms, I think that the simplicity offered by "state" and "society" can be misleading, since these terms also carry their own historical baggage and particularities. Fundamentally, however, Benson is acknowledging the *presence* of religion in state and society as well as a remedy for the many misappropriations of concept of secularism. While the omnipresence of religion in society may come across as an equalising force, it points to Benson's belief that a non-religious or a-religious discourse cannot have precedence in the public sphere of society[552]. But then again, however, neither can religious discourse.

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[550] Benson, "Fresh Look at Religion", *supra* note 546, 5-6.

[551] Benson, "Challenges and Opportunities", *supra* note 545, 155.

[552] Benson, "Fresh Look at Religion", *supra* note 546, 5-6: "Courts have, recently, come to acknowledge that any pre-emptive exclusion of "religion" from the category of "beliefs" that may operate in the public sphere of society, is an unwarranted attack on the freedom of "conscience and religion" set out in Section 2(a) of the *Charter of Rights and Freedoms.* **This recognition is of great significance for Canadian public policy but it has yet to be widely understood as such. To allow only the beliefs of atheists and agnostics to have any public relevance is not to treat religious beliefs fairly and those who hold them as equal citizens. To allow only those beliefs that emanate from the convictions of atheists and agnostics to have public relevance is discriminatory against religious beliefs just as much as it would be to allow *only* religious beliefs to have public relevance**." [my emphasis] Benson recommends, at pages 30-40, that Federal Government consider whether it might be a good idea to develop something like a *Freedom of Conscience and Religion Act* (as in South Africa), which would expressly deal with conscience and religion giving a set of guidelines regarding rights and obligations of religious believers and their communities as well as stipulating the limits on government power in certain areas. This suggestion should be contrasted with the suggestion made in the *Bouchard-Taylor Report* to adopt a Charter on Laicity. Moreover, although most of Benson's stated considerations would likely fall under provincial jurisdiction, such as public school education and health care, he is advocating for the *federal* government to consider a *Freedom of Conscience and Religion Act* "or an Act though Federal/Provincial issues create challenges with respect to application. At the very least a Charter, Bill or legislative instrument could provide for express recognition of the importance of the group dimension of religious adherence - - an aspect known to be only weakly recognized in our current jurisprudence." (Benson, "Fresh Look at Religion", *supra* note 546, 32). Although reference is made by Benson, for example, to British Columbia's

The continued relevance of freedom of religion has also been questioned by author Timothy Macklem in "Faith as a Secular Value"[553]. Proposing a new justification for freedom of religion, Macklem sets aside the conventional semantic and psychological approaches, suggesting instead that the morality justifying freedom of religion must be secular, not religious[554]. The former conventional approach tended to question the proper meaning of the term religion, whereas the latter sought to focus on the internal attitude of religious believers and thus on the individual's ultimate concern[555]. The semantic justification was rejected by Macklem because employing religious doctrine ultimately produced a misguided meaning and scope of freedom of religion[556] while the psychological justification was put aside because it suggested that even the most secular of individuals would lead a religious life, unless their life was devoid of anything that he or she could regard as an ultimate concern[557]. In light of these mitigated justifications to freedom of religion, Macklem recommended that an essential distinction needs to be made between faith and conscience: "religious belief is sustained by faith, conscientious belief by reason."[558] By emphasising *faith*, Macklem is advocating that there must an added value to religious belief[559]. In this way, it cannot exist because of existing religious doctrine or because of a personal feeling: "religious faith can only be said to be capable of enhancing human well-being when it is confined to issues that, from the

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Master Agreement respecting Denominational Health Care (Benson, "Fresh Look at Religion*", supra* note 546, 34-35), Benson's suggestion would require a re-examination of the constitutional separation of powers.

[553] Timothy Macklem, "Faith as a Secular Value", (2000) 45 *McGill L.J.* 1 [Macklem, "Faith as a Secular Value"].

[554] *Ibid*, 22.

[555] *Ibid*, 23.

[556] *Ibid*, 22.

[557] *Ibid*, 23. Macklem demonstrates the dangers of reducing concepts to a point where they have lost their meaning and purpose by the example of the fanatical stamp collector. No matter how obsessive the collector may be, stamp collecting is not and should not be considered a religion: Macklem, *supra*, 25. This is also reminiscent of Durkheim's determination that magical societies can exist, but a *Church of magic* cannot: see Chapter 1, *supra*.

[558] *Ibid*, 36. Macklem describes "reasoned beliefs" at page 35 as being "protected by freedom of belief, and to offer the same beliefs the same protection in the name of freedom of religion would be superfluous."

[559] Macklem explains, *ibid*, at page 34 that "like religion, faith has several possible meanings, with the result that a selection must be made from among those meanings on the basis of their relevance to the issue at hand." Faith does not have to be religious, continues Macklem at the same page, but rather must be able of providing the moral basis for the guarantee of a fundamental freedom. Therefore faith matters insofar as the justification that it provides.

point of view of the believer, are inaccessible to reason and, from the point of view of reason itself, are in some way genuinely mysterious."[560] Although Macklem is not attempting to tarnish the shine associated with religious freedom, he is proposing that it should not reside in instant gratification but rather be demonstrated constructively[561], as would any other right or freedom[562]. Macklem's faith-based beliefs have the potential to enlarge the scope of protection, though seems uncertain of which beliefs will recognised and worthy of protection. The example of marginal, "unconventional religious beliefs", such as the Church of Scientology or the cult of Jim Jones, poses a particular problem insofar as their protection under the rubric of freedom of religion and their contribution to the enhancement of human well-being[563]. Atheists and agnostics, just as those who hold political views, are treated as the antithesis of a religious believer, since their beliefs are versed in reason; their beliefs could still be recognised, but always seconded to more religiously-leaning groups[564]. In this way, by changing the value of faith and making it a secular rather than religious value, the general lens by which religious freedom is regarded and evaluated is modified, permitting therein the recognition of both religious as well as faith-based beliefs, but always cognizant of the hierarchy that exists between these beliefs.

If freedom of conscience were to be considered as existing yet acutely anaemic (*lesser than*) when compared to freedom of religion, a question of existential order must be asked. If religion is omnipresent, irreducible and perceived to be essential by some authors, is conscience forever destined to be dependent? Furthermore, if one assumes that the Legislator does not speak unnecessarily, one wonders what is the point of including conscience in a document as essential as the *Charter*[565]? The interventions of the Central Mennonite Community and the

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[560] Macklem, "Faith as a Secular Value, *supra* note 553, 55-56.
[561] *Ibid*, 57: "The ascendancy of reason in relation to those matters has not entirely displaced faith, as the continuing existence of religious conviction confirms, but has limited faith's authority."
[562] *Ibid*, 63.
[563] *Ibid*, 53-54.
[564] *Ibid*, 54-63.
[565] Although I admit and readily acknowledge that a fundamental freedom and the preamble to the *Charter* do not carry the same weight or importance, the Preamble to the *Charter* has

Canadian Association of Chiefs of Police on the subject of freedom of conscience demonstrate the breadth that could be afforded to this right, but also illustrate how this right could be misappropriated[566]. By conceiving of conscience as *lesser than* religion, the overarching theme becomes one of belief: by admitting that everyone believes[567], it then becomes a question of justification or meritocracy of beliefs.

2.1.2 Freedom of Conscience as Equivalent to Freedom of Religion

Freedom of conscience can also be interpreted as being *equivalent to* freedom of religion; in this light, conscience develops distinctly from religion. Inevitably, the line becomes drawn between religious and non-religious beliefs, suddenly at odds with the "single integrated concept" advocated by Chief Justice Dickson in *Big M Drug Mart*. Some authors have suggested that conscience should be interpreted as representing secular beliefs in society. I will now examine the proposal of freedom of conscience as equivalent to freedom of religion.

Apart from the question of ultimate ends, the exclusive focus on religious beliefs/practices (and inclusion of non-mandatory religious practices) expressed by Justice Iacobucci in *Amselem*, demonstrates special treatment of freedom of religion. According to Richard Moon, by distinguishing religious beliefs/practices from secular or non religious-beliefs, a hierarchy of protections is fostered: as stated by the author, "[n]on-religious beliefs, however, do not generally receive the same protection from government interference or favouritism. Religion remains at the centre of the courts' understanding of the freedom […] Religious beliefs/practices are viewed as both more threatening and more vulnerable tha[n] secular

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encountered great opposition in its interpretation and its very nature as a political compromise. On the Preamble's questionable utility in the Charter era, the reader is referred to Lorne Sossin, "The "Supremacy of God", Human Dignity, and the *Charter of Rights and Freedoms*", (2003) 52 *U.N.B.L.J.* 227; Jonathon W. Penney and Robert J. Danay, "The Embarrassing Preamble? Understanding the "Supremacy of God" and the Charter", (2006) 39 *U.B.C. L. Rev.* 287.

[566] See *supra*, Chapter, section 3.2.1.

[567] Iain T. Benson came to this conclusion in his text entitled "There are No Secular "Unbelievers"" (2000) 7 *Centre Points*, reproduced in the PROTECTION OF CONSCIENCE PROJECT, <Issues in Depth: Ethical Commentary>, "There are No Secular Unbelievers", online: http://www.consciencelaws.org/Examining-Conscience-Ethical/Ethical10.html (site last accessed 29.04.2009).

beliefs/practices in the life of the community."[568] The value of the belief and thus the importance attributed to it varies according to whether it is of religious or secular leaning. This is not to say, therefore, that secular beliefs are not afforded protection; rather, it is calibrated meaning, according to its religious counterpart.

Despite this position, there is a shift in Richard Moon's approach to justification of religious adherence, since he signalled internal incoherence both before[569] and in light of[570] *Amselem.* Framed prior to *Amselem* as an uncertainty between membership to a particular community *or* as a contestable opinion, Moon later argued that religious adherence should be based on the dominant religious or secular values in the community. Subsequently justified by Moon because of the connection of the individual to a cultural community[571], a different stance on the protection of religious freedom is adopted by the majority in *Amselem*. Richard Moon suggested that the majority's view of religion as a cultural practice "fits awkwardly with Iacobucci's J.'s insistence that religion is a "function of personal autonomy and choice" and that a claimant under section 2(a) need only show that his or her spiritual belief is sincere."[572] Hence, the emphasis is no longer based on an individual's attachment to a community, but an individual's choice and autonomy within a society. By favouring individual autonomy over cultural identity to define religious commitment, the door to non-religious beliefs is effectively opened, according to Moon, since it becomes difficult to explain why non-religious beliefs, which are the product of individual choice or judgment, should not receive the same protection as religious beliefs/practices[573]. As such, the reasoning behind protecting religious freedoms because they are at once more threatening and more vulnerable

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[568] Moon, "Religious Commitment and Identity", *supra* note 382, 216 at footnote 32
[569] Moon, "Liberty, Neutrality and Inclusion", *supra* note 382, 573: "This ambiguity reflects a general uncertainty as to whether we should view religious adherence as a personal commitment or as a matter of identity (or socialized community membership), or whether we should see religious belief as contestable opinion/judgment or as outside the scope of reasonable debate."
[570] Moon, "Religious Commitment and Identity", *supra* note 382, 214-215.
[571] *Ibid*, 214.
[572] *Ibid*, 217-218.
[573] *Ibid*, 219. *A fortiori* at the same page: "Or, from the other direction, it is difficult to explain why freedom of religion should protect more than the individual's liberty to make and follow moral judgments – a liberty that may be limited when it interferes with the rights and interest of others."

starts to crumble with this new tension, jeopardising the religious stranglehold on morality[574] and opening the door to protection of non-religious beliefs. Positing a hierarchy of protections within the freedom of conscience and religion, on the one hand, and an opening for equality between protections, on the other hand, there is no choice but accept that on some level, it is impossible to dissociate these two concepts but also impossible not to protect them on a more or less equal terrain.

Bruce Ryder, in "State Neutrality and Religious Freedom", attempts to provide readers with a justification for the constitutional protection of some non-religious belief systems: "freedom of conscience, for the purposes of section 2(a), ought to embrace comprehensive non-religious belief systems that have the kinds of significance in the lives of believers analogous to the significance of religion in the lives of the devout."[575] Moreover, Justice Iacobucci's emphasis of personal choice in *Amselem* encourages the development of an "equally broad conception of freedom of conscience in the future", according to the author[576].

I consider that Bruce Ryder's approach fosters a contradiction of terms. On the one hand, freedom of conscience has to have the "significance" or intensity of belief that derives from freedom of religion. On the other, freedom of conscience is encouraged to develop in a broad manner, but once again, in a similar fashion to freedom of religion. Although Ryder's definitional attempt has merit, it falls slightly short of an independent definition. I believe, however, that by embracing a purely synonymous approach, the debate on freedom of conscience is belittled, stripping it of flexibility not afforded to freedom of religion.

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[574] Moon, "Religious Commitment and Identity", *supra* note 382, 219.

[575] Ryder, "State Neutrality", *supra* note 388, 193-194 and footnote 85: I remark that by rendering this definition comparable to that of "religion", as adopted by Supreme Court of the United States in conscientious objector cases such as *Seeger* and *Welsh*, Canadian courts are encouraged to adopt as broad an interpretation of conscience

[576] *Ibid*, 199. *A fortiori* at the same page : « His [Justice Iacobucci] opinion contains a strong endorsement of the idea that the courts should avoid as much as possible becoming arbiters of religious doctrine, another positive development from the point of view of state religious neutrality."

Perhaps the only author to actively divide freedom of conscience from freedom of religion is J. Kent Donlevy[577]. Nevertheless, despite the initial promise, his study of 'juridical conscience'[578] seems to muddle the line between freedom of conscience and religion and that of fundamental freedoms (which he calls a 'derivative right'[579]). He suggested that conscience under s. 7 of the *Charter* can be understood as an *interpretive principle* in relation to the *Charter*'s legal rights, rather than a substantive right[580]. Interestingly, Donlevy also explains that conscience can be understood as a "collective concept for Canadian values acting both as a shield (negative liberty) and a sword (positive liberty) for the individual."[581] Even though Donlevy readily admits that freedom of conscience under s. 2(a) of the *Charter* does not constitute a collective right[582], he seemingly posits that conscience has been offered a collective meaning under s. 7 of the *Charter* as an interpretive principle. He accomplishes this, however, in an uncertain manner, by employing such words as "perhaps" and "at least some"[583]; indeed, an element of conscience exists, though it resides, in my opinion, in the right of choice. In my view, he does not expand sufficiently on these 'collective legal rights' found in s. 7 of the *Charter* to substantiate his argument. Although certain reservations were expressed about Donlevy's methodology, I would be remiss to overlook his proffered definition of freedom of conscience:

> "Juridically, freedom of conscience is a fundamental right of all persons; it is expressly protected under section 2(a), but may be derived from section 7; it is defined as a belief conscientiously or strongly held; it is an individual right not a

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[577] Donlevy, "Catholic Schools and Freedom of Conscience", *supra* note 489.
[578] The author explains "juridical conscience" in Canada as being "intrinsically entwined with the concept of freedom and is perceived by the courts as a keystone for a free, democratic, pluralistic society. It is secular in nature and relies upon the history, norms, and values of Canadian society for its content and juridical interpretation which in turn underpins and legitimizes the authority of the modern democratic state." *Ibid*, 78.
[579] The author described finding freedom of conscience under section 7 of the *Charter* as a 'derivative right'. J.K. Donlevy explained that "[t]he significance of the *Big M Drug Mart* and *Morgentaler* cases are that the Court had defined freedom of conscience not as the collective right of a community but as an individual right, in accord with Dworkin's notion of rights, in that it was necessary to ensure a free, liberal democracy." [references omitted] *Ibid*, 72-73.
[580] *Ibid*, 77 [my emphasis].
[581] *Ibid*, 78.
[582] *Ibid*, 73, 77.
[583] *Ibid*, 77. Donlevy explained that "[i]t thus appears that conscience has, in at least some cases, perhaps under section 7 of the Charter, a collective meaning not as a fundamental freedom but rather as an interpretive principle in relation to the Charter's legal rights."

> collective right; it requires a cogent manifestation and clear indicia that such a belief is bona fide held by the individual; it is not based upon a philosophy or theology but arguably it may be so; its expression must be balanced against the fundamental rights and values of the Charter; and it is warranted as one of the, if not *the*, keystones to a free, democratic, pluralistic, democracy. The above is consistent with the idea that the Charter's rights and freedoms are interpreted by the courts by the *purposive method*, which takes into account the purpose and rationale of the freedom or right in question within the context of the Charter as a whole, the Canadian legal and political tradition, and the changing needs of Canadian society. Juridically, freedom of conscience is the sine qua non of a free, democratic, pluralistic, liberal society."[584]
>
> […]
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> "In sum, the juridical conscience in Canada is intrinsically entwined with the concept of freedom and is perceived by the courts as a keystone for a free, democratic, pluralistic society. It is secular in nature and relies upon the history, norms, and values of Canadian society for its content and juridical interpretation which in turn underpins and legitimizes the authority of the modern democratic state. Moreover, as a concept it is present in matters of extradition and equity and is used as a collective concept for Canadian values acting both as a shield (negative liberty) and a sword (positive liberty) for the individual."[585]

While it is acknowledged that conscience exists within the spheres of both sections 2(a) and 7 of the *Charter*, I believe that their purpose and protection vary greatly, since the former protects the *freedom* of conscience whereas the latter enables the *liberty* of conscience[586]. Resonating more loudly is the inherent need to clarify what is meant by freedom of conscience, as protected by the Charter as a fundamental freedom. While the legal literature on freedom of conscience has proposed certain elements of a solution, more reflection on this topic is needed.

2.1.3 Freedom of Conscience as Broader Than Freedom of Religion

Interpreting freedom of conscience as being *equivalent to* freedom of religion is an affirmation of both faith and reason and a denial of hierarchy. Demonstrating that freedom of conscience is capable of having distinct – yet equally important – content from freedom of religion implies that these freedoms could be understood as

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[584] Donlevy, "Catholic Schools and Freedom of Conscience", *supra* note 489, 76-77 [references omitted].
[585] *Ibid*, 78.
[586] See Chief Justice Lamer's comments on the different dimensions of "freedom" and "liberty" within the *Charter*: *Children's Aid Society, supra* note 200, ¶ 36-39 [my emphasis].

synonyms. Which raises the following question: could the sincerity of an individual's asserted religious beliefs as required by the majority in *Amselem*[587] apply *proprio motu* (of one's own accord) to conscientious beliefs? In this way, freedom of conscience and religion *really* become a "single integrated concept". The consequence of this approach, however, suggests that conscientious beliefs are ubiquitous to all claims, whether they are of religious or 'secular' in nature within the scope of freedom of conscience and religion.

Referring to freedom of conscience as being *broader* than freedom of religion might turn a few heads, elicit certain existential questions and perhaps generate outcry from others, since it challenges the tradition order of things. However, this reference to freedom of conscience as *broader than* freedom of religion permits us to give weight to both convictions of conscience and religion; the difference, however, lies in formulation of the initial right. Therefore, conceiving of conscience as *broader than* religion becomes a strategic position: religion is therefore but an aspect of freedom of conscience. This stance was brought to the forefront by the authors of the Bouchard-Taylor Report[588] as well as philosopher Jocelyn Maclure[589].

The Bouchard-Taylor Report makes it eminently clear that it is not attempting to deny standing to freedom of religion. Rather, "[t]he idea here is not to assert that freedom of religion has a moral or legal status inferior to freedom of conscience but that freedom of conscience belongs to a broader class or category of freedom of conscience, which includes all deep-seated convictions."[590] The overarching objective of these beliefs, whether religious or secular in nature, is that they give direction to their life and act as their moral compass. The denial of deep-seated

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[587] *Amselem*, *supra* note 3, ¶ 52: "the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings."

[588] As stated in Bouchard & Taylor, *supra* note 450, 144.

[589] In the interest of full disclosure, Jocelyn Maclure served as an expert analyst for the Secretariat of the Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles. See COMMISSION DE CONSULTATION SUR LES PRATIQUES D'ACCOMMODEMENTS RELIÉES AUX DIFFÉRENCES CULTURELLES, <Secretariat of the Commission>, online : http://www.accommodements.qc.ca/commission/secretariat-en.html (site last accessed 29.04.2009)

[590] Bouchard & Taylor, *supra* note 450, 144 at footnote 23.

convictions would therefore be detrimental to an individual's moral integrity. Therefore, the emphasis is placed on the function of the belief rather than its source. This approach to freedom of conscience does away with the official diktats of a church and places the importance on the role of the conviction in the life of the individual. The Bouchard-Taylor Report, more than anything else, calls for a recalibration of perspectives. While the debate over reasonable accommodations is far from over, the focus on "deep-seated convictions" implies a broadening of views, all the while dispelling further myths about the 'culture of disbelief'[591].

Rather than bring conscience 'up' to the plane of religion, or alternatively, dragging religion 'down' to the level of conscience, conjuring up negative perceptions of both religion and conscience, author Jocelyn Maclure proposes that the role that 'strong evaluations' play in the moral life of an individual be assessed[592]. The notion of 'strong evaluations' comes from Charles Taylor's philosophy and refers to "a language of evaluative distinctions in which different desires are described as noble or base, integrating or fragmenting, courageous or cowardly, clairvoyant or blind."[593] Put differently, "strong evaluation is concerned with the qualitative *worth* of different desires."[594] Applied to the obligation of accommodation, Maclure argues that the essential question is not whether a belief emanates from personal choice or circumstance but rather to evaluate the role that the belief plays in the moral life of the individual[595]. In this way, the evaluative distinction is not between religious and secular beliefs, but rather between 'strong evaluations' and personal preferences[596]. By insisting on the moral weight rather than the origin of the belief, I consider that

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[591] While I take no credit for this saying, I was not purposefully referring to author Stephen L. Carter's study of the role of religion in society (Stephen L. Carter *The Culture of Disbelief,* New York, Anchor Books, 1994).
[592] Jocelyn Maclure, « Convictions de conscience, responsabilité individuelle et équité: l'obligation d'accommodement est-elle équitable? » in Eid, Bosset, Milot & Lebel-Grenier, *supra* note 321, 327-350 **[Maclure, "Conviction de conscience"]**.
[593] Charles Taylor, "What is Human Agency?" in Charles Taylor, *Human Agency and Language* (Cambridge, Cambridge University Press, 1985), 19 **[Taylor, « Human Agency »]** as cited in Maclure, « Convictions de conscience» in Eid, Bosset, Milot & Lebel-Grenier, *supra* note 321, 340.
[594] Taylor, "Human Agency", *supra* note 593, 16.
[595] Maclure, « Convictions de conscience» in Eid, Bosset, Milot & Lebel-Grenier, *supra* note 321, 340.
[596] *Ibid*, 344.

Maclure brings religion and conscience onto the same playing field because they belong to the same normative category[597] and are integral to the moral life of an individual[598]. While Maclure admits that this re-evaluation of the obligation of accommodation might cause a proliferation[599] as well as an instrumentalisation[600] of requests, it also has the potential to contribute most significantly to the development of a just and stable moral diversity which characterises contemporary liberal democracies[601]. It would probably, should it be adopted, imply a "tightening" of the conditions of reasonable accommodation. While the vulnerabilities of this approach are not to be underestimated, this approach to convictions of conscience encourages a non-hierarchical view of beliefs, emphasising the *qualitative* contribution of the belief.

3. The Future of Freedom of Conscience

Like most matters in law, freedom of conscience remains impregnated by its surroundings. Our brief survey of freedom of conscience in Canadian case law and legal literature leads to diverging interpretations. While the study of freedom of conscience in Canadian legal literature has led us to believe that its strength is derived from its interdependence with freedom of religion rather than afforded independent protection as a "secular" concept. It has become evident that distinguishing the freedoms of conscience and religion is not an exercise that has been particularly well envisaged or accomplished by authors and case law alike.

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[597] Jocelyn Maclure reminds the reader that freedom of religion is a sub-category of freedom of conscience, which is in and of itself one of the fundamental freedoms that liberal regimes look to protect. As he explains, «[l]'idée, comme nous le verrons plus loin, n'est pas de soutenir que les croyances religieuses ne se distinguent en rien, d'un point de vue sémantique, des convictions de conscience séculières, mais bien qu'elles appartiennent à la même catégorie normative. » : Maclure, « Convictions de conscience» in Eid, Bosset, Milot & Lebel-Grenier, *supra* note 321, 342-343 (footnote 24).
[598] *Ibid*, 344-345.
[599] *Ibid*, 344-347.
[600] *Ibid*, 347-349. The author explains the 'instrumentalisation' of beliefs could corrupt existing philosophical or religious systems by arguing that their belief is not flexible. Jocelyn Maclure reminds the reader that these rights are not absolute; a further way in which to counter the instrumentalisation of requests is through the existing concept of "undue hardship". For an account of instrumentalisation of requests, see Gaudreault-DesBiens, « Quelques angles morts », *supra* note 71.
[601] *Ibid*, 350.

Within the case law, freedom of conscience has been conceived either as related to personal autonomy and free choice – thus drawing on liberal theory – or as a protection of secular beliefs. Very rarely has freedom of conscience been afforded independent content in the case law; as such, *Maurice* represents a 'blip' on the constitutional radar. Nevertheless, by conceiving of freedom of conscience on a scale with freedom of religion within the legal literature, *all* authors acknowledge some role to freedom of conscience in Canada. Perceived as *lesser than* freedom of religion, freedom of conscience remains a footnote in the discourse on freedom of religion; considered as *equivalent to* freedom of religion, freedom of conscience is allowed to grow as an independent, yet staunchly interdependent, concept; lastly, understanding freedom of conscience as *broader than* freedom of religion, the basis of the claim loses its importance in favour of the role it plays in the individual's life. While not aware of any cases having employed this broadest conception of freedom of conscience, I believe that this could herald a new era in claims of convictions under freedom of conscience and religion. Drawing on Archie Bahm's aforementioned scale of theories of conscience, I also accept that at a fundamental level, the concepts (and thus rights) of freedom of conscience and freedom of religion are intertwined. In a Bahmian sense, I contend that there is an interdependence of organistic theories of conscience in Canada. The most favourable interpretation of freedom of conscience can be found, in my view, in the interpretation of freedom of conscience as *equivalent to* that of freedom of religion within the Canadian constitutional context. While this might 'shock the conscience'[602] of some, I consider that it will assuage the conscience of others. In a way, a more level playing field is suggested, not drawing on historical conclusions, but rather on current evaluations of individuals' beliefs in society. In the years to come, the quest for the Holy Grail of freedom of conscience will no doubt continue, religious undertones included.

[602] This expression is employed on a regular basis in Canadian case law, especially when situations can be considered as unjust or oppressive, such as that of extradition or surrender; see Donlevy, "Catholic Schools and Freedom of Conscience", *supra* note 489, at 78, who refers to extradition and equity.

A mere look at some statistical facts bolsters our conclusion. Indeed, a general change in religious geography has been observed in Canada in recent years. Juxtaposed with this change in the religious landscape is an increase in the share of the population with "no religion". According to the Canadian Centre for Justice (Statistics Profile Series), "[i]n 1999, 16% of Canadians said they had no religious affiliation, up from 13% in 1991, and 7% in both 1981 and 1971."[603] Anecdotally, I point out that prior to the 1971 census, all persons were assumed to have a religious affiliation in Canada[604]. While it is beyond my objective to dissect these findings, the "nones" seem to represent a non-negligible segment of the population in Canada. Though they do not represent a unified front beyond their a-religious status, the legal mobilisation of this segment of the population will likely be significant as well as of deep interest to the greater legal community.

Examining freedom of conscience offers a view that is not religious and serves as a new point of reference for understanding the relationship between the individual and the State. This is not to say, however, that the study on freedom of conscience has been without weaknesses. Perhaps its most obvious flaw is revealed in the case law on freedom of conscience, which presents a seemingly incomplete portrait of this fundamental freedom. Within the Canadian constitutional context, freedom of conscience is perceived alternatively as a broad-based concept or the right of choice comprised in liberal theory. While freedom of conscience has received

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[603] STATISTICS CANADA, CANADIAN CENTRE FOR JUSTICE STATISTICS PROFILE SERIES, *Religious Groups in Canada* (June 14 2001), Cat. No. 85F0033MIE, online: http://www.statcan.gc.ca/pub/85f0033m/85f0033m2001007-eng.pdf (site last accessed 30.04.2009), p. 3. According to Statistics Canada, the total population of 15 years and over who worked since January 1, 2000 by language used most often at work identifying themselves as "No Religion" was 2 863 220: STATISTICS CANADA, "Selected Cultural and Labour Force Characteristics (58), Selected Religions (35A), Age Groups (5A) and Sex (3) for Population 15 Years and Over, for Canada, Provinces, Territories and Census Metropolitan Areas, 2001 Census - 20% Sample Data", Ottawa, March 25 2004. 2001 Census of Canada. Cat. No. 97F0022XCB2001042, online: http://www12.statcan.ca/english/census01/products/standard/themes/RetrieveProductTable.cfm?Temporal=2001&PID=67773&APATH=3&GID=517770&METH=1&PTYPE=55496&THEME=56&FOCUS=0&AID=0&PLACENAME=0&PROVINCE=0&SEARCH=0&GC=0&GK=0&VID=0&VNAMEE=&VNAMEF=&FL=0&RL=0&FREE=0 (site last accessed 30.04.2009).

[604] *Ibid*, 3.

a certain degree of protection and well as recognition under the *Canadian Charter of Rights and Freedoms*; *Amselem* has also afforded a wider interpretation to both religion and conscience in Canada. The consequences of this approach have not yet been determined; however, there has been an unquestionable openness and respect of subjective beliefs, both religious and secular in nature.

Can freedom of religion ever be considered anything but an aspect of freedom of conscience? In light of the study of Canadian case law and legal literature, such an assertion cannot be endorsed. On the one hand, the relation between freedom of religion and freedom of conscience must be better understood and conceptualised within the discourse of constitutionalism and the 'political culture of liberalism'[605]. On the other hand, convictions of conscience, whether religious or non-religious in nature, need to be better defined within the discourse of freedom of conscience and religion and better contextualised within the greater discourse of rights. In an effort to better grasp the interconnection between freedom of conscience and freedom of religion in Canada, the American and European experiences of freedom of conscience will be examined in the following chapter.

[605] See Berger, "Law's Religion", *supra* note 20; Peter D. Lauwers, "Religion and the Ambiguities of Liberal Pluralism: A Canadian Perspective (2007) 37 *Sup. Ct. L. Rev.* (2d) 1.

Chapter IV. Freedom of Conscience in Comparative Constitutional Law: American and European Perspectives

Introduction

As observed in the third chapter, freedom of conscience has yet to find its place in the Canadian constitutional setting. Its relationship with freedom of religion remains in flux, given recent overtures in *Amselem* and even *Hutterian Brethren of Wilson Colony*[606]. Within the Canadian case law on freedom of conscience, I interpreted freedom of conscience alternatively as the absence of autonomy of freedom of conscience or as related to free choice and personal autonomy. In my analysis of the Canadian legal literature, however, freedom of conscience was addressed as if on a scale, namely as *lesser than*, *equivalent to* and *broader than* freedom of religion. In an effort to present a more complete portrait of freedom of conscience, I have elected to examine freedom of conscience in a comparative setting, namely through the American and European Court of Human Rights perspectives. As observed in the Canadian study on freedom of conscience, it is difficult to dissociate it from freedom of religion; by not proceeding to a comparative analysis in this chapter, some may think that the analysis will be flawed or lacking. However, as I will argue, freedom of religion is undeniably present in the discourse on freedom of conscience: within the American context, freedom of conscience is only afforded a role if it is found to be synonymous with freedom of religion whereas the European context leads us to envision of freedom of conscience as protected amidst the freedoms of thought and religion. This, coupled with the theoretical models of religion in law, as addressed in the first Chapter, provides a complete framework to my study.

In a first part, the case law of freedom of conscience will be examined in the United States (1.1) and through the decisions of the European Commission and Court of Human Rights (1.2). In a second part, the legal literature related to freedom of conscience will be analysed, through the same perspectives, that is to say the United States (2.1) and in Europe (2.2.). A preliminary conclusion on the state of freedom of conscience will reveal that the right to freedom of religion is intensely

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[606] See discussion, *supra*.

protected in the American context, forcing freedom of conscience to find a voice elsewhere in the constitutional setting; within the European context, freedom of conscience has been interpreted as possessing its own voice, but rarely receives individual judicial attention (3). In both cases, it remains apparent that freedom of conscience is an underdeveloped concept as well as protection in constitutional law.

1. The Comparative Case Law of Freedom of Conscience: American and European Court of Human Rights' Perspectives

1.1 The American Case Law on Freedom of Conscience

Two preliminary remarks must be made before undertaking the case law analysis on freedom of conscience on the American constitutional condition. The use of "condition", however, is not by accident: rather, it denotes a state of being. In fact, I am pointing at this sense of tension, this "play in the joints"[607], between the Free Exercise and Anti-Establishment Clauses.

Firstly, freedom of conscience is not an expressly protected right under the Constitution. The First Amendment of the *Bill of Rights* states that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[608]

Although rights of conscience had been considered in earlier drafts of the Constitution[609], they were ultimately excluded. Consequently, the omission of conscience has been interpreted by some as an admission of the exclusive

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[607] This notion of « play in the joints » was explained by Chief Justice Burger, in the opinion of the Court in *Walz* v. *Tax Comm'n of City of New York,* 397 U.S. 664, 669 (1970): "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, **there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference**." [our emphasis]

[608] U.S. CONST., amend. I.

[609] Phillip E. Hammond, "Church, State, and the Dilemma of Conscience" (1995) 37 *J. Church & State* 555, 562-563.

protection of religion[610]; this point will be examined further on. Despite or in light of this, however, conscience has retained a place of interest in the American legal psyche, perhaps in an effort to reconcile the puzzle of Free Exercise and Establishment clauses[611]. As noted by author Andrew Koppelman, "[i]t is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection."[612] Conscience offers a way out of this terminological tangle, according to Koppelman, "by describing the basis of free exercise in a way that specifies only the internal psychology of the person exempted, without endorsing any claims about religious truth."[613] In a way, then, conscience offers fluid neutrality without the cumbersome labels usually associated to this concept.

An example of conscience on the lateral constitutional move toward other clauses of the Constitution is *Locke* v. *Davey*[614]. At issue in this case was a scholarship programme established by the State of Washington; in accordance with the State constitution[615], the scholarship could not be used to pursue theological

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[610] Peñalver, "Note", *supra* note 73, 803; Michael W. McConnell, "The Origins and the Historical Understanding of Free Exercise of Religion", (1990) 103 *Harv. L. Rev.* 1410, 1495 **[McConnell, "Origins"]**; Steven D. Smith, "What Does Religion have to do with Freedom of Conscience?", (2005) 76 *U. Colo. L. Rev.* 911, 913 **[Smith, "What does Religion"]**.

[611] See Andrew Koppelman, "Conscience, Volitional Necessity, and Religion Exemptions", (2006) *bepress Legal Series*, Working Paper 1761, 5-8, http://law.bepress.com/expresso/eps/1761 (site last consulted 15.09.2008) **[Koppelman, Volitional Necessity"]**.

[612] *Ibid*, 6. The author continues by explaining the "free exercise/establishment dilemma" at the same page: "Some justices and many commentators have therefore regarded the First Amendment as in tension with itself."

[613] *Ibid*, 7-8.

[614] *Locke* v. *Davey*, 540 U.S. 712, 722 (2004) **[*Locke*]**, as cited in Smith, "What does Religion", *supra* note 610, 913: "An while the Court as a whole has not fully embraced this position [as advocated by Justice Souter, when invoking freedom of conscience in school aid cases to argue that it is unconstitutional to burden the consciences of taxpayers who object to spending public money in ways that have a legitimate secular function but may also have the effect of subsidizing religious instruction], the Court *has* indicated that protecting the conscience of such tax-payers is at least a legitimate and important state interest – one that can serve to justify what might otherwise be anti-religious discrimination." [emphasis in original]

[615] Wash. CONST., Art. I, §11: "Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No

devotional studies. Joshua Davey, the respondent and a recipient of the scholarship programme, chose to enrol in a double major of devotional pastoral studies and business management and administration. The respondent was unable to use the scholarship due to his choice of majors and argued that this constituted an infringement of his rights to free exercise and non-establishment, as protected by the Constitution's First Amendment. Chief Justice Renquist, writing for the majority, held that this case involved that "play in the joints": "[i]n other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[616] Distinguishing from the facially neutral rule about religion established in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*[617], the Court credits the State of Washington with having adopted a much milder "disfavour of religion"[618] and ultimately found that there is no suggestion on the part of history, the Washington State Constitution or the operation of the scholarship programme that could suggest *animus* toward religion[619]. Therefore, the State's interest in protecting taxpayers'

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public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

[616] *Locke*, *supra* note 614, 718-719.

[617] *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,* 508 U.S. 520 (1993) **[*Church of Lukumi*]**. At issue in the case at bar was the establishment of a church practising the rites associated with the religion of Santeria, namely animal sacrifice, in the Florida town of Hialeah. In an effort to 'curb' such practices, the city passed a number of resolutions and ordinances aimed at protecting the unnecessary cruelty or killing of animals. The petititionners for the Church argued that their rights to Free Exercise had consequently been violated. Justice Kennedy, delivering the opinion for the Court, concluded that the resolutions and ordinances passed were contrary to the Free Exercise clause. According to Justice Kennedy, "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words "sacrifice" and "ritual," words with strong religious connotations. […] **Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination**. The Clause "forbids subtle departures from neutrality," and "covert suppression of particular religious beliefs,". Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.": *Church of Lukumi, supra*, 533-534. [my emphasis; references omitted]

[618] *Locke*, *supra* note 614, 720. As simply put by Chief Justice Burger at page 721, "[t]he State has merely chosen not to fund a distinct category of instruction." However, at *Locke*, 724, the Chief Justice also held that "[f]ar from evincing the hostility toward religion which was manifest in *Lukumi,* we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited." [references omitted]

[619] *Ibid*, 725.

conscience could justify the exclusion of theology students' eligibility from state-sponsored scholarships.

Secondly, although the United States does not define religion *per se*, the definition is derived from conscientious objector cases[620]. Thus, even though these cases should, *a priori*, allow a better understanding of conscience in the American setting, I contend that this categorisation of explaining religion by what it is not – since the State cannot address or define directly what is religion because that would be contrary to the Anti-Establishment Clause – further exacerbates the relationship between the freedoms of religion and conscience.

Following these preliminary remarks, I now turn to the American case law on freedom of conscience.

Although 'conscience' has been addressed most thoroughly through the lens of conscientious objection in the United States, it has still evaded proper definition. Conscience has been employed, therefore, to define what religion isn't rather than what constitutes conscience; this was seen in the cases of *Seeger* and *Welsh*. At issue in *Seeger* was the interpretation of Section 6(j) of the *Universal Military Training and Service Act*, which created an exception for conscientious objectors on the basis of their "religious training and belief". The test established within the meaning of the exemption in Section 6(j) of the *Universal Military Training and Service Act* was the following: "whether it is a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption"[621]. This launched a two-pronged constitutional attack under the Establishment clause and the Free Exercise clause. Thus the following questions were put forth to the Supreme Court: "(1) the section does not exempt nonreligious conscientious objectors; and (2) it discriminates between different forms of religious expression in violation of the Due Process Clause of the

[620] *Seeger*, *supra* note 64; *Welsh*, *supra* note 65. Authors agree that *Seeger* and *Welsh* serve as the foundation for the definition of religion: Ahdar & Leigh, *supra* note 4, 115-117 and Koppelman, "Volitional Necessity", *supra* note 611, 8-12.
[621] *Seeger*, *supra* note 64, 173-180.

Fifth Amendment"[622]. More precisely, the question revolved around the interpretation of "Supreme Being" in the before mentioned Section 6(j) of the *Universal Military Training and Service Act.* Although Seeger based his objection on the "*belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed*"[623]*,* the Supreme Court understood Seeger as having professed "religious belief" and "religious faith"[624].

Factually similar to *Seeger*, the Supreme Court in *Welsh* held that although the applicant's viewpoint constituted a set of beliefs, they were not considered religious enough to qualify for the exemption provided under Section 6(j) of the *Universal Military Training and Service Act*. The majority in *Welsh* developed a two-pronged test to discern if an objection warranted an accommodation in law: "(1) that this opposition stem[s] from the [objector]'s moral, ethical, or religious beliefs about what is right and what is wrong and (2) that these beliefs be held with the strength of traditional religious conviction"[625]. Although Justice Harlan was concurring, his emphasis was placed on the *intensity* of the belief[626], rather than what is believed to be right or wrong, irrespective of the *foundation* of the belief. The Supreme Court therefore closed the constitutional door on claims of conscience that could not be defined as analogous to that of religious convictions. This was affirmed in *Wisconsin* v. *Yoder*, which clearly stated that philosophical and personal beliefs, whatever their sincerity, were not protected by the Free Exercise clause[627].

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[622] *Seeger*, *supra* note 64, 165.
[623] *Ibid*, 166.
[624] *Ibid*, 187.
[625] *Welsh*, *supra* note 65, 340.
[626] *Ibid*, 358. Although Justice Harlan was concurring, he thought that the removal of the theistic requirement of *Universal Military Training and Service Act* was "a remarkable feat of judicial surgery": *Welsh*, *supra* note 65, 351 as cited in Koppelman, "Volitional Necessity", *supra* note 583, 12.
[627] *Yoder*, *supra* note 66, 215-216: "[i]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."

In conclusion, it can be said that the American position equates conscience with religion, if the intensity of the belief can be rendered analogous to a religious belief, therein dissolving the need for separate protection of non-religious beliefs. If conscience is interpreted as a 'philosophical belief', no protection is offered. In a similar way, if a religion cannot be recognised because it does not fit the pre-ordained function of religion as ascertained by the Free Exercise and Establishment clauses, how can analogous nonreligious beliefs be protected[628]? A form of tautological thinking springs out from this response to conscience; it becomes inherently clear that within the framework of the Free Exercise clause, religion remains the first liberty[629]. In a way, the United States remains "one nation under God"…

1.2 The Case Law on Freedom of Conscience under the European Court of Human Rights

> "Where shall the line be drawn between philosophical convictions whose freedom should be properly respected and the convictions of cranks and faddists?"[630]

Although the question above was raised over fifty years ago, the contours of conscience remain fluid. However, the European perspective provides a distinct interpretation with respect to the protection of conscience due to the international instruments for the protection of human rights on which all EU members are bound[631]. It has been said that the text of Article 9 of the *ECHR* was derived "almost

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[628] In this way, religions such as Buddhism or Hinduism, whose institutional structures differ from monotheistic religions, could suffer. Moreover, if philosophical beliefs mirror the aforementioned religions, it might be difficult to get their beliefs recognised and protected under the Constitution.

[629] See *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707 at 713 (1981) **[*Thomas*]**, where the Supreme Court stated that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection the exercise of religion." On that subject, see Michael W. McConnell, "Why is Religious Liberty the First Freedom?", (1999-2000) 21 *Cardozo L. Rev*. 1243 **[McConnell, "First Freedom"]**.

[630] A.H. Robertson, "The European Convention of Human Rights: Recent Developments", (1951) 28 *Brit. Y.B. Int'l L.* 359 at 362, as cited in Malcolm D. Evans, *Religious Liberty and international law in Europe* (Cambridge, Cambridge University Press, 1997), 280.

[631] All EU members are bound by the *European Convention on Human Rights*, 213 U.N.T.S. 221at 223 **[*ECHR*]**, the *International Covenant on Economic, Social and Cultural Rights,* G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. **[*ICESC*]**, the *International Covenant on Civil and Political Rights,* (1976) R.T.N.U. 171 **[*ICCPR*]** and the *Convention on the Elimination of All*

verbatim"[632] from Article 18 of the *ICCPR*[633]. While the right of freedom of conscience was recognised by the *ICCPR*, the right of conscientious objection was addressed by the Human Rights Committee (HRC)[634]. In its *General Comment No. 22*, the HRC stated that "[t]he Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use legal force may seriously conflict with the freedom of conscience and the rights to manifest one's religion or belief."[635] More

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Forms of Discrimination Against Women **[*CEDAW*]**: see E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, *Opinion No. 4-2005: The Right to Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See,* CFR-CDF.Opinion 4-2005.doc, http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf (site last accessed 24.04.2009), p. 15

[632] According to author T. Jeremy Gunn, "Adjudicating Rights of Conscience Under the European Convention on Human Rights" in J. D. Van Der Vyer and John Witte, eds., *Religious Human Rights in a Global Perspective* (The Hague, Martinus Nijhoff Publishers, 1996), 305 at 308.

[633] Article 18 ICCPR, *supra* note 631, states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[634] Article 4(3)(b) *ECHR, supra* note 631 also addresses the "conscientious objector", which provides an option if no replacement service is offered, but is not enforceable and thus does not constitute an absolute right: "4(3) For the purpose of this article the term 'forced or compulsory labour' shall not include

[…]

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service."

[635] OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (art. 18), (48th Sess. 1993), in Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies U.N. Doc HRI/GEN/1/Rev.7>, http://www.unhchr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15 (site last accessed 24. 04.2009), ¶ 11. Although the adoption of an additional protocol amending article 4(3)(b) and article 9 of the ECHR has been proposed (known as Recommendation 1518 (2001)), the Committee of Ministers, in a response dated March 1st 2002, considers that it would actually be preferable to concentrate efforts on the implementation of the 1987 Recommendation (known as Recommendation No. R(87) 8 of the Committee of Ministers to member states regarding conscientious objection to compulsory military service, adopted by

recently, the E.U. Network of Independent Experts on Fundamental Rights distinguished between the expressed position stated in the *General Comment No. 22* and the general right stated in the drafting process by the HRC[636]. However this same network of independent experts commenced their analysis on the right to religious conscientious objection by recalling that it "should be seen as one dimension of the right to freedom of thought, conscience and religious recognized both under Article 9 of the European Convention on Human Rights and under Article 18 of the International Covenant on Civil and Political Rights."[637] While the right of conscientious objection has been addressed by certain international and European institutions[638], it will become clear that the European Commission and Court of Human Rights have not reached a similar conclusion on this issue.

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the Committee of Ministers on 9 April 1987 at the 406th meeting of the Ministers' Deputies): see COUNCIL OF EUROPE, Parliamentary Assembly, "Exercice du droit à l'objection de conscience au serrvice militaire dans les États members du Conseil de l'Europe Recommandation 1518 (2001)", Doc. 9379 (adopted at the 785th meeting of Ministers' Deputies, 26-27 February 2002), http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc02/FDOC9379.htm> (site last accessed 24.04.2009). The Council of Europe also regards Recommendation No. R (87) 8 as setting out the "basic minimum principles": see Directorate General of Human Rights, COUNCIL OF EUROPE, *Conscientious Objection to Compulsory Military Service*, Strasbourg, 2007, available online: http://www.coe.int/t/e/human_rights/objcone.pdf (site last accessed 26.04.2009), p. 7. Finally, the European Union urged "all countries concerned to recognise the rights of conscientious objectors" at the OSCE Human Dimension Implementation Meeting 2006.": EU Statement for Working Session 13: Fundamental Freedoms II, OSCE Human Dimension Implementation Meeting 2006 (10 October 2006, Warsaw) HDIM.DEL/412/06 (10 October 2006) 2 as cited in Hitomi Takemura, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* (Dusseldorf, Springer-Verlag, 2008), 95

[636] E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, *supra* note 631, 16: "Article 18 ICCPR includes a more general right to religious conscientious objection."

[637] *Ibid*, 15.

[638] Certain contexts, such as that of health care and the right of conscientious objection, require a compromise between conscientious objection and the patient's right to health care access. Adriana Lamačková, in *Pichon and Sajous v. France: Implications for Slovakia*, proposed to examine the issue of conscientious objection invoked by pharmacists and its impact on women's access to reproductive and sexual health care services and provided an excellent overview of the recognition of conscientious objection in international and European instruments (see esp. pages 10-23). She argued that a fair balance must be struck between a right to conscientious objection and other affected human rights and freedoms, since "restriction upon the exercise of conscientious objection in the health care field is justified by the state's obligation to ensure effective enjoyment of women's rights clustered around the reproductive interests.": see Adriana Lamačková, *Pichon and Sajous v. France: Implications for Slovakia*", LL.M., Graduate Department for the Faculty of Law, University of Toronto, 2006, 88

As previously discussed, article 9 of the *ECHR* is comprised of two paragraphs, the first stating the protections of thought, conscience and religion, while the second asserts the limits of manifesting one's beliefs and religion. As a result, the freedom of conscience has been labelled a protected right, but the same cannot be said about its manifestation. I will examine the jurisprudence in order to better understand the place of conscience in the *ECHR*. I begin with three preliminary remarks that illustrate the scope, standing and consequences of invoking claims of conscience.

Firstly, in *Kokkinakis* v. *Greece*[639], a Jehovah's Witness couple was arrested for proselytism after engaging the wife of a cantor at the local Greek Orthodox Church in a discussion. At the level of the ECtHR, Mr. Kokkinakis considered that his conviction for proselytism was contrary to his rights to freedom of expression and freedom of thought, conscience and religion as protected under the *ECHR*[640]. The majority of the Court explained Article 9 *ECHR* in the following manner:

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[639] *Kokkinakis, supra* note 113.

[640] I reproduce the sections of the *ECHR*, as invoked by M. Kokkinakis before the European Commission on Human Rights:

Article 7. No punishment without law
1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 9. Freedom of thought, conscience and religion
1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10. Freedom of expression
1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> "freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. **It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned**. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions. According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9, would be likely to remain a dead letter."[641]

While the ECtHR majority found that there was a breach of Article 9, judges Pettiti (partly concurring), Martens (partly dissenting)[642] and judge Valticos (dissenting)[643] expressed their opinions differently. In his partially concurring opinion, Judge Pettiti criticises the majority of the Court on two levels. First, Judge Pettiti eschewed the case-by-case approach seemingly favoured by the majority, and stated that "what is in issue is the very principle of the punishment and it is not the European Court's

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2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the
protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 14. Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[641] *Kokkinakis*, *supra* note 113, ¶31 [my emphasis].
[642] Judge Martens was of the opinion that the majority of the Court touched only briefly on the crux of the case. According to Judge Martens (*Kokkinakis*, *supra* note 19, ¶ 13), Article 9 does not allow member States to make it a criminal offence to attempt to induce somebody to change his religion. This view is different from that of the majority opinion (see *ibid*, ¶ 40-42 and 46 of the main opinion).
[643] After reviewing certain surrounding issues to the case, Judge Valticos concludes that the European Convention on Human Rights has not been breached.

function to rule on the degree of severity of sentences in domestic law"[644]. The expression of "proselytism that is not respectable" should have been sufficient to demonstrate the violation of article 9 ECHR, according to Judge Pettiti[645]. Flowing from the first criticism, the reasoning employed by the majority with respect to the breadth of Article 9 ECHR was severely questioned: given the 'particular importance' of *Kokkinakis*, the majority should have made more of an effort to define "proselytism" and "non-religious beliefs"[646]. This point has been echoed loudly by critics as well[647]. Judge Petitti's dissection of freedom of religion and conscience illustrate that value-laden judgments or opinions should be avoided at all costs[648]. He also cautioned against using interdisciplinary documentation such as the rather distant (if not to say outdated) 1956 World Council of Churches report[649], since the form of words used, namely "Christian witness" and "improper proselytism", generate black and white judgments on issues that are predominantly grey. Although I agree that using material drawn from other sources can be regarded as a hazard, I believe that if employed properly – namely in a comparative fashion – other areas of study could bring much-needed context to legal concepts.

Although *Kokkinakis* has had a lasting legacy with respect to the foundations of a democratic society, it remains clear that the pull between individual and society had not been resolved definitively. Nevertheless, the rights of the religious and the non-religious (and thus belief and non-belief) were acknowledged by the European

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[644] *Kokkinakis*, *supra* note 113, 21

[645] Judge Pettiti, at page 22 of *Kokkinakis*, asks "whether the very principle of applying a criminal statute to proselytism is compatible with Article 9 (art. 9) of the Convention."

[646] *Ibid*, 23: « The reasoning could also have better reflected the fact that Article 9 (art. 9) applies also to non-religious philosophical beliefs and that the application of it must protect people from abuses by certain sects; but here it is for the States to legislate so that any deviation leading to attempts at brainwashing are regulated by the ordinary law. Non-criminal proselytism remains the main expression of freedom of religion. Attempting to make converts is not in itself an attack on the freedom and beliefs of others or an infringement of their rights. »

[647] As discussed *supra.*

[648] *Kokkinakis*, *supra* note 113, 22: « Freedom of religion and conscience certainly entails accepting proselytism, **even where it is "not respectable".** Believers and agnostic philosophers have a right to expound their beliefs, to try to get other people to share them and even to try to convert those whom they are addressing. The only limits on the exercise of this right are those dictated by respect for the rights of others where there is an attempt to coerce the person into consenting or to use manipulative techniques. » [my emphasis]

[649] *Ibid*, 25.

Court on Human Rights. It is interesting to note that the formulation of freedom of thought, conscience and religion given by the ECtHR in *Kokkinakis* defines the religious dimension of this freedom as "vital elements"[650] whereas the non-religious dimension – which they refer to as the atheists, agnostics, sceptics and the unconcerned – is seen as a "precious asset"[651]. The terms are not equivalent, I believe, since the former refers to a *necessary* component whereas the latter points more to a *resource or advantage*. In this way, the ECtHR distinguished between what is *essential* and what is *helpful*, but *superfluous*. Furthermore, the expression used to explain the religious dimension is redundant in nature and the term employed for the non-religious dimension connotes a lesser status in our view. Finally, the interweaving of pluralism and democracy has been recognised as a point of contention amongst authors[652] and has generated further questions about the relationship between these two founding concepts.

Secondly, the European Commission on Human Rights held in *Verein* "*Kontakt-Information Therapie" and Hagen v. Austria* that unlike freedom of religion, claims of breach of conscience can only be asserted by individuals[653]. Therefore, freedom of conscience, in the supranational setting that is the Council of Europe, has been acknowledged as an individual right, both in terms of who can argue this right as well as who it aims to protect.

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[650] "Element" was defined as follows by the Merriam-Webster as "2. a constituent part: as **a** *plural* **:** the simplest principles of a subject of study **:** RUDIMENTS **b** (1)**:** a part of a geometric magnitude <an infinitesimal *element* of volume> (2)**:** a generator of a geometric figure ; *also* **:** a line or line segment contained in the surface of a cone or cylinder (3)**:** a basic member of a mathematical or logical class or set (4)**:** one of the individual entries in a mathematical matrix or determinant **c:** a distinct group within a larger group or community <the criminal *element* in the city> d **(1)**: **one of the necessary data or values on which calculations or conclusions are based (2)**: **one of the factors determining the outcome of a process** e: **any of the fundamental substances that consist of atoms of only one kind and that singly or in combination constitute all matter f:** a distinct part of a composite device **g:** a subdivision of a military unit": *Merriam-Webster Online Dictionary.* Retrieved February 6, 2009 from http://www.merriam-webster.com/dictionary/element [our emphasis]

[651] The Merriam-Webster dictionary defines "asset" as "2. Avantage, Ressource < his wit is his chief asset >; 4. something that is useful in an effort to foil or defeat an enemy." (asset. (2009). In *Merriam-Webster Online Dictionary*., *supra,* Retrieved February 6, 2009, from http://www.merriam-webster.com/dictionary/asset)

[652] For example, see Edge, "Current Problems", *supra* note 110, 49; Evans, *supra* note 77, 200-201.

[653] *Verein* "*Kontakt-Information Therapie" and Hagen v. Austria,* decision of October 12th 1998, App. No. 11921/96, D.R., no. 85, p. 29 **[*Kontakt-Information Therapie*]**.

Finally, the European Court on Human Rights recognised that invoking conscience to protect a fledgling minority group cannot be justified as being "necessary in a democratic society"[654]. At issue in *Sidiropoulos and others* v. *Greece*[655] was the formation of a non-profit organisation known as the "Home of Macedonian Civilization" by "Macedonians" who possessed a "Macedonian national consciousness", their second objective being the protection of Macedonian culture and heritage. It should be noted, however, that the members of the embryonic association were born in what is considered Greece (and thus would be considered Greek nationals). The association failed to register its name, even though appropriate procedure had been followed. The Florina Court of First Instance opined that the second objective, namely the protection of Macedonian culture and heritage, was not the true objective but rather "the promotion of the idea that there is a Macedonian minority in Greece, which is contrary to the country's national interest and consequently contrary to law."[656] After appeals in the national courts, the applicants applied to the European Commission on Human Rights, alleging violations of Articles 6, 9, 10, 11 and 14 of the *ECHR*. The European Commission on Human Rights examined the case under Article 11 *ECHR*, which provides the right to freedom of assembly and association, and found that the intervention by the State could not be justified as being "necessary in a democratic society"[657]; it became unnecessary to deal with the other articles of the *ECHR*.

As a conclusion to the preliminary remarks on Article 9 of the *ECHR*, "freedom of conscience" has been recognised by the European Commission and the Court of Human Rights as protecting the beliefs of the "atheists, agnostics, sceptics and the unconcerned"[658], thus confirming that freedom of thought, conscience and religion protects both rights of the religious and the nonreligious. Another determining factor is that unlike freedom of religion, freedom of conscience can only be invoked by individuals. Finally, the simple act of invoking "conscience" is not

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[654] *Sidiropoulos and others* v. *Greece*, decision of July 10th 1998, App. No. 26695/95, Reports 1998-IV **[*Sidiropoulos*]**, ¶ 33-41, 47. See also Renucci, *supra* note 111, ¶ 154 (pages 196-197).
[655] *Sidiropoulous, supra.*
[656] *Ibid*, ¶ 10.
[657] *Kokkinakis*, *supra* note 113, ¶ 33-41, 47.
[658] *Ibid*, ¶ 31.

enough to engage its protection before the Courts. Nevertheless, the twin pillars extolled in *Kokkinakis* – pluralism and democratic society – seem to be at odds rather than in harmony with each other, which can be attributed to the use of the "margin of appreciation"[659].

In order to fully appreciate the scope and standing of claims of freedom of conscience in the European Union case law, one must return to its more humble beginnings. Non-religious rights were recognised far before *Kokkinakis*; pacifism was acknowledged as one such right in *Arrowsmith* v. *United Kingdom*[660] but its manifestation was not. Pat Arrowsmith, an avowed pacifist, distributed pamphlets to soldiers, which urged them to "desert or refuse to obey orders if they were posted in Northern Ireland"[661]. The Committee of Ministers found that although her right to conscience was protected, the content of her pamphlets was not, since it did not reflect her values as a pacifist but rather her criticism of governmental policy[662].

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[659] On the doctrine of the "margin of appreciation" in the jurisprudence of the European Court of Human Rights, see Howard C. Yourow, *The margin of appreciation doctrine in the dynamics of European human rights jurisprudence* (The Hague, Kluwer Law International, 1996) and Yukata Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (Antwerp, Intersentia, 2002). Succintly put, the margin of appreciation refers to "the latitude a government enjoys in evaluating factual situations and in applying the provisions enumerated in international human rights treaties.": see Y. Arai-Takahashi, *supra,* 2. In this way, the "margin of appreciation" was developed not through the text of the *European Convention on Human Rights*, but rather by the Strasbourg organs themselves: see George Letsas, "Two Concepts of the Margin of Appreciation" (2006) 26(4) *Oxford J. Legal Stud.* 705, at 705-706 **[Letsas, "Two Concepts"]**. On recent criticisms of the doctrine of margin of appreciation and the decisions of the ECtHR, see, for example: Letsas, "Two Concepts", *supra*; Janneke Gerards and Hanneke Senden, "The Structure of Fundamental Rights and the European Court of Human Rights (2009) 7 *ICON* 619 **[Gerards & Senden, "Structure of Fundamental Rights"]**; Stefan Sottiaux and Gerhard Van der Schyff, "Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights" (2008) 31 *Hastings Int'l & Comp. L. Rev.* 115 **[Sottiaux & Van der Schyff, "Towards a More Structured Decision Making Process"]**.

[660] *Arrowsmith* v. *United Kingdom*, decision of May 16th 1977, App. No. 7050/77, D.R. 8, p. 123 **[*Arrowsmith 1*]**.

[661] *Ibid*, 124.

[662] *Arrowsmith* v. *United Kingdom*, decision of June 12th 1979, App. No. 7050/77, Committee of Ministers, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=687137&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (ECHR, HUDOC portal, last consulted 26.09.2008) **[Arrowsmith 3]**.

Furthermore, Arrowsmith's claim under Article 10 *ECHR* for the right to impart information under freedom of expression was not violated.

Freedom of conscience has routinely been invoked in cases of conscientious objection to military service, but no absolute right to conscientious objection exists under the auspices of the *ECHR*[663]. Representing a turning point in conscientious objection case law, *Thlimmenos* v. *Greece* examined the status of a military conscientious objector and the aftermath of his refusal[664]. While the European Commission on Human Rights relied on article 4(3)(b) ECHR to demonstrate that a right to conscientious objection did not exist in *Grandrath* v. *Federal Republic of Germany*[665], the ECtHR held that there had been a violation on of one's right to conscientious objection. What distinguishes *Thlimmenos* from previous cases is the *manner* in which conscientious objection was invoked, namely by a combination of Articles 14[666] and 9 ECHR. Applied to the facts at hand, the applicant was contesting the laws governing access to the profession of chartered accountants which did not distinguish between categories of criminal records[667]. As a Jehovah's Witness, the applicant was committed to pacifism; these beliefs also constituted the reason behind the applicant's criminal record. Thus the ECtHR considered that the applicant's Article 14 ECHR rights had been violated in two manners: first, by treating persons in analogous situations differently without providing an objective and reasonable justification and second, when States without an objective and reasonable justification fail to treat differently persons whose situations are

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[663] As noted by Renucci, *supra* note 111, ¶ 154 : « L'ancienne Commission s'est prononcée nettement : la Convention européenne ne garantit aucun droit à l'objection de conscience et si les États prévoient un service civil de remplacement, il ne sera pas possible d'invoquer une violation de l'article 4 de la Convention interdisant le travail forcé et obligatoire. » [references omitted] The author notes, at footnote 529 (p. 196) the cases mentioned by the Commission in its refusal to recognise a right to conscientious objection.

[664] *Thlimmenos* v. *Greece*, decision of April 6th 2000, Application no. 34369/97 **[*Thlimmenos*]**.

[665] *Grandrath* v. *Federal Republic of Germany*, App. No 2299/64, 8 Y.B. Eur. Conv. H.R. 324 **[*Grandrath*]**.

[666] Art. 14 ECHR, *supra* note 631: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[667] The ECtHR decision was made on the conjoined claim of Articles 9 and 14 *ECHR*; it was deemed unnecessary to treat the Article 9 *ECHR* violation separately. See *Thlimmenos*, *supra* note 664, ¶ 42-43.

significantly different[668]. Indeed, while *Thlimmenos* illustrates a changing point in the recognition of conscientious objection, the ECtHR found it unnecessary to address "the question whether, notwithstanding the wording of Article 4 § 3 (b), the imposition of such sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9 § 1."[669] In this way, the ECtHR conveniently sidesteps the decision under Article 9 *ECHR* made by the European Commission of Human Rights in *Thlimmenos*. Therefore, pacifism as a committed value for both religious and non-religious beliefs provides an interesting example of the crafting of claims and complaints.

Freedom *from* religion has been accepted by the European Commission and the European Court of Human Rights; in this way, one should be free to decide to partake in or hold religious beliefs. This principle was recognised in *Kokkinakis*[670] and reiterated more recently when taking an oath for public office[671], as well as in the context of a professional oath[672]. After being elected to the parliament of the Republic of San Marino, officials must take an oath of office which required them to swear on the Holy Gospels[673]. This oath caused consternation amongst new officials, arguing that "holding parliamentary office […] was subject to publicly professing a particular faith, in breach of Article 9."[674] This view was upheld by the European Commission on Human Rights. Moreover, freedom *from* religion was re-asserted

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[668] *Thlimmenos*, *supra* note 664, ¶ 44.
[669] *Ibid*, ¶ 43. In this way, the ECtHR conveniently sidesteps the question of Article 9 ECHR; this point was previously addressed, however, by the European Commission on Human Rights in *Thlimmenos*: see *supra* note19, ¶ 43. See also Evans, *supra* note 77, 178; Lamačková, *supra* note 638, 22.
[670] *Kokkinakis*, *supra* note 113, ¶ 31. See also *Buscarini and others* v. *San Marino*, decision of February 18th 1999, App. No. 24645/94 **[*Buscarini*]**, ¶ 34; *Alexandris* v. *Greece*, decision of February 21st 2008, App. No. 19516/06 **[*Alexandris*]**, ¶ 31.
[671] *Buscarini, ibid*.
[672] *Alexandris, supra* note 670 **[*Alexandris*]**.
[673] I reproduce the oath in its entirety. See *Buscarini*, *supra* note 670, ¶ 8: "I, …, swear on the Holy Gospels ever to be faithful to and obey the Constitution of the Republic, to uphold and defend freedom with all my might, ever to observe the Laws and Decrees, whether ancient, modern or yet to be enacted or issued and to nominate and vote for as candidates to the Judiciary and other Public Office only those whom I consider apt, loyal and fit to serve the Republic, without allowing myself to be swayed by any feelings of hatred or love or by any other consideration."
[674] *Buscarini*, *supra* note 670, ¶ 30.

recently in *Alexandris*, where the applicant alleged that he had to reveal that he was not of the Christian Orthodox faith when swearing a professional oath, which infringed on his right not to manifest his convictions. The ECtHR recalled the right not to manifest one's convictions and stated that the State authorities (autorités étatiques) did not have the right to intervene in the sphere of an individual's right to freedom of conscience and to seek out their religious convictions, or to oblige them to manifest their convictions regarding divinity[675]. The fact that this professional oath must be taken in order to practice – while bearing in mind that a lawyer is considered an officer of justice – makes State intervention all the more unsavoury. The ECtHR found that Articles 9 and 13 of the *ECHR* were violated[676].

While freedom of conscience has been unequivocally articulated in cases of conscientious objection to military service, a right to religious conscientious freedom has also recently received considerable support from the E.U. Network of Independent Experts on Fundamental Rights[677]. This recognition provides support for cases in the areas of employment relationships[678], healthcare services[679], taxation and objections to the content of schooling[680] to name a few.

In conclusion, claims of coerced consciousness remain difficult to prove and are often decided on the basis of other rights that have been violated, such as the

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[675] *Alexandris*, *supra* note 670, ¶ 38 [my translation].
[676] *Ibid*, ¶ 41.
[677] E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, *supra* note 631.
[678] While author Dinah Shelton offers the example of *Gandharv Raj Chauhan* v. *United Kingdom*, App. 11518/85, decision on admissibility (12/07/1988), where the European Commission on Human Rights deemed admissible a case where the applicant contended that his right to conscientious objection to joining a trade union had been violated due to his religious beliefs: Dinah Shelton, "Conscientious objection and Religious Groups" in Jean-François Flauss, ed., *La protection international de la liberté religieuse* (Bruxelles, Bruylant, 2002), 189. A friendly settlement was reached in this case: see *Gandharv Raj Chauhan* v. *United Kingdom*, App. 11518/85, friendly settlement (16/05/1990)
[679] This issue of conscientious objection to abortion remains a contentious issue: see E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, *supra* note 631.
[680] *Valsamis* v. *Greece*, Decision of 18 December 1996, App. No. 21787/93 **[*Valsamis*]**; *Efstratiou* v. *Greece*, Decision of 18 December 1996, App. No. 24095/94 **[*Efstratiou*]**: the majority of the ECtHR found that Greece did not provide an effective legal channel or remedy to protect the religious rights of parents and their children. This is not to say, however, that a right to conscientious objection was recognised with respect to participation in a school parade: see *Valsamis*, *supra,* ¶ 35-37.

right to equality and the right to association. However, freedom of conscience has been interpreted to include the rights of pacifists, atheists[681], vegans[682] as well as conscientious objectors. As a sidebar, conscientious beliefs have recently been interpreted to include environmental beliefs, as observed by the decision of the Employment Appeal Tribunal in London[683]. Although Article 9(1) *ECHR* seemingly protects the freedoms of thought and conscience and religion equally, it is obvious that freedom of religion holds a privileged position with regard to its manifestation.

1.3 Conclusion on the Comparative Case Law of Freedom of Conscience

Freedom of conscience, as seen through the American and European lenses, paints less than coherent picture. Perceived as analogous to religion, freedom of conscience retains little (if any) independent meaning in American jurisprudence. Interpreted as including certain non-religious opinions, the European concept of freedom of conscience provides an interesting – though stunted – vision of a right.

At best, conscience affords a certain protection to individuals and in this sense a collective understanding of conscience is developed, though its potential

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[681] *Angelini v. Sweden*, (1986), DR 51, App. No. 10491/83, p. 41 **[*Angelini*]**, as cited by Jim Murdoch, COUNCIL OF EUROPE, *Freedom of thought, conscience and religion. A guide to the implementation of Article 9 of the European Convention on Human Rights (2007),* Human Rights Handbook No. 9, online: http://echr.coe.int/NR/rdonlyres/88B98643-09C1-4D80-ACD8-EBBB51851747/0/DG2ENHRHAND092007.pdf (site last accessed 03.04.2009), 12.

[682] *W v. the United Kingdom,* decision of 10 February 1993, App. No. 18187/91, as cited by J. Murdoch, *supra* note 681*,* 12.

[683] See *Grainger PLC and Others* v. *Nicholson*, Appeal No. UKEAT/0219/09/ZT, online: <Employment Appeal Tribunal>, http://www.employmentappeals.gov.uk/Public/Upload/09_0219rjfhLBZT.doc (site last accessed 10.11.2009) **[*Nicholson*]**. The Respondent's employment was terminated on grounds of redundancy; the Respondent claimed that his termination was due to his philosophical beliefs about climate change and the environment. Mr. Justice Burton, sitting alone, held at ¶ 31that "[t]he existence of a positive *philosophical belief* does not depend upon the existence of a negative *philosophical belief* to the contrary. What is intended to be protected by paragraph 1(d) is discrimination against a person on the grounds of his *lack of belief*. Thus, if the Respondent has his *philosophical belief* in climate change, and he were to discriminate against someone else in the workforce who does not have that belief, then the latter would be capable of arguing that he was being treated less favourably because of his absence of the belief held by the Respondent." The Respondent's advocate also makes an interesting cross-reference to Justice Wilson's broad interpretation of conscientious beliefs in *Morgentaler* (*Morgentaler*, supra, ¶ 469) when treating the question of the genuineness of the belief, as stated in *Williamson, supra* note 109, ¶ 23-24 as cited in *Nicholson*, *supra,* ¶ 22-23.

remains unclear. However, the actual content of these provisions confers a seemingly incomplete portrait. In an effort the fill in the shadows and the voids, I will now examine freedom of conscience in comparative legal literature.

2. Freedom of Conscience as Analysed in Comparative Legal Literature

2.1 Freedom of Conscience in American Legal Literature

Conscience has occupied a questionable place in the American constitutional debate, even referred to as a "black box" by one author[684]. Many authors have understood the omission of conscience from the First Amendment as an admission of the exclusive protection of religion[685], while others have understood the existence of freedom of conscience as signalling the absence of (political) coercion[686]. While author Noah Feldman described the modern understanding of freedom of conscience as fundamentally secular, entitling "every person […] not to be coerced into performing actions or subscribing to beliefs that violate his most deeply held principles"[687], he points out, however, that this applies only to the Establishment Clause. Whereas the Free Exercise Clause exhorts the protection of religion, the Establishment Clause safeguards against compulsory (political) beliefs on individuals. This precision leads us to two conclusions: first, "conscience" is not fully defined in law, constitutional or otherwise; second, a distinction must be made between "conscience" in the Free Exercise and Establishment settings. In light of this, the academic community has found different and innovative ways in which to deal with the definitional conundrum. Freedom of conscience thus faces a dilemma

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[684] Koppelman, "Volitional Necessity", *supra* note 611, 2. Interestingly, authors Christopher L. Eisgruber and Lawrence G. Sager, in the "Vulnerability of Conscience: The Constitutional Basis For Protecting Religious Conduct", (1994) 61 *U. Chicago L. Rev.* 1245, at 1292 **[Eisgruber & Sager, "Vulnerability of Conscience"]**, have referred to religious belief as being a black box: in this perspective, "religious conscience requires that the state treat religious belief as a "black box"; *for purposes of assessing the impact of a sincerely held scheme of religious belief upon the believer,* the ultimate truth or the reasonability of the scheme is beyond the constitutional competence of the state." [emphasis in original]

[685] Peñalver, "Note", *supra* note 73, 803 (footnote 89); McConnell, "Origins", *supra* note 610, 1495.

[686] Noah Feldman, "The Intellectual Origins of the Establishment Clause", (2002) 77 *N.Y.U.L. Rev*. 346 **[Feldman, "Intellectual Origins"]**; Martin H. Belsky, "A Practical and Pragmatic Approach to Freedom of Conscience" (2005) 76 *U. Colo. L. Rev.* 1057 **[Belsky, "Practical and Pragmatic Approach"]**; Smith, "What does Religion", *supra* note 610.

[687] Feldman, "Intellectual Origins", *supra* note 686, 424.

of its own as to the locus of recognition: it must either be recognised of its own accord, or be resigned to be forever lost in the penumbras of religion. The manners in which freedom of conscience has been defined by scholars will be addressed as well as the conclusions that can be drawn from the use of freedom of conscience in the American setting.

Perhaps one of the most vocal sceptics of the importance of freedom of conscience has been Michael W. McConnell, author and now judge, who has unequivocally placed religion above all other claims of accommodation, since in his view, "[n]o other freedom is a duty to a higher authority."[688] McConnell explains that religion is not the only concept that is singled out by (and in) the Constitution and as such, detains legitimacy as a 'human concern'[689]. This approach to religion – to the detriment of conscience amongst others – has aptly been coined the "McConnell-conscience" by others[690]. Conscientious objector cases such as *Welsh* v. *United States*[691] and *United States* v. *Seeger*[692] have been dismissed by McConnell, stating that "in those cases, the Court relied on the interpretation of a statute, and only Justice Harlan took the position that the Constitution forbids the singling out of religion."[693] Another facet to McConnell's reasoning, this time questioning the 'legitimacy' of the sphere of religious discourse, considers that this discourse cannot be excluded from the public sphere on the basis of the principle of secular rationale[694]. McConnell explains that the principle of secular rationale (also known as the ideal of public reason) is put forward as a means of "protecting the public sphere

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[688] Michael W. McConnell, "The Problem of Singling Out Religion", (2000) 50 *DePaul L. Rev.* 1, 30 **[McConnell, "Singling out Religion"]**.

[689] McConnell, "Singling out Religion", *supra* note 688 32. The author lists many ideas, interests and concerns that are singled out by the Constitution. Among them are property, self-incriminating statements, punishment, habeas corpus, ex post facto laws, involuntary servitude, voting rights and rights deemed "fundamental": *Ibid*, 31.

[690] Koppelman, "Volitional Necessity", *supra* note 611, 27.

[691] *Welsh*, *supra* note 65.

[692] *Seeger*, *supra* note 64.

[693] McConnell, "Singling out Religion", *supra* note 688, 6, as cited by Koppelman, "Volitional Necessity", *supra* note 611, 27 at footnote 58

[694] Michael W. McConnell, "Secular Reason and Misguided Attempts to Exclude Religious Arguments from Democratic Deliberation", (2007) 1(1) *J.L. Phil. & Culture* 159, 174 **[McConnell, "Secular Reason and Misguided Attempts"]**. In this article, the author contends that the principle of secular rationale rests on a false distinction between generally accessible public reason and religious ideas: see pages 161, 168-171.

from divisive, absolutist, intolerant impulses and from arguments that cannot be supported on basis of accessible evidence"[695]. The author states that this principle would in fact limit the scope as well as the actors engaged in public debate. Consequently, McConnell argues for arguments to be based on merit rather than on origin. While this suggestion might be persuasive and encourage acceptance, I believe it to be a misnomer, since McConnell is advocating for religious tolerance, not a general tolerance of ideas. Thus, to ask why religion's firstness excludes convictions of conscience is perhaps not the right question; rather, the question is: can conscience serve a purpose in explaining the relationship between the State and society other than the one provided for by the Religion Clauses? Instead of acknowledging that conscience may have a place in the dialogue between the State and society, McConnell suggests that it may be more "helpful to think in ways in which the twin protections of free exercise and nonestablishment could be extended into nonreligious spheres of life."[696] Therefore, the McConnell-conscience approach unconscionably exhorts the "firstness" of religion at the cost of all other – including conscience – rationales.

Professor Martha Nussbaum, in her recent book entitled *Liberty of Conscience*[697], grappled with the opposition of 'ordinary conscience' and the 'special nature of religion' in the American constitutional psyche[698]. A poignant example of the difference between conscience and religion can be found in the *commitment* behind the conscientious objector, demonstrating the space afforded in one sphere

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[695] McConnell, "Secular Reason and Misguided Attempts", *supra* note 694, 174.

[696] McConnell, "The Problem of Singling out Religion", *supra* note 688, 47. Michael McConnell argues that it is not logically possible to achieve equal regard between each secular concept and religion, since the former are treated with unequal regard. Furthermore, according to the author, the Religion Clauses offer the most highly articulated constitutional doctrine insulating a sphere of life from governmental control and is therefore better suited to serve as the benchmark for analysing legal arrangements between government and other aspects of human life: see McConnell, "Singling out Religion", *supra* note 688, 46-47.

[697] M.C. Nussbaum, *supra* note 302. Martha Nussbaum readily admits that this book is first and foremost a work of philosophical analysis: see page 29.

[698] Liberty of conscience was also addressed by Martha Nussbaum in "Liberty of Conscience: The Attack on Equal Respect", (2007) 8(3) *J. Hum. Dev.* 337, at 339 **[Nussbaum, "Attack on Equal Respect"]**: "respecting liberty of conscience equally entails that the state may not create a two-tiered system of citizenship by establishing a religious orthodoxy that gives rights to others on unequal terms."

at the expense of another[699]. Nussbaum proposes to return to Roger Williams' idea of conscience to resolve its very meaning, as well as elicit other queries. Although Williams spoke of defending religious liberty in his definition of conscience[700], Nussbaum contends that Williams conceived of moral choice "as a general power of choice, the directing capacity of our lives (like the Stoic *hegemonikon*)."[701] It is worth noting that Williams is often seen as the precursor to Locke's *Letter on Tolerance*. Accordingly, "it is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudging the question whether there is a meaning to be found, or what it might be like."[702] Interestingly, the Williams' account of conscience also pushes the boundaries of religion further[703], which ignites another dilemma as to the scope of religion in constitutional law in America. By insisting on the individual 'practical identity' and the sincerity of the individual as did Williams, Nussbaum believes that this could signal a new era in general moral choice. Again, it is the *faculty* rather than the *outcome* of the belief that would matter to Williams[704]. By exacting Williamsian tolerance, the structure of protection of religious freedom changes, therein proffering protection to Buddhism, Taoism and other nontheistic religions that had historically been set aside[705]. Despite this galvanizing approach to conscience, Nussbaum's work remains admittedly bound to the current rule of law[706].

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[699] In *Liberty of Conscience: in Defense of America's Tradition of Religious Equality, supra* note 302, Nussbaum explains the judicial recognition of protected space as follows at page 102: "If I resist the military draft because I follow the ethical ideas of Henry David Thoreau and you resist the draft because you are an Orthodox Jew, it seems somewhat unfair for your commitment to be honored and mine to be rejected, simply because yours is religious and mine is ethical – and yet this is what our Constitution appears to authorize."

[700] Martha Nussbaum explains that Williams defined conscience as ""holy Light" and as "a perswasion fixed in the minde and heart of a man, which inforceth him to judge … and to do so and so, with respect to God, his worship, etc.": see Glenn La Fantaisie, *The Correspondence of Roger William,* (Providence, Brown University Press, 1988), vol. 1, pages 33-40 as cited in Nussbaum, *supra* note 302, 51-52.

[701] *Ibid*, 52.

[702] *Ibid*, 169.

[703] *Ibid*, 170.

[704] *Ibid*, 169. See Chapter III discussion on the facets of freedom of conscience in Canada, *supra*.

[705] *Ibid*, 170

[706] *Ibid*, 174: "Americans, and their courts, will continue to disagree on all these issues, but we should admire the seriousness, and the subtlety, of our tradition's wrestling with the fundamental issue, Antigone's issue: how to respect the individual conscience when it seems to butt up against the rule of law."

Andrew Koppelman has also examined why conscience has been unsuccessful in justifying exemptions and why it thus far has escaped proper explanation. Despite these puzzles, he contends that the right to conscience remains a powerful idea for people[707]. Nevertheless, conscience remains an unsuitable fit for accommodation, according to him. Using Harry Frankfurt's account of volitional necessity, Koppelman argues that conscience cannot serve as a basis for accommodation[708]. Volitional necessity is described as someone caring so wholeheartedly about something that he cannot form an intention to act in a way that is inconsistent with that care. Volitional necessity is by its existence, a subjective tool. By its very nature, then, objectification of the situation – thus rendering a situation comparable to others – is very difficult, rendering it an unsuitable basis for claims. Hence, according to Koppelman, conscience can be employed as a tool to determine whether a claim is religious, but cannot serve as the determining element[709].

Christopher L. Eisgruber and Lawrence G. Sager have extensively discussed and written about the role of religion in American law. In a well-known 1994 article, the authors explain that the line between religious and secular consciences as follows:

> "religious conscience is crucially dependent on schemes of fact and value (epistemologies) that are private in the sense that they do not depend upon their conformity to generally accepted tests of truth or widely shared perceptions of value; **secular conscience, in contrast, appeals to a public epistemology that depends on generally accepted tests of truth and widely shared perceptions of value**."[710]

The authors explain that the protection of religious conscience, in their view, demands that the State treat religious belief as a "black box", since the reasonability of the scheme is viewed as beyond the constitutional competence of the State[711]. On

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[707] Koppelman, "Volitional Necessity", *supra* note 611, 2
[708] *Ibid*, 3.
[709] *Ibid*, 3-4. *A fortiori* at 4: "The same is true of conscience, which is simply volitional necessity with a (perceived) moral component." The author refers later on to this form of conscience as "Welsh-conscience": see page 49.
[710] Eisgruber & Sager, "Vulnerability of Conscience", *supra* note 684, 1291 [my emphasis].
[711] *Ibid*, 1292.

the other hand, "[w]ith secular claims of conscience, however, the believer and the state in principle share a common epistemic foundation." [712] The State can therefore respond to the responsibility of the secular claimant's conscientious commitment[713]. Eisgruber and Sager admit that the concept of secular conscience fits imperfectly with their theory of equal regard. Although equal regard is a symmetrical principle insofar as it applies to both secular as well as sectarian concerns, one cannot logically conclude that the enforcement of equal regard, as it applied to secular conscience, is appropriately on the agenda of the judiciary[714]. Despite the fact that equal regard should apply to the abovementioned concerns, the authors argue that secular beliefs are distinctly vulnerable to discrimination and should equal protection from discrimination, just as religious conscience. This approach would render a parsimonious application of the protection of conscience unconscionable, thereby reinforcing the application of equal regard[715]. Equal regard is defined as follows:

> "First, no members of our political community ought to be devalued on the basis of the spiritual foundations of their important commitments and projects. Second, all members of our political community ought to enjoy rights of free speech, personal autonomy, and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow a broad range of religious beliefs and practices to flourish."[716]

Eisgruber and Sager acknowledged that equal regard is not without costs to the citizens, though it is difficult to quantify by the State. Following the United States

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[712] Eisgruber & Sager, "Vulnerability of Conscience", *supra* note 684, 1293. According to the authors at the same page, "[r]easonability here speaks not so much to the plausibility of a given belief, as to the elevation of that belief to a dominant position with regard to motivation and self-identity."

[713] *Ibid*, 1293. According to the authors, "[r]easonability here speaks not so much to the plausibility of a given belief, as to the elevation of that belief to a dominant position with regard to motivation and self-identity."

[714] *Ibid*, 1291 and 1293. The failures of equal regard can be remedied by the principle of Equal Liberty, according the authors, "[s]ince Equal Liberty endorses congressional efforts to remedy failures of equal regard": See Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, Harvard University Press, 2007) at page 253. Nevertheless, Eisgruber and Sager admit their solution of Equal Liberty might be imperfect since they state, at page 243 of *Religious Freedom and the Constitution* that "[t]he suggestion that legislatures in general and Congress in particular have an important role to play in assuring Equal Liberty, may seem like asking the fox to guard the henhouse."

[715] Eisgruber & Sager, "Vulnerability of Conscience", *supra* note 684, 1291-1292.

[716] *Ibid*, 1285. The authors define "equal regard" in *Religious Freedom and the Constitution*, *supra* note 714, 4. See also Christopher L. Eisgruber and Lawrence G. Sager, "Chips off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle", (2007) 85 *Tex. L. Rev.* 1272 **[Eisgruber & Sager, "Chips off Our Block"]**.

Supreme Court ruling in *Thomas* v. *Review Board of the Indiana Employment Security Division*[717] where it was found that the denial of unemployment compensation benefits to the petitioner violated his First Amendment right to religious freedom. The petitioner quit his employment because he believed that his religious convictions as a Jehovah's Witness prevented him from engaging in the production of weapons; it was discerned that his beliefs did not constitute "good cause" of voluntary termination as required by the Indiana statute. In this light, Eisgruber and Sager developed the hypothetical "Secular Thomas" (Secular Thomas is a pacifist, but on secular rather than on religious grounds)[718] to exemplify their approach to equal regard. The authors were attempting to demonstrate that the Thomases are the two side of the same coin: both are requesting an exemption, the only difference being the source of the request. Although the Secular and Religious dichotomies of "Thomas" should receive equal protection, Eisgruber and Sager note that these observations cannot be generalised to what they call the 'full run of conscientious secular claimants'; rather, "they are specific (and presumably substantial) subset of claimants whose conscientious commitments are reasonable."[719] Indeed, while the reasonability of the claim ultimately determines its recognition by the courts, Koppelman wonders whether Eisgruber and Sager find something problematic about religion-specific accommodations[720]. I believe that authors Eisgruber and Sager have responded indirectly to Koppelman's concern in a recent article, explaining that the distinctiveness of religion *constitutionally* justifies subjecting the government's treatment of religion to greater scrutiny than many other topics or policies receive[721].

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[717] *Thomas, supra* note 629.

[718] Eisgruber & Sager, "Vulnerability of Conscience", *supra* note 684, 1292; Eisgruber & Sager, *supra* note 714, 114. The authors have also developed, in a similar fashion, 'Officer Beard' and 'Sergeant Collar' in the same texts.

[719] Eisgruber & Sager, "Vulnerability of Conscience", *supra* note 684, 1296-1297

[720] Andrew Koppelman, "Is it Fair to Give Religion Special Treatment?", (2006) 3 *U. Ill. L. Rev*. 571, 578 **[Koppelman, "Special Treatment"]**. The author decries, at the same page, the lack of fair comparison by authors Eisgruber and Sager with regard to the law' treatment of other claims such as that of Sergeant Collar's. Koppelman notes that as this article was going to press, *Religious Freedom and the Constitution* by Eisgruber and Sager was forthcoming; Koppelman's arguments are therefore restricted to Eisgruber and Sager's previous body of work.

[721] This comment was made in response to a trilogy of reviews of *Religious Freedom and the Constitution.* See Eisgruber & Sager, "Chips off Our Block", *supra* note 716, 1273.

A final – though by no means exhaustive – view of conscience in American constitutional law comes to us from Steven D. Smith[722]. He contributes to the discussion on freedom of conscience in two ways: first, in terms of the real *locus* of the debate; second, with respect to the senses given to conscience in American constitutional dialogue. In a recent working paper, the author acknowledged that although the *epistemology* of conscience might be interesting, it is the *metaethical* presuppositions of conscience that cannot be ignored[723], since it is at the root of one's moral judgment. In fact, the metaethical approach requires that our moral judgments be justified; metaethics demand that we look at the broader picture without a vested opinion[724]. While the various metaethical reasonings shed some light on what arguments can further or hinder the cause of conscience, Smith's paper regrettably lives up to its (tenuous) title. Instead of conclusions, we are informed by the author that conscience suffers from "partly parasitic […] older ways of thinking" on the one hand, and on the other, "uncertainty [and] degradation" in the modern invocations of conscience[725]. This unflattering portrait of conscience is perhaps the most realistic one: conscience has proven to be inseparable from its religious content and unable to form an utterly distinct (secular) identity. Perhaps a rejoinder to Smith's conclusions on the tenuous case for conscience can be found in another of his texts, where he argued that conscience has migrated to textual locations such as the Establishment Clause and the Due Process Clause, where freedom of

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[722] See Smith, "What Does Religion", *supra* note 610; Steven Douglas Smith, "The Tenuous Case for Conscience", (2004) *U San Diego Legal Studies Research Paper* No. 05-02. Available at SSRN: http://ssrn.com/abstract=590944 or DOI: 10.2139/ssrn.590944 **[Smith, "Tenuous Case for Conscience"]**; Steven Douglas Smith, "Interrogating Thomas More: The Conundrums of Conscience", (2003) *U San Diego Public Law Research Paper* No. 62. Available at SSRN: http://ssrn.com/abstract=449061 or DOI: 10.2139/ssrn.449061 **[Smith, "Interrogating Thomas More"]**.

[723] Smith, "Tenuous Case for Conscience", *supra,* 5. The author describes, at pages 5-11 that there are four different responses to the metaethical questioning: (1) "objectivist" (it is given or natural); (2) "conventionalist" (conventional rules and principles that a society accepts); (3) "subjectivist" (morality is generated by individual subjects); (4) "nihilist" (morality is an illusion or a sham).

[724] The *Stanford Encyclopedia of Philosophy* explains that « metaethics » play an important role in society, by stepping back from an actual debate within morality in order to ask questions about views, assumptions and commitments shared of those who are engaged in the debate: see Geoff Sayre-McCord, "Metaethics" in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (Winter 2007 Edition), URL = http://plato.stanford.edu/entries/metaethics/#Rel/ (site last accessed 15.09.2009)

[725] Smith, "Tenuous Case for Conscience", *supra* note 722, 38.

conscience can appear in peculiar and secularized forms[726]. As such, under the Establishment Clause, freedom of conscience has been invoked in school aid cases when attempting to balance the consciences of taxpayers with unintended consequences of public funding, namely indirectly supporting religious instruction. Although he acknowledges that this position has not been adhered to fully, "the Court *has* indicated that protecting the consciences of such taxpayers is at least a legitimate and important state interest – one that can serve to justify what might otherwise be anti-religious discrimination."[727] Conscience has also been afforded a role within 'substantive due process', though this offensive has been led almost exclusively by Justice J.P. Stevens[728]. Although these illustrations might be underwhelming in terms of effectiveness, I think that Smith has fingered the pulse of a deeper problem, that of "conscience" and "belief", where "in reality, the two are neither identical nor coextensive."[729] The "personhood" rationale is developed by Smith, following unsatisfactory results with classic rationales[730], as a plausible yet admittedly precarious alternative and is defined as follows: "[a]nd that [personhood]

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[726] Smith, "What Does Religion", *supra* note 610, 913.

[727] *Ibid*, 913 [emphasis in original]. At the same page, the author offers a few illustrations of freedom of conscience understood in the Establishment Clause: *Locke, supra* note 586, 722; *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 711-716 (2002) (Souter J., dissenting); *Mitchell* v. *Helms*, 530 U.S. 793, 870 (2000) (Souter J., dissenting). These cases recognise, though not explicitly, the right to conscience of the taxpayer, in cases as diverse as the spending of public money which could indirectly fund religious instruction and the eligibility of students for state-sponsored scholarships. Steven Smith notes, at page 913 that "while the Court as a whole has not fully embraced this position, the Court *has* indicated that protecting the consciences of such taxpayers is at least a legitimate and an important state interest – one can serve to justify what might otherwise be anti-religious discrimination."

[728] *Ibid*, 914. For examples at the same page: *Planned Parenthood* v. *Casey*, 505 U.S. 833, 851-852 (1992) (Stevens J., joint opinion); *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 572 (1989) (Stevens J., concurring and dissenting); *Cruzan* v. *Missouri Department of Health*, 497 U.S. 261, 350 (1990) (Stevens J., dissenting). These cases allude to, if not recognise, the right to conscience in the choice of abortion, as well as what has been termed "the right to die". Steven Smith give pause when he notes that "[w]hen the concerns of conscience arise regarding matters or on grounds that are not conventionally religious, as with abortion or the right to die, Stevens seems prepared to strike down at least some restrictions across-the-board, for *all* cases, because they might intrude on judgments of conscience in *some* cases. But where the claim of conscience arises in a context in which the right has been thought to belong for centuries – that is, in religious belief – Stevens not only declines to strike down a restriction burdening conscience; he will not even *permit* government to accommodate the conscience of the religious dissenter.": Smith, "What Does Religion", *supra* note 610, 914).

[729] Smith, "What Does Religion", *supra* note 610, 921. *A fortiori*, 922.

[730] *Ibid,* 927.

rationale, grounded in a contestable but nonetheless intuitively attractive account of what it is to be a full person, is neither inherently religious nor limited in its application to religiously-formed conscience."[731]. Smith has offered a somewhat frustrating, yet highly edifying, portrait of conscience in the American constitutional setting.

Conclusion

When the black box is retrieved from a crash site, much hope is placed on the answers found in the device. However, when freedom of conscience is likened to a black box, it is not in the guise of providing answers, but rather to illustrate its 'mysterious or unknown internal functions or mechanisms'[732]. Freedom of conscience's definition, role, objective, constitutional force, remains therefore, subject to debate and often times, discord. I suggest that conscience should be seen through the lens of a prism[733] in American constitutional law. From one facet, freedom of religion is valued above all other rationales, effectively shutting down the debate over the place of freedom of conscience. From another facet, freedom of conscience is offered a supporting role, but that it cannot be the decisive factor. From yet another facet, it is argued that freedom of conscience should be afforded an equal place to religion, but it is recognised that its enforcement will remain problematic. In sum, there is a role for freedom of conscience in American constitutional law; its clout, given its undefined status, remains unquantifiable. Epistemological and metaethical concerns, as highlighted by Steven D. Smith, illustrate the complexity and dependent nature relationship of freedoms of religion and conscience. It becomes all the more difficult to define freedom conscience vis-à-

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[731] Smith, "What Does Religion", *supra* note 610, 940.

[732] "black box [1]." Merriam-Webster Online Dictionary. 2008. Merriam-Webster Online. 5 December 2008, http://www.merriam-webster.com/dictionary/black box[1]

[733] Unlike author Benjamin L. Berger's use of a triptych to describe religion in his illuminating article entitled "Law's Religion: Rendering Culture", *supra* note 20, the use of the prism denotes the presence of two nonparallel plane faces; the light or color that is refracted changes depending on the angle, thus permitting a multitude of views. This approach, applied to conscience, permits us to see religion and conscience next to one another, but without necessarily explaining their level (if any) of dependence. This illustration allows for different emphasis to be placed on conscience or religion, depending on the angle of departure.

vis freedom of religion, when the scope of freedom of religion is determined by what it is not. Perhaps, as he suggests, freedom of conscience will have to find a home outside of the realm of freedom of religion in order to validate its place in American constitutional law, and to a greater extent, society.

2.2 Freedom of Conscience in European Legal Literature

Freedom of conscience *as a concept* has generally been developed by authors rather than by the courts[734] in the European context. This approach has led to a number of interesting uses and interpretations of freedom of conscience, while not necessarily following the jurisprudential developments. Nevertheless, it is quite clear that freedom of conscience suffers from a definitional deficit in the European context, much like the already studied contexts of Canada and the United States. The distinction that must be made with previous case studies, however, is the way in which the conceptualisation of freedom of conscience has evolved. On that note, according to Corneliu Birsan, current member of the ECtHR, « la conscience nous paraît comme un '*produit*' plus élaboré et structuré que la pensée de la personne. »[735] Touching upon this form of thought suggests the inevitable presence of a moral framework as a reference point in a person's life. Nevertheless, interpreting freedom of conscience as an elaborated version of freedom of thought can permeate other domains of the *ECHR*, reflecting the ebb and flow of such a lithe – albeit laden – concept. Freedom of expression offers a much broader protection than that of freedom of thought, conscience and religion and therefore encompasses not only the content of the opinion but also every expression of an opinion[736]. As put by Jacques Robert, in his introductory report on freedom of conscience before the Council of Europe in 1992, freedom of conscience is midway between freedom of

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[734] Jean-François Renucci, *L'article 9 de la Convention Européenne des droits de l'Homme : la liberté de pensée, de conscience et de religion*, Dossiers sur les droits de l'homme, no. 20 (Strasbourg, Éditions du Conseil de l'Europe, 2004), p. 14; see also Louis-Émond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert, eds., *La Convention Européenne des droits de l'Homme : commentaire article par article* (Paris, Economica, 1995), 354.

[735] Corneliu Birsan, « Le juge européen, la liberté de pensée et de conscience » in Thierry Massis and Christophe Pettiti, eds., *La liberté religieuse et la Convention européenne des droits de l'homme,* coll. Droit et Justice, vol. 58 (Bruxelles, Bruylant, 2004), 45 at 52.

[736] Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak, eds., *Theory and Practice of the European Convention on Human Rights,* 4th ed. (Antwerpen, Intersentia, 2006), 791 [my translation].

expression and freedom of religion or better yet, at the junction of what they both represent[737]. According to that author, freedom of conscience *assumes* freedom of expression and *implies* freedom of religion[738]. I will now examine how Article 9 *ECHR* has been interpreted by authors, as well as offer suggestions for a better understanding of the right to freedom of conscience.

Freedom of conscience, has for the most part, occupied a minor role in greater European works on freedom of religion[739]. This diminutive address can be interpreted in one of two ways. On the one hand, the lack of importance given to freedom of conscience in doctrine could demonstrate that freedom of conscience, as a deeply-seated conviction is capable of permeating other existing discourses. As noted by one author when defining freedom of conscience, "[l]a liberté de conscience semble pouvoir se définir comme la liberté d'avoir des opinions religieuses, philosophiques, sociales ou politiques."[740] Convictions of conscience therefore imply first and foremost the right of inner choice or *forum internum*. Flowing from this proposal, freedom of conscience is not, *a priori*, religious or secular but can become either. On the other hand, cases of particular interest to freedom of conscience have been afforded a modest space before the legal bodies of the ECHR, reducing the opportunities of examining and exacting the conditions and chances related to the

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[737] Jacques Robert, "Liberté de conscience, pluralisme et tolérance" (Rapport introductif) in CONSEIL DE L'EUROPE, *Liberté de conscience / actes, séminaire organisé par le Secrétariat général du Conseil de l'Europe ; en collaboration avec le Centre d'études des droits de l'homme "F.M. van Asbeck" de l'Université de Leiden, Leiden (Pays-Bas), 12-14 novembre 1992*, (Strasbourg, Éditions Conseil de l'Europe, 1992), 23 at 25 [my translation and emphasis]

[738] *Ibid* [my translation].

[739] See Evans, *supra* note 630, 294-295; Evans, *supra* note 77, 52-53. An exception to the previous statement is author Paul Taylor's comprehensive study of freedom of religion as well as a weighty section dedicated to the *forum internum* and more specifically, conscience. See Taylor, *supra* note 118, 119-202

[740] Anne-Sophie Delbove, « La liberté de conscience dans le cadre national : approche comparative du régime juridique en France et en Allemagne » in Patrice Meyer-Bisch and Jean-Bernard Marie, eds., *La liberté de conscience dans le champ de la religion,* (Fribourg, Document de travail de l'IIEDH No. 4, janvier 2002), online : Institut interdisciplinaire d'éthique et des droits de l'homme, <http://www.unifr.ch/iiedh/assets/files/Publications/publicdt04.pdf> (site last accessed 15.10.2008), 32 at p. 33. While I recognise that this remark was made within a study of national practices in France and Germany, I consider that this description can also be useful at the supranational.

acts of freedom of conscience[741]. Author Jean-Bernard Marie argues that cases involving freedom of conscience are more likely to be examined through the lens of freedom of religion, expression, privacy, association and anti-discrimination, therefore marginalising the content of conscience further[742]. Either way, freedom of conscience finds itself inserted in various rights and discourses, reaching beyond the simple protection afforded in the *European Convention on Human Rights*. The discussions of the 1992 Report on freedom of conscience are still applicable, since freedom of conscience can still be addressed through the lenses of pluralism and tolerance, conscientious objection[743] and that of minority groups[744]. A collective right to freedom of conscience seems to evoke a greater sense of responsibility and engagement on the side of the State. This idea of a collective freedom of conscience has been used to further both religious[745] and secular[746] arguments. Although polar opposites, claims based on a collective freedom of conscience share an important element and thus draw from the same source: the need to be heard outside of

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[741] Jean-Bernard Marie, « La liberté de conscience dans les instruments internationaux des droits de l'homme : reconnaissance et interprétation » in Meyer-Bisch & Marie, *supra* note 740, 18 at 28.

[742] *Ibid*.

[743] Author Dinah Shelton explained that in addition to the question of the *right* of conscientious objection, the issue of it as a *duty* must be considered: Shelton, "Conscientious objection and Religious Groups", *supra* note 678, 196.

[744] See Karel Rimanque, « Liberté de conscience et groupes minoritaires » in CONSEIL DE L'EUROPE, *supra* note 737, 167 : « Les minorités religieuses peuvent devenir la victime d'imputations diffamatoires. La liberté de conscience ne protège pas contre toutes les critiques. Mais la responsabilité de l'État peut être en cause lorsque l'agitation à l'encontre d'une communauté a pris de telles proportions qu'elle porterait atteinte à sa liberté de manifester sa religion en public. » Freedom of conscience is interpreted here as an extension of an obligation, namely engaging the State's responsibility in order to insure a minority group's right to freedom of conscience. This represents a different manner in which to engage the minority group within the majority group setting. This is strengthened by Jan Remmelink's General Report, where he stated that "[e]n exprimant nos objections [de conscience], nous faisons usage de notre liberté, quel que soit notre sentiment d'impuissance. La non-reconnaissance de nos objections par un gouvernement honorable et le conflit insoluble qui en découle démontrent non seulement les failles, mais aussi la particularité et le caractère de l'esprit humain. » : Jan Remmelink, « Rapport Général » in in CONSEIL DE L'EUROPE, *supra* note 737*,* 208 at 223.

[745] This approach has been suggested by authors Jacques Robert and Alain Garay. See : Robert, "Liberté de conscience, pluralisme et tolérance" in CONSEIL DE L'EUROPE, *supra* note 737, 23 at 26; Alain Garay, "L'exercice collectif de la liberté de conscience religieuse en droit international", (2006) 67 *R.T.D.H.* 597 **[Garay, "L'exercice collectif"]**. In a slightly different perspective, freedom of religion as a cultural (and thus collective) right has been discussed in Jean-Bernard Marie and Patrice Meyer-Bisch, eds., *Un noeud de libertés. Les seuils de la liberté de conscience dans le domaine religieux* (Bruxelles, Bruylant, 2005).

[746] Hammer, *supra* note 85.

traditionally established rights. This recourse to freedom of conscience, albeit far from clear-cut as a judicial tool or concept, suggests that recalibration of relationships between the State and the group and between the individual and the collective[747] is needed.

Alain Garay acknowledges the definitional deficit of freedom of conscience in international law[748]. He notes, however, that freedom of conscience is a principle of the contemporary legal order that has been formulated in international law as an individual civil right[749]. Notwithstanding its recognition as an individual right, freedom of conscience has an undeniable collective dimension, according to Garay, which has produced less interest than it should have[750]. He argues that there should be a collective right to religious freedom of conscience, since it is the necessary corollary of 'spiritual freedom' taken in its individual form[751]. From this perspective, if an individual right is exercised in a collective fashion by many individuals, a collective protection is fostered. Garay explains that a collective conscience is akin to a community chest (*fonds commun*), a communal project and ideal that embodies religious values that are expressed in communally, collectively or in public[752]. Moreover, this collective right is promoted in order to establish a basic moral order ("*morale-plancher*"[753]) from the religious collective unto the individual. An imbalance in the call to morality is uncovered when comparing the individual and collective's right to freedom of conscience. While Garay admits that the collective right to freedom of religious conscience does not have a comfortable legal status[754], he believes that it is the necessary corollary to individual spiritual freedom[755]. I consider that Garay's claim to a collective right of freedom of (religious) conscience also lacks

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[747] See Alain Garay, who states that « qu'il exprime par un principe moral, éthique ou religieux, le droit à la liberté de conscience conduit à s'interroger sur la relation entre l'individu et la collectivité (société civile), d'une part, et, d'autre part, sur la relation entre l'individu et l'État. » in Garay, « L'exercice collectif », *supra* note 745, 600.
[748] *Ibid*, 599.
[749] *Ibid*, 600 [my translation].
[750] *Ibid*, 600.
[751] *Ibid,* 613 [my translation].
[752] *Ibid*, 603.
[753] Dominique Laszlo-Fenouillet, *La conscience* (Paris, L.G.D.J., Bibliothèque de droit privé, tome 235, 1993), 70, as cited in Garay, « L'exercice collectif », *supra* note 745, 603.
[754] Garay, « L'exercice collectif », *supra* note 745, 604.
[755] *Ibid*, 613.

a secure intellectual status and would perform a redundant function given available protections of the *ECHR*. Approaching freedom of conscience in this manner, as a form of social or ethical curtailment, effectively eliminates the individual from the equation. While this might serve to strengthen a collective right, it is at the expense of an individual one. Lastly, Garay's conception of a collective freedom of conscience obliterates the line between philosophical convictions and the convictions of the nonconformists and extremists[756].

Jean-Marie Bernard and Patrice Meyer-Bisch suggest that freedom of conscience, within the scope of religion, should be considered through the lens of cultural rights. Cultural rights, therefore, are identity rights (*droits à l'identité*)[757], which foster a dialectic between the individual and the community and the space metered out to each[758]. In this way, freedom of conscience acts as a "red thread" ("*fil rouge*"), providing a continuum between the *forum internum* and the *forum externum*[759]. Seen in another light, freedom of conscience acts as the bond between the individual and the collectivity: it is the most intimate freedom that engages all the other freedoms and is continually questioned and daily jostled by all them[760]. Hence conscience serves as our gauge between individual conscience and collective action. Meyer-Bisch expanded on this argument in a recent interdisciplinary collection entitled *Un noeud de libertés*, where he suggests the intersection of seven (religious) freedoms: the three contemplative sisters (freedom of opinion, thought and conscience) and the four gate keeping sisters (freedom of expression, association, information and formation)[761]. The use of the familial imagery allows the author to reveal the uniqueness of each right, as well as the clashes between these

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[756] I am, of course, alluding to A.H. Robertson's quote at the beginning of the section on the ECHR perspective on freedom of conscience. By establishing (or effectively imposing by its collective exercise by individuals) a basic moral order, the middle is favored at the expense of more extreme positions or convictions.

[757] Patrice Meyer-Bisch, « Le droit à la liberté de conscience dans le champ religieux selon la logique des droits culturels » in Meyer-Bisch & Marie, *supra* note 713, 8 at 12.

[758] *Ibid*, 8 at 12 : «La personne, aussi bien que les communautés auxquelles elle peut adhérer, joue (est actrice) entre des pôles en opposition dialectique qui garantissent autant d'espaces de libertés, les dimensions de *son espace/écart culturel propre*. »

[759] *Ibid*, 8 at 9.

[760] Patrice Meyer-Bisch, « Comment les libertés culturelles se nouent : le défi d'une culture religieuse des libertés », in Marie & Meyer-Bisch, *supra* note 745, 51 at 54 [my translation].

[761] *Ibid*, 51 at 52 [my translation].

rights[762]. In my opinion, it also demonstrates the inherent interdependency of such rights. Meyer-Bisch explains that freedom of conscience implies a permanent reflexive process, reinvigorating and reaffirming one's faith each time[763]. While I think that Meyer-Bisch has correctly identified the flexibility allotted to freedom of conscience, I find it conceptually difficult to limit freedom of conscience to the scope of religion. This reflexive act can then be employed to demonstrate the (continued) existence of any deep seated conviction, not just religious ones.

Finally, Leonard M. Hammer proposes to look at the right to freedom of conscience in order to distinguish between the more formalised and recognised notions of religious beliefs from conscientious beliefs. The author explains that the term 'conscientious beliefs' refer to a belief that is external to a religious context[764]. The group approach to the right of conscience is proposed by Hammer in order to give a voice to emergent minority communities and other groups within the state who assert the right to uphold their beliefs and their rights. This perspective lends itself to a secular rather than religious interpretation of conscientious beliefs. Nonetheless, by favouring the intersection of minority groups and individual beliefs, I consider that the author is left with a cultural interpretation of the right to freedom of conscience. In fact, conscience is used here to reduce the boundaries between internal beliefs (*forum internum*) and external actions (*forum externum*); this same tactic is employed to better define "minority"[765] in "minority rights". Hammer has understood conscience as an external, transgressive notion[766]. Conscience goes beyond the boundary of individual rights and becomes necessary in shaping the social community. In this perspective, freedom of conscience can thus be considered as a group right. It then becomes possible to use conscience as a medium to achieve a certain balance between individual and collective rights. On that subject, the author notes that one manner of dealing with group-individual rights conflicts is to consider

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[762] Patrice Meyer-Bisch, « Comment les libertés culturelles se nouent : le défi d'une culture religieuse des libertés », in Marie & Meyer-Bisch, *supra* note 745, 51 at 55.
[763] *Ibid*, 54.
[764] Hammer, *supra* note 85, 3. The author notes, at pages 3-4, that he is not trying to form a new human right, but rather to understand the far-reaching implications of freedom of religion.
[765] *Ibid*, 256-257.
[766] *Ibid*, 248.

how the group notion of conscientious belief conforms to the normative structure proposed by the rights of minorities and the right of freedom of religion and conscience[767]. Hammer relies heavily on social factors, such as the impact of common beliefs to put forward his proposal of a group-oriented approach to freedom of conscience[768]. Conscience takes on a 'common identity' and promptly enhances the minority group's eligibility for legal safeguards. He cites the "vexing" problem of proselytism in international law as a candidate for a group understanding of freedom of conscience. By considering the missionary activity from the standpoint of a group, one necessarily includes social elements, thus implicating the community (the group), the individual but also the community at large. This approach, which can be qualified as contextual, presents a supple frame which permits for the evolution of minority groups. By addressing conscience as constituting a cultural right, Hammer is encouraging the reader to move beyond the 'sober normative framework' and examine other social factors that shape and are shaped by individuals and societies[769]. While I agree that it is necessary for conscience to develop outside of the shadow cast by religion, some of the same pitfalls are unavoidable[770]. Nevertheless, the inclusion of "New Social Movements" (NSM)[771] – who are to be considered analogous to group conscientious beliefs according to Leonard Hammer – illustrate at once the need for recognition as well as reassessment of what constitutes the *forum internum* as well as who may benefit from its protection.

Conclusion

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[767] Hammer, *supra* note 85, 246.

[768] The author defines "group beliefs" as follows: "[a] spontaneous, yet permanent, joining of individuals for a specific purpose or due to particular qualities, depending on the individuals within the group and the greater community's view of the group as such." Hammer, *supra* note 85, 253.

[769] *Ibid,* 271.

[770] *Ibid*, 266. By 'unavoidable pitfalls' the author is referring to the descriptive interpretations of conscientious belief, one such example being the analysis of the phenomenon of conscience and its necessary implications.

[771] Leonard Hammer gives early examples Protestantism during the Reformation and the Salvation Army; contemporary examples of NSM would include Scientologists, Falun Gong and Jehovah's Witnesses. Nevertheless, it is the desire to change the *forum internum* of the individual which draws the line between what is 'acceptable' and 'coercive': see Hammer, *supra* note 85*,* 260. I can only surmise that time will tell if these minority groups will be recognised within the scope of conscientious beliefs to the same extent as other groups.

In conclusion, freedom of conscience has found a collective voice, as well as religious and secular vocations within the European context. The enduring characteristic of conscience is its legal malleability. Understanding conscience as a collective right demands that the boundaries of both individual and collective rights be reassessed. Interpreting conscience as a cultural right infers that conscience also constitute a cultural identity as well as the gateway to group membership[772]. Finally, by demonstrating the interdependence of rights as well as actors, conscience remains a flexible discourse in European legal literature.

Nevertheless and despite the claims of common beliefs, it seems impossible to thoroughly develop an independent claim to freedom of conscience and as such, remains inevitably associated to religion in some degree. In spite of author Leonard Hammer's valiant attempt at examining freedom of conscience through the lens of minority rights and common beliefs, the groups most likely to use the interpretation of this right are considered "religious". Perhaps most salient in the study of freedom of conscience in the European context, is the re-evaluation of the relationship between the individual and the community.

3. The Future of Freedom of Conscience in American and European Constitutional Settings

Despite it being a much layered concept, freedom of conscience has emerged with a voice in the American and European constitutional settings. While the definition and justification of freedom of conscience remains a work in progress, the right to freedom of conscience warrants, and calls for, deeper examination.

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[772] While beyond the objectives of my chapter to examine 'identity politics' and legal-political ramifications as well as multiple criticisms, I recognise the important discussion on the existence of a people's culture and how it remains essential to the survival of the group: see Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (Princeton, Princeton University Press, 1994), 40; Will Kymlicka, *Liberalism, Community, and Culture* (Oxford, Oxford University Press, 1991), 167.

Just as a general change in religious geography has been observed in Canada[773] in recent years, a similar change has also been ascertained in the United States and especially in the European Union. Juxtaposed with this change in the religious landscape is an increase in the share of the population with "no religion", also known as the "Nones"[774] in the United States. The American Religious Identification Survey (ARIS) of 2008 observed that the ""Nones" (no stated religious preference, atheist, or agnostic) continue to grow, though at a much slower pace than in the 1990s, from 8.2% in 1990, to 14.1% in 2001, to 15.0% in 2008."[775] The group that grew most rapidly between 1990 and 2008 was the population who didn't know or refused to answer the key question about religious self-identification in the ARIS survey, which "reflects social changes in attitudes and in American society over the past two years."[776] Given that the U.S. Census Bureau is constitutionally precluded from such inquiries into the religious lives of individuals, the ARIS has become the statistical source for religious identification[777]. Within the European context, according to the *Special Eurobarometer*[778] *on Social Values, Science and Technology*[779], "18% [of all EU citizens] declares that they don't believe that there is any sort of spirit, God or life force."[780] The effect of this change in religious geography remains imprecise at this point; however, it is clear that the traditional categories of beliefs are in need of re-evaluation, given the individual's changing relationship with society, and by extension, the State.

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[773] See *supra*.
[774] The "Nones" are identified, in the ARIS taxonomy of religious traditions, as: "*None, No religion, Humanistic, Ethical Culture, Agnostic, Atheist, Secular".* See Barry A. Kosmin and Ariela Keysar, *AMERICAN RELIGIOUS IDENTIFICATION SURVEY (ARIS)*, Summary Report (March 2009), online: http://b27.cc.trincoll.edu/weblogs/AmericanReligionSurvey-ARIS/reports/ARIS_Report_2008.pdf (site last accessed 30.04.2009), 23 **[Kosmin & Keysar, *AMERICAN RELIGIOUS IDENTIFICATION SURVEY (ARIS)*]**.
[775] *Ibid*, 3.
[776] Kosmin & Keysar, *AMERICAN RELIGIOUS IDENTIFICATION SURVEY (ARIS)*, *supra* note774, 4.
[777] *Ibid*, 2.
[778] The Special Eurobarometer is described as "reports are based on in-depth thematical studies carried out for various services of the European Commission or other EU Institutions and integrated in Standard Eurobarometer's polling waves.": EUROPA, <Public Opinion Analysis>, <Eurobarometer Special Surveys>, online: http://ec.europa.eu/public_opinion/archives/eb_special_en.htm (site last accessed 30.04. 2009)
[779] *Ibid*.
[780] *Ibid*, 9. At the same page, it is noted however that "the average results mask considerable differences in the beliefs of the various nationalities."

Freedom of conscience, in the American and European case law contexts, serves as a new point of reference for understanding the relationship between the individual and the State. The European perspective on freedom of conscience relies on both religious and secular conceptions of conscience. Secular convictions were recognised by the ECtHR in *Kokkinakis*; furthermore, freedom of conscience was recognised as a deeply subjective and individual consideration. As stated previously, freedom of conscience is not recognised under the American Constitution or its Amendments; it has served instead to demonstrate what should be included in a claim of religion rather than a claim of conscience. It is eminently evident that religion as a right retains a privileged position, within both the eyes of the law and of society and exposes its intrinsic connection when freedom of conscience is invoked.

The study of comparative legal literature has revealed itself to be more fruitful. By imagining conscience through the lens of a prism in the setting American legal literature, it is possible to retain different understandings of the role of conscience in society and law but it is clear that protection of freedom of religion is second to none. However, the overarching and ever-present right of free exercise of religion overshadows any true developments of the concept of conscience. Given this unwavering diktat, the best manner for freedom of conscience to grow is outside of the shadow of religion. Author Steven D. Smith's pragmatic approach to the problem of conscience, namely that it must migrate to other textual locations in the Constitution, would be most apt to garner normative content as well as respect for the concept. Finally, freedom of conscience has found meaning in various discourses of the ECHR, thus reinforcing its legal malleability. Understanding freedom of conscience as encompassing pluralism and tolerance, conscientious objection as well as minority groups[781] demonstrates the plausible breadth afforded to this fundamental freedom under the ECHR and by authors alike. This European approach to conscience also calls for a re-evaluation of the relationship between the individual and the community, which leaves the door open to non-traditional 'groups' to find a place in the general discourse on conscientious rights. Nevertheless, envisioning conscience as something other than religion – such as expression or

[781] As done by the CONSEIL DE L'EUROPE, *supra* note 737.

non-religious beliefs – demonstrates the flexibility of the concept and a possibility to continually reinvent the relationship between the individual and the State.

What can be retained from this comparative study of freedom of conscience? Freedom of conscience has an undeniable interdependence with freedom of religion, but at the same time, demonstrates a certain level of independent interpretation. Either way, convictions of conscience, whether religious or non-religious in nature, need to be better defined within the discourse of freedom of conscience and religion and better contextualised within the greater discourse of rights.

Conclusion

I chose to examine the freedoms of conscience and religion in comparative constitutional law settings of Canada, the United States and through the decisions of the European Court of Human Rights under Article 9 *ECHR* in my master's thesis. In light of this discussion, I explored more closely the tensions that exist between freedom of conscience and freedom of religion.

I investigated, in a first chapter, how a better understanding of religion *in* law can be achieved by examining religion *out* of law. Drawing on different definitional philosophies of religion from the areas of sociology and anthropology, various approaches to religion were suggested, thereby challenging what could be considered part of the context and the subtext of religion. In studying religion *out* of law, the role of the community was greatly emphasised and valued, constituting the foremost difference with the evaluation of religion *in* law[782]. In studying religion *in* law, three approaches to defining religion in law were proposed, setting the stage for our comparative constitutional analysis of Canada, the United States and the decisions under article 9 of the *ECHR*. I argued that the Supreme Court of Canada had espoused a definition of freedom of religion that ultimately straddles the subjective-functional and substantive-content approaches since *Amselem*[783], demonstrating the inherent difficulty of defining religion in law, and its impact on its sister provision of freedom of conscience.

In a second chapter, I examined freedom of religion in Canada, also known as its 'first freedom', in order to later suggest that the relationship between freedom of conscience and freedom of religion in Canada should be examined in order to present a better understanding of these two fundamentally interrelated freedoms. By examining freedom of religion in successive waves, one is reminded that freedom of religion should not be considered an absolute right, but rather one that must be

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[782] While the dissenting opinions in *Hutterian Brethren* acknowledged that religion was not only about individual beliefs but also about communities of faith and religious relationships, it remains a secondary consideration: see *Hutterian Brethren of Wilson Colony*, *supra* note 4, ¶ 167 (Abella J.); ¶ 181-182 (LeBel J.).

[783] *Amselem*, *supra* note 3.

calibrated with other rights. By proceeding to an assessment of rights and thus a balancing of interests, I suggested that the locus for assessing violations of freedom of religion has migrated from that of reasonable accommodation to the proportionality of the *Oakes* test under section 1 of the *Charter*. While this resettlement can be understood as a further indication of where resolution should occur when a violation of freedom of religion has been admitted, this only represents a part of its implications, in my view. It should also be interpreted as a statement as to how rights should be managed vis-à-vis the greater community. In this way, while still bound by the test based on the sincerity of beliefs, the Supreme Court can move forward by addressing the infringed right in terms of context, and therefore minimal impairment. Lastly, I addressed certain unresolved issues pertaining to freedom of religion, thereby indicating the ongoing discourse on this fundamental freedom.

In a third chapter, I explored how freedom of conscience has been interpreted in Canadian case law and legal literature. In the case law, I suggested that freedom of conscience could either be interpreted as related to free choice and personal autonomy or as the absence of autonomy of freedom of conscience in the interpretation of this right. In practice, this means that freedom of conscience can be regarded as a philosophical choice but also as a concrete right than can be called upon on its own. In the legal literature, I proposed that all authors seem to create space for this freedom, through with varying intensity. It is on this basis that I presented an interpretative a scale with freedom of religion: in this way, freedom of conscience could be understood as *lesser than*, *equivalent to* and *broader than* freedom of religion. Within this framework, I argued that recognising freedom of conscience as *equivalent to* freedom of religion would constitute its optimal recognition in the Canadian constitutional context. While the case law and legal literature on freedom of conscience remains scant, I consider that claims based on this fundamental right will increase in the years to come; it is therefore essential to think more about what we mean by and what we want from freedom of conscience, rather than a formulaic reaction. Pivotal in its constitutional recognition yet intensely private in nature, freedom of conscience invites further discussion and consideration on the interconnectedness of these freedoms of conscience and religion.

In a last chapter, I sought to ascertain whether freedom of conscience was present or absent from the American and European constitutional law discourses, in an effort to provide a point of comparison to my Canadian case study. As noted earlier, freedom of conscience was purposively excluded from the American Constitution or its Amendments. This choice inherently colours the place and the positioning that freedom of conscience can occupy in case law and legal literature. Developed mainly in through conscientious objector cases in the United States, freedom of conscience was circumscribed to and by religious standards. In this way, synonymy with religious beliefs was the only option. Within the legal literature, freedom of conscience was discussed in further detail, but the omnipresence of religion lingered. Unlike the American portrait, freedom of conscience figures prominently and constitutionally in the *European Convention on Human Rights*. However, as noted previously, freedom of conscience has developed more in the literature than in the case law. Within the legal literature, freedom of conscience was interpreted as a vehicle for groups as a supplementary protection to a more stringent freedom of religion. In the case law under the *ECHR*, pacifists, atheists, vegans, conscientious objectors and the environmentally-conscious have all had their beliefs upheld under freedom of conscience. In this manner, freedom of conscience is afforded a breadth unparalleled by its American or even Canadian counterparts. While convictions of conscience exist, whether religious or a-religious in nature, they would benefit greatly from a better understanding within the discourse of freedom of conscience and religion and better contextualised within the greater discourse of rights.

Freedom of religion and freedom of conscience, as seen through the comparative legal lenses of Canada, the United States and through the decisions on Article 9 of the *ECHR*, can enhance one's own comprehension of the belief. As noted by Robert Leckey, "[a] transnational discourse of comparative constitutionalism is thriving in the law reviews […] [o]n its terms, constitutional quandaries are ones of political morality or policy, not hermeneutics. It is from that vantage that the 'imperative' for consultation of foreign and international sources is plainest."[784] This statement should not denote a state of certainty, but rather an

[784] Leckey, "Language and Judgment's Reach", *supra* note 438, 4.

opportunity of understanding, in my opinion. Although a comparative lens can be of use, it should not supplant, or come at the expense of, a detailed local analysis. Whereas the European and American perspectives can be seen as the two extremes of constitutional comparative discourse, the Canadian approach has been an intermediary pole in this exchange. Recent comparative legal literature on freedom of religion seems to focus on the presence or absence of the Establishment Clause[785], when putting Canada and the United States side by side. This does not, for all intents and purposes, serve to further the debate, but rather exacerbate the differences that exist between these countries. As a point of contrast, when examining freedom of religion in American and European perspectives, certain authors have suggested that a reorientation toward a less individualistic approach[786]. While these are only a few examples of how freedom of religion is discussed in a comparative lens, it should not be taken as conclusive evidence, but rather as an invitation for further transnational investigation.

Returning to the title of my master's thesis, where does the triangulation of rights fit into the balancing of interests? Triangulation, as a concept, implies "**1** (in surveying) the tracing and measurement of a series or network of triangles in order to determine the distances and relative positions of points spread over a territory or region. **2** formation of or division into triangles."[787] Applied to freedom of conscience and religion, I traced the network between this overarching right and those of freedom of religion and freedom of conscience. In this manner, a triangulation enables an independent content to each right, though requiring an overarching structure for the greater fundamental freedom. That "single integrated concept" of freedom of conscience and religion, advocated by Justice Dickson (as he was

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[785] See, for example: Donald Beschle, "Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada" (2002) 4 *U. Pa. J. Const. L.* 451; Jeremy Patrick, "Church, State, and Charter: Canada's Hidden Establishment Clause" (2006) 14(1) *Tulsa J. Comp. & Int'l L.* 25; Christopher L. Eisgruber and Mariah Zeisberg, "Religious Freedom in Canada and the United States" (2006) 4(2) *ICON* 244. Eisgruber and Zeisberg add at page 268, however, "that scholars interested in the comparative study of religious freedom in the two countries would profit from paying more attention to another constitutional difference between them – namely, the greater fragmentation of political power in the United States."

[786] See, for example: Bernadette A. Meyler, "The Limits of Group Rights: Religious Institutions and Religious Minorities in International Law" (2007) 22 *St. John's J.L. Comm.* 535.

[787] COMPACT OXFORD ENGLISH DICTIONARY, "Triangulation", *supra* note 2, http://www.askoxford.com/concise_oed/triangulation?view=uk (last accessed 25.12.2009).

then)[788], has elicited certain questions in recent years, as discussed earlier on in my study. While freedom of conscience does not constitute an independent right at present in the Canadian constitutional context, there is a certain openness of interpretation. I take this overture as an invitation for further academic consideration. Completing the final point of the triangle, the fundamental freedom of religion has developed greatly, envisioning outer definitions and inner protections. In my opinion, freedom of religion also serves as the juncture point between triangulation of rights and the balancing of interests. This can be observed in the shift toward 'communitarian interests' and '*Charter* values' in the recent case law on freedom of religion. While this can be interpreted as a more effective manner in which to manage religious claims, by playing devil's advocate, I suggest that it could be seen as a more efficient fashion by which religious minority claims can be deflected under the guise of 'collective interests'[789]. Either way, however, the language employed toward justificatory measures and '*Charter* values' needs to clarified, in my view. Lastly, I would like to underline to two overlapping points: first, the use of speculative risk in freedom of religion cases and second, the employment of magical language to demonstrate the difficulty of using legal tools to explain religious concepts. Whereas the former was used in *Hutterian Brethren of Wilson Colony* by the majority to demonstrate the factual risk of identity fraud and the 'speculative' risk of exercising one's right to religion, the latter was employed to demonstrate that no magic formula (or barometer, as in the case of *Hutterian Brethren of Wilson Colony*) or 'eureka' moment (as was the case in *A.C.*) exists to quantify that risk, or the breach to one's fundamental rights. By relying on magic – which implies retaining an element of disbelief – and eureka moments – which require a definitive moment – there is an admission of the uncertainty of content in freedom of religion. While recourse to magical language does not claim to decipher the language of rights, it declares its vulnerability to the multiplicity of voices and influences in this discourse. This point is buttressed, I think, by McLachlin C.J.'s explanation of freedom of religion as being "a matter of faith, intermingled with culture"[790], which admits and invites a more contextual exploration of freedom of religion. At the same time, it is also

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[788] *Supra* note 181.
[789] On the notions of "effective" and "efficient" (*effectivité*, *efficacité*) in law, see Guy Rocher, "L'effectivité du droit" in Andrée Lajoie, ed., *Théories et emergence du droit* (Montréal, Les Éditions Thémis, 1998), 135, at 138, 143, 144.
[790] *Hutterian Brethren of Wilson Colony, supra* note 4, ¶ 89, 90.

acknowledged that the locus of the equation between rights and interests will migrate, inviting us to decipher the language of communal interests and the justification of the ‘common good’. Composing with the communities of faith and the good faith of communities using this new equation hails, in my view, an innovative era in the constitutional discourse on fundamental freedoms in Canada.

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