

# Of Eureka Moments and Magic Barometers: Freedom of Religion as the “First” Freedom in the Canadian Constitutional Context

Dia DABBY<sup>1</sup>

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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. Cet article examinera la liberté de religion dans le contexte constitutionnel canadien. Nous avons choisi d’étudier la liberté de religion dans trois vagues successives : avant l’entrée en vigueur de la Déclaration canadienne des droits, sous la Déclaration canadienne des droits; et enfin, après l’entrée en vigueur de la Charte canadienne des droits et libertés. De plus, l’accommodement ainsi que de la proportionnalité de la liberté de religion d’un individu sera également traité. Ainsi que nous le démontrerons, la liberté de religion a engendré un repositionnement de l’individu face aux intérêts de la communauté ainsi qu’une réinterprétation des justifications menant à la sauvegarde de ces croyances.

**Summary:** 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. This article will examine freedom of religion in the Canadian constitutional context. 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.

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<sup>1</sup> (Lawyer), B.A., LL.B., LL.M., Ph.D. (Candidate). The study of freedom of religion should be understood as the backdrop to my analysis of freedom of conscience in my master’s thesis entitled “Triangulation of Rights, Balancing of Interests: Exploring the Tensions between Freedom of Conscience and Freedom of Religion in Comparative Constitutional Law”, LL.M., Faculty of Graduate Studies, Université de Montréal, 2010. 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.

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## Introduction

In this article, 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 (together with its limits) be examined 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 set 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".

## 1. Freedom of Religion: a Retrospective

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

The *British North America Act*<sup>2</sup> 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<sup>3</sup>. Pierre Elliott Trudeau, in one of his last articles as a law professor, trenchantly set aside the *BNA Act* for 'its lack of principles, ideals, or other frills'<sup>4</sup>. Under the *BNA Act*, religion was conceptualised in terms of majority-minority group setting<sup>5</sup> and thus special status was granted to certain minority groups, namely through education provisions<sup>6</sup>. For instance, whereas the laws on marriage were of federal competence<sup>7</sup>, the solemnization of marriage was

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<sup>2</sup> *British North America Act*, (1867) 30 & 31 Victoria, c. 3. (U.K.) [*BNA Act*].

<sup>3</sup> 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 needless to say that nothing in the foregoing has reference to matters that are confined to Parliament."

<sup>4</sup> 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.

<sup>5</sup> 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."

<sup>6</sup> *BNA Act*, *supra* note 2, 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.

<sup>7</sup> *Ibid*, s. 91(26).

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deemed a provincial matter<sup>8</sup>. Moreover, s. 92(13) and 92(16) of the *BNA Act* could also be read as applying to (religious) civil rights<sup>9</sup>.

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<sup>10</sup>, provincial licensing laws<sup>11</sup> as well as municipal by-laws<sup>12</sup>, 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<sup>13</sup> 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 concep-*

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<sup>8</sup> *Ibid*, s. 92(12).

<sup>9</sup> This was noted by Rand J. in *Saumur*, *supra* note 3, 329. See *BNA Act*, *supra* note 2, 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."

<sup>10</sup> *Boucher v. The King*, [1951] S.C.R. 265 [**Boucher**].

<sup>11</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121 [**Roncarelli**].

<sup>12</sup> *Saumur*, *supra* note 3.

<sup>13</sup> 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."

*tions; 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.”<sup>14</sup>*

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.

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<sup>15</sup>. 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<sup>16</sup>. *Saumur* furthermore demonstrated the historical legacy of religious freedom in Canada, as put once again so eloquently by Justice Rand:

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<sup>14</sup> *Boucher*, *supra* note 10, 288 [my emphasis].

<sup>15</sup> 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 3, 299, 321.

<sup>16</sup> As stated by Justice Rand in *Saumur*, *supra* note 3, 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]

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*“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.**”<sup>17</sup>*

*“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.**”<sup>18</sup>*

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*<sup>19</sup>.

Following the overture in *Saumur*, equality of religions was addressed in *Chaput v. Romain*<sup>20</sup>, where Taschereau J. (speaking for Kerwin and Estey JJ.), explained that individual liberty existed with regard to religion<sup>21</sup>. The Supreme Court asserted that in this light, the police

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<sup>17</sup> *Saumur*, *supra* note 3, 327 [my emphasis].

<sup>18</sup> *Ibid*, 329 [my emphasis].

<sup>19</sup> 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:”

<sup>20</sup> *Chaput v. Romain*, [1955] S.C.R. 834 [**Chaput**].

<sup>21</sup> *Chaput*, *supra* note 20, 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.”

were wrong to break up a meeting of Jehovah's 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<sup>22</sup>. 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<sup>23</sup>. Fundamentally, this case highlighted the historic disadvantage of religious subgroups and their often arbitrary treatment by not only greater society but also governmental actors<sup>24</sup>.

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<sup>25</sup> and as recently as the *Freedom of Worship Act*<sup>26</sup> in Québec, the "witnessing religion" era provided the observer with fractured dialogues on religious values.

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<sup>22</sup>Tremblay, *supra* note 13, 115.

<sup>23</sup>*Roncarelli*, *supra* note 11, 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]

<sup>24</sup>This point was underlined by L'Heureux-Dubé J. (dissenting) in *Adler v. Ontario*, [1996] 3 S.C.R. 609, ¶ 80 [*Adler*].

<sup>25</sup>As cited in *Saumur*, *supra* note 3, 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 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."

<sup>26</sup>*Freedom of Worship Act*, R.S.Q. 1941, c. 307.

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

The enactment of the *Canadian Bill of Rights* in 1960<sup>27</sup> presented Canadians with a more tangible protection of religion<sup>28</sup>, though limited to matters within the legislative authority of the Parliament of Canada<sup>29</sup>. The Parliament sought, however, to make the *Canadian Bill of Rights* relevant to the society into which this law was to be introduced<sup>30</sup>, by employing verbs such as “recognized” and “declared”<sup>31</sup>.

The confluence of criminal law and religious freedom was once again at the forefront in *Robertson and Rosetanni v. R.*<sup>32</sup>, 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*<sup>33</sup>. The *Lord’s Day Act* was recognised as being purely “secular and financial”<sup>34</sup> rather than having “abrogate[d], abridge[d], or infringe[d] or authorize[d] the abrogation, abridgment or infringement of religious freedom.”<sup>35</sup> Therefore, it was deemed not to have contravened the *Bill of Rights*. The *Lord’s Day Act* was later found to be religious in purpose under the *Charter* era, where, this time, its constitutionality was discussed rather than its application<sup>36</sup>.

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

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<sup>27</sup> *Canadian Bill of Rights* (1960, c. 44 ) [*Canadian Bill of Rights*].

<sup>28</sup> *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]

<sup>29</sup> *Canadian Bill of Rights*, *supra* note 27, s. 5(2) and 5(3).

<sup>30</sup> 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*.

<sup>31</sup> *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...”

<sup>32</sup> *Robertson and Rosetanni*, *supra* note 30, 654.

<sup>33</sup> *Ibid*, 567.

<sup>34</sup> *Ibid*, 567.

<sup>35</sup> *Ibid*, 568.

<sup>36</sup> *Ibid*, 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 *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 [*Big M. Drug Mart*], ¶ 114-115.

two speeds of rights. While not the first province to adopt a human rights code in Canada<sup>37</sup>, it was the breadth of protection afforded to its citizens which made Québec's *Charter of Human Rights and Freedoms*<sup>38</sup> singular<sup>39</sup>. Propitious, given the international pacts that came into force around the time of its adoption<sup>40</sup>, the *Québec Charter* found its meaning within the leading texts on human rights<sup>41</sup>. The *Québec Charter* sought to protect conscience and religion, not only as fundamental freedoms<sup>42</sup>, but also, in the case of religion, as prohibited grounds of discrimination<sup>43</sup>, except when a distinction based on aptitudes exist<sup>44</sup>.

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<sup>45</sup>. 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.

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<sup>37</sup> 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; *Newfoundland 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.

<sup>38</sup> *Charter of Human Rights and Freedoms*, L.R.Q. c. C-12 (adopted on June 27<sup>th</sup> 1975, enacted in law on June 28<sup>th</sup> 1976) [*Québec Charter*].

<sup>39</sup> 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 législative canadienne", (1987) 21 *R.J.T.* 1, 16.

<sup>40</sup> *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.

<sup>41</sup> 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.

<sup>42</sup> *Québec Charter*, *supra* note 38, 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."

<sup>43</sup> *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, 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."

<sup>44</sup> *Québec Charter*, *supra* note 38, 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."

<sup>45</sup> *Supra*, note 29.

## 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<sup>46</sup> fundamental freedom<sup>47</sup>. 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<sup>48</sup>, 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 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<sup>49</sup>, since it brandished its religious purpose

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<sup>46</sup> 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**].

<sup>47</sup> *Canadian Charter of Rights and Freedoms*, *ibid*, s. 2a): “Everyone has the following fundamental freedoms:  
a) freedom of conscience and religion”.

<sup>48</sup> 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”**]; Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008) [**Moon, Law and Religious Pluralism**].

<sup>49</sup> *Big M Drug Mart*, *supra* note 36, ¶ 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

overtly<sup>50</sup>. 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<sup>51</sup>. This approach also followed Justice Dickson's interpretation of section 2(a) as a "single integrated concept"<sup>52</sup>. As such, the religious purpose of the *Lord's Day Act* was sufficient to demonstrate a breach of freedom of conscience and religion<sup>53</sup> and no section 1 analysis was conducted. Hence, Dickson J. encapsulated the fundamental freedom as followed:

*"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***

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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.

<sup>50</sup> 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 36, ¶ 79-80.

<sup>51</sup> 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 36, ¶ 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."

<sup>52</sup> *Big M. Drug Mart, supra* note 36, ¶ 120.

<sup>53</sup> *Ibid.*, ¶ 79-85.

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*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.*"<sup>54</sup>

In this way, freedom of conscience and religion – much like all other rights and freedoms contained in the *Charter* – is not an absolute right<sup>55</sup>, 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<sup>56</sup>.

Thus not all Sunday closing laws can be considered religious in nature. The Supreme Court in *R. v. Edwards Books and Art Limited*<sup>57</sup>, explained that the Ontario *Retail Business Holiday Act*<sup>58</sup>, was enacted for the *secular* purpose of providing a uniform holidays for retail workers. An exemption was also provided in the act<sup>59</sup>. 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 section 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*

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<sup>54</sup>*Ibid*, at, ¶ 94-95 [my emphasis].

<sup>55</sup> 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.

<sup>56</sup> The issue of reasonable limits in a free and democratic society will be discussed further on.

<sup>57</sup> *Edwards Books*, *supra* note 47.

<sup>58</sup> *Retail Business Holidays Act*, R.S.O. 1980, c. 453, ss. 2(1), 3(4).

<sup>59</sup> *Ibid*, ss. 2(1), 3(4). See *Edwards Books*, *supra* note 47, ¶ 115-120, ¶ 144.

*which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial”<sup>60</sup>*

Interestingly, *Edwards Books* also distinguished freedom of conscience from freedom of religion. Dickson J. (as he was then) proffered that section 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<sup>61</sup>. 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*<sup>62</sup>. The appellant, Thomas 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<sup>63</sup>. 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<sup>64</sup>. In this way, the appellant argued that the *Alberta School Act* infringed on his section 2(a) and section 7 *Charter* rights. Although both arguments ultimately failed<sup>65</sup>, 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<sup>66</sup>.

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-

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<sup>60</sup> *Edwards Books*, *supra* note 49, ¶ 97 [references omitted], as stated by Wilson J. (dissent.) in *R. v. Jones*, [1986] 2 S.C.R. 284 [*Jones*], ¶ 67.

<sup>61</sup> *Edwards Books*, *supra* note 49, ¶ 144.

<sup>62</sup> *Jones*, *supra* note 60.

<sup>63</sup> *School Act*, R.S.A. 1980, c. S-3, ss. 142(1), 143(1) [*Alberta School Act*].

<sup>64</sup> *Jones*, *supra* note 60, ¶ 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”.”

<sup>65</sup> *Jones*, *supra* note 60, ¶ 33, 48-49 (Laforest J., writing for the majority).

<sup>66</sup> 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 *Jones*, *supra* note 60, ¶ 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.

called ‘Elgin County’ cases<sup>67</sup>. These cases concerned the funding of education of denominational schools, as formulated by section 93 of the *BNA Act*, which reflected the political and “historical compromise” between Catholics and Protestants leading to Confederation, as noted in *Adler*<sup>68</sup>. 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 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.”<sup>69</sup> While the Supreme Court judged it important that membership in a “discrete and insular minority” be recognised in *Adler*, section 93 of the *BNA Act* nevertheless conferred 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.”<sup>70</sup>

Freedom of religion was further addressed in 1995 with *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*<sup>71</sup>, 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<sup>72</sup>. The Supreme Court held that a broad interpretation of freedom of religion should be favoured, in order to balance competing rights under section one of the *Charter*<sup>73</sup>. According to La Forest J. (writing for the majority), this approach gave necessary context as well as a broad

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<sup>67</sup> *Big M. Drug Mart*, *supra* note 36, ¶ 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 24.

<sup>68</sup> *Adler*, *supra*, ¶ 29.

<sup>69</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, ¶ 4 [references omitted].

<sup>70</sup> *Adler*, *supra* note 24, ¶ 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**].

<sup>71</sup> *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [**Children’s Aid Society**].

<sup>72</sup> 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.

<sup>73</sup> *Children’s Aid Society*, *supra* note 71, at 383-384; see also *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [**Ross**], at ¶ 73-75.

power of judicial review<sup>74</sup> 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.”*<sup>75</sup>

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<sup>76</sup>.

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<sup>74</sup> *Children’s Aid Society*, *supra* note 71, 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 71, 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.**”

<sup>75</sup> *Children’s Aid Society*, *supra* note 71, 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. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, ¶ 102-108 [*A.C.*] (Abella J., writing for LeBel, Deschamps and Charron JJ. concurring). This decision will be examined in depth further on in our study.

<sup>76</sup> *Children’s Aid Society*, *supra* note 71, 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

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Freedom *from* religious discrimination, and more specifically freedom from constraint or coercion, has also appeared as a facet of freedom of conscience and religion<sup>77</sup>. 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<sup>78</sup>. For example, in *Freitag v. Penetanguishene*<sup>79</sup>, the recital of a Christian prayer to commence a city council meeting was interpreted as imposing a Christian moral tone to the gathering<sup>80</sup>. Within an educational setting such as faced in *Chamberlain v. Surrey School District No. 36*<sup>81</sup>, 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<sup>82</sup>; the interpretation of section 2(a) as a ‘single integrated

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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]

<sup>77</sup> *Big M. Drug Mart*, *supra* note 36, ¶ 96-97.

<sup>78</sup> This point will be addressed in depth further on in our study.

<sup>79</sup> *Freitag v. Penetanguishene (Town)*, 1999 CanLII 3786 (Ont. C.A.) [*Freitag*].

<sup>80</sup> *Freitag*, *ibid*. 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 (January 20, 2009)>, [http://www.cdpcj.qc.ca/fr/communiqués/docs-2009/COM\\_PriereTroisRivieres.pdf](http://www.cdpcj.qc.ca/fr/communiqués/docs-2009/COM_PriereTroisRivieres.pdf) (site last accessed 31.03.2009).

<sup>81</sup> *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.”

<sup>82</sup> The Supreme Court of Canada, in *Big M. Drug Mart*, *supra* note 36 at ¶ 94-95, explained that the concept of freedom of religion should be understood as the right to entertain religious beliefs, but also that each is entitled to

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*<sup>83</sup>. 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

Freedom of religion became overwhelming present at the Supreme Court in 2004, developing a broad definition of religion on the one hand<sup>84</sup> and determining the religious neutrality of the State on the other<sup>85</sup>.

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 article 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*<sup>86</sup> 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*<sup>87</sup>. All judges agreed that the right to freedom of religion is not absolute<sup>88</sup>. However, it is with respect to the definition and scope of freedom of religion that

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their views. In this way, a positive and negative right to religion co-exist, which serves as a first parameter of the individual's conception of religion.

<sup>83</sup> For further discussion on section 1 *Charter* analysis, see *infra* section 1.4.2.

<sup>84</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 [*Amselem*].

<sup>85</sup> *Congrégation des témoins de Jéhovah de Saint-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650 [*Lafontaine*].

<sup>86</sup> The *succah* is explained as follows in *Amselem*, *supra* note 84, 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."

<sup>87</sup> *Amselem*, *supra* note 84, ¶ 37.

<sup>88</sup> 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

Dia DABBY, « Of Eureka Moments and Magic Barometers: Freedom of Religion as the "First" Freedom in the Canadian Constitutional Context »

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*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 which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.”*<sup>89</sup>

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*<sup>90</sup>. The emphasis on the individual’s subjective conception of freedom of religion resounds unmistakably<sup>91</sup>. 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.”*<sup>92</sup>

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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*.

<sup>89</sup> *Amselem*, *supra* note 84, ¶ 39 [my emphasis].

<sup>90</sup> *Amselem*, *supra* note 84, ¶ 47.

<sup>91</sup> *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 48, at 385.

<sup>92</sup> *Amselem*, *supra* note 84, ¶ 56

While readily admitting that the Court should not become the arbiter of religious dogma<sup>93</sup>, *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<sup>94</sup>.

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<sup>95</sup>; Bastarache J., writing for Deschamps and LeBel JJ.). While the approach proposed by Bastarache J. did not differ substantially<sup>96</sup> from that of the majority insofar as 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<sup>97</sup>. Second, Bastarache J. also mentioned that the *Québec Charter* must be interpreted in harmony with the *Civil Code of Québec*<sup>98</sup>; in this sense, a distinction is made between the *purpose of* freedom of religion and the *right to* freedom of religion<sup>99</sup>. The minority opinions triangulated the wronged rights in a manner distinct from that of the majority<sup>100</sup> and given the framing of the issue<sup>101</sup>, it is not surprising that the appeal would have been dismissed<sup>102</sup>.

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).

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<sup>93</sup> *Ibid*, ¶ 50

<sup>94</sup> *Ibid*, ¶ 54. On this point, see also Binnie J.'s opinion at ¶ 190.

<sup>95</sup> 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 only with rights and freedoms but with a citizen's *responsibilities* to other citizens in the *exercise* of those rights and freedoms.": *Amselem*, *supra*, ¶ 186.

<sup>96</sup> *Amselem*, *supra* note 84, ¶ 144

<sup>97</sup> *Ibid*, ¶ 140, 159. Bastarache J. employs "useful" to describe the input of expert testimony in discerning the fundamental precepts and practices of a religion.

<sup>98</sup> *Ibid*, ¶ 146, 165. I refer, of course, to the *Civil Code of Québec*, (L.Q., 1991, c. 64.) [*C.c.Q.*].

<sup>99</sup> *Ibid*, ¶ 146.

<sup>100</sup> *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."

<sup>101</sup> *Ibid*, ¶ 180.

<sup>102</sup> *Ibid*, ¶ 182. Binnie J. would have also dismissed the appeal at ¶ 210.

The minority, as expressed by LeBel J., underlined the importance of the negative aspect of freedom of religion by asserting the duty of religious neutrality of the state and public authorities<sup>103</sup>. As such, the municipality would be breaching its obligation of neutrality by providing the appellants with further assistance<sup>104</sup>. 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<sup>105</sup>. 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<sup>106</sup>. 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<sup>107</sup>.

*Bruker v. Marcovitz*<sup>108</sup> provided further fertile terrain 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<sup>109</sup>, and this, despite the fact that a standing agreement had been negotiated (known as the Consent to Corollary Relief). More specifically, Clause 12 of the aforementioned agreement<sup>110</sup> 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, alleging 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 chains” or “wife in chains”<sup>111</sup>. The husband argued that the agreement was not valid under civil law and that by seeking damages, his right to freedom of

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<sup>103</sup> *Lafontaine*, *supra* note 85, ¶ 65.

<sup>104</sup> *Ibid.*, ¶ 71 *in fine*.

<sup>105</sup> *Ibid.*, ¶ 72.

<sup>106</sup> *Ibid.*, ¶ 73-93.

<sup>107</sup> *Ibid.*, ¶ 36.

<sup>108</sup> *Bruker v. Marcovitz*, [2007] 3 R.C.S. 607 [“*Bruker*”]

<sup>109</sup> 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). 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.

<sup>110</sup> 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”)

<sup>111</sup> *Bruker*, *supra* note 108, ¶ 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.

religion under the *Québec Charter* had been breached. Seen as a civil obligation with religious undertones by the Superior Court<sup>112</sup>, 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<sup>113</sup> – 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<sup>114</sup>) 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.”<sup>115</sup> This need for balance or reconciliation amongst fundamental rights is reflected, according to Abella J., in article 9.1 of the *Québec Charter*<sup>116</sup>. The majority of the Supreme Court found that a dispute with a religious aspect can be appropriately interpreted as justiciable<sup>117</sup> as well as civilly viable<sup>118</sup> and thus legally binding<sup>119</sup>. Justice Abella completed her analysis by noting that she did not believe that Mr. Marcovitz

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<sup>112</sup> *S.B.B.*, *supra* note 110.

<sup>113</sup> *Marcovitz v. Bruker*, 259 D.L.R. (4<sup>th</sup>) 55, No. 500-09-013353-032 (C.A.Q.) (QL) [*Marcovitz*]

<sup>114</sup> Justice Deschamps wrote a lengthy 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 85 – 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 108, ¶ 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).

<sup>115</sup> *Bruker*, *supra* note 108, ¶ 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)

<sup>116</sup> *Québec Charter*, *supra* note 38, 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 108, ¶ 76-82.

<sup>117</sup> *Bruker*, *supra* note 108, ¶ 41-43, 47.

<sup>118</sup> *Ibid*, ¶ 51.

<sup>119</sup> *Ibid*, ¶ 62-64.

objected to giving the *get* to Ms. Bruker on religious grounds<sup>120</sup>, thereby questioning his sincerity. Moreover, when balanced with Ms. Bruker's curtailed "ability to live her life fully as a Jewish woman in Canada"<sup>121</sup>, it was found that the breach of Mr. Marcovitz's rights was indeed inconsequential<sup>122</sup>.

The right to freedom of religion was challenged lately in *A.C. v. Manitoba (Director of Child and Family Services)*<sup>123</sup>, where a fourteen years old child 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<sup>124</sup>. 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<sup>125</sup>. 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 circumstance<sup>126</sup>. 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"<sup>127</sup>. 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<sup>128</sup>. 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<sup>129</sup>. The treatment order was appealed by A.C. and her parents, arguing on the one hand that section 25(8) of the *CFSA* should not have been applied to her and on the other, that sections 25(8) and 25(9) of the *CFSA* were unconstitutional since they violated A.C.'s sections 2(a), 7 and 15 *Charter* rights<sup>130</sup>. Steel J.A., for a unanimous court, summarised their conclusions as follows:

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<sup>120</sup> *Ibid*, ¶ 78-79.

<sup>121</sup> *Ibid*, ¶ 93.

<sup>122</sup> The majority did not discern any errors in the assessment of damages by the trial judge and therefore elected to leave them undisturbed: *Bruker, 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: *Bruker, ibid*, ¶ 177-180.

<sup>123</sup> *A.C.*, *supra* note 75.

<sup>124</sup> *Child and Family Services Act*, C.C.S.M. c. C80, s. 25(8) [*CFSA*].

<sup>125</sup> *CFSA*, *supra* note 124, s. 25(9).

<sup>126</sup> *A.C.*, *supra* note 75, ¶ 6.

<sup>127</sup> *Ibid*, ¶ 6.

<sup>128</sup> *Ibid*, ¶ 7-8.

<sup>129</sup> *Ibid*, ¶ 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.

<sup>130</sup> *Ibid*, ¶ 14.

“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.”<sup>131</sup>

The interpretation of section 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 Court of Appeal. Justice Abella argued that one should adopt a ‘sliding scale of scrutiny’<sup>132</sup> 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<sup>133</sup>. According to the common law approach to medical treatment of

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<sup>131</sup> *Director of Child and Family Services v. A.C.*, 2007 MBCA 9 (CanLII), ¶ 4 [*Director of Family Services*].

<sup>132</sup> *A.C.*, *supra* note 75, ¶ 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.”

<sup>133</sup> Section 2(1) of the *CFSA*, *supra* note 124, 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 75, ¶ 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;



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”<sup>134</sup>, but rather “granting adolescents a degree of autonomy that is reflective of their evolving maturity”<sup>135</sup>. In this way, there is no “eureka moment”<sup>136</sup> 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<sup>137</sup>. 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<sup>138</sup>, 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.)<sup>139</sup> or Justice Binnie (dissenting)<sup>140</sup>, who both agreed that section 25(8) of the *CFSA* violated A.C.’s right to freedom of religion<sup>141</sup>. This is, however, where McLachlin C.J. and Binnie J. part ways, since the former opined that upon closer analysis, section 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***

- 
- (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.

<sup>134</sup> *A.C.*, *supra* note 75, ¶ 69.

<sup>135</sup> *Ibid.* 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.

<sup>136</sup> *Ibid.*, ¶ 4.

<sup>137</sup> 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* note 75, ¶ 111.

<sup>138</sup> *A.C.*, *supra* note 75, ¶ 115.

<sup>139</sup> *Ibid.*, ¶ 153.

<sup>140</sup> *Ibid.*, ¶ 214.

<sup>141</sup> *Ibid.*, ¶ 154 (McLachlin C.J.); ¶ 215 (Binnie J.)

*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.*"<sup>142</sup>

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 section 1 of the *Charter*<sup>143</sup>.

Unlike the majority opinions, Justice Binnie argued that the crux of the dispute lay in the fact that the presumption of incapacity contained in section 25 *CFSA* remained irrebutable<sup>144</sup>. Therefore, beyond the violation of section 2(a) and 7 of the *Charter*, the *CFSA* was conceptually closed to A.C. being considered a "mature minor"<sup>145</sup>. 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<sup>146</sup>.

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<sup>142</sup> *A.C.*, *supra* note 75, ¶ 155 [my emphasis].

<sup>143</sup> *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*.

<sup>144</sup> *Ibid.*, ¶ 225, 231.

<sup>145</sup> *Ibid.*, ¶ 224.

<sup>146</sup> In considering the spiritual and physical consequences of choices, Professor Shauna Van Praagh wrote an opinion piece following *A.C.*, *supra* note 75, 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 15<sup>th</sup> 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 75: "[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*<sup>147</sup>. New regulations regarding drivers' licenses<sup>148</sup> were instituted by the Alberta government, upsetting a careful balance that had existed with the Hutterian Colony for the last thirty years<sup>149</sup>. 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<sup>150</sup>. 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<sup>151</sup> 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] section 2(a) of the *Canadian Charter of Rights and Freedoms*"<sup>152</sup>.

Whereas both lower courts ruled in favour of the Hutterian Brethren of Wilson Colony<sup>153</sup> 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

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<sup>147</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69.

<sup>148</sup> *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, s. 14(1)(b) (am. Alta. Reg. 137/2003, s. 3).

<sup>149</sup> 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.

<sup>150</sup> "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 69, ¶ 29.

<sup>151</sup> 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 69, ¶ 122 (Abella J., diss.)). See also *Ibid.*, ¶ 12 (McLachlin C.J.).

<sup>152</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 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.

<sup>153</sup> 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).

freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion.”<sup>154</sup>

Although the sincerity of the Hutterites’ belief was not challenged<sup>155</sup> 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.<sup>156</sup> Moreover, it was acknowledged by McLachlin C.J. that freedom of religion can pose a particular challenge to the universality of many regulatory programs<sup>157</sup>. 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<sup>158</sup>. This interpretation was thus considered a ‘measure prescribed by law’ and constituted a substantial and pressing objective<sup>159</sup>, 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 well as preventing it from being used for the purposes of identity theft<sup>160</sup>. 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<sup>161</sup>. 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<sup>162</sup>. As such, she held that:

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<sup>154</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 95.

<sup>155</sup> *Ibid.*, ¶ 7, 33.

<sup>156</sup> *Ibid.*, ¶ 34 citing *Edwards Books*, *supra* note 47, at 759.

<sup>157</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 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.

<sup>158</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 45.

<sup>159</sup> *Ibid.*, ¶ 47.

<sup>160</sup> *Ibid.*, ¶ 52.

<sup>161</sup> *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.

<sup>162</sup> *Ibid.*, ¶ 65.

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*“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.**”*<sup>163</sup>

This represents a significant divergence from the result in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*<sup>164</sup>, 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. argued that waiting for “proof positive” would decrease the number of laws passed as well as make public interest suffer<sup>165</sup>. 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.”<sup>166</sup> 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<sup>167</sup>. Although it was acknowledged that the

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<sup>163</sup> *Ibid.*, ¶ 71 [my emphasis].

<sup>164</sup> *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.

<sup>165</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 85.

<sup>166</sup> *Ibid.*, ¶ 89, 90.

<sup>167</sup> *Ibid.*, ¶ 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.

universal photo requirement curtailed the claimants' right to freedom of religion, the majority of the Supreme Court concluded that limit imposed was justified under section 1 of the *Charter*.<sup>168</sup>

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<sup>169</sup>, I believe that Justice Abella's use of freedom of religion case law from the European Court of Human Rights (hereafter ECHR) proved to be at the same time "novel and inconsistent", to borrow her own words<sup>170</sup> and dangerous, to add my own<sup>171</sup>. 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<sup>172</sup> 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

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<sup>168</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 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 75, ¶ 111.

<sup>169</sup> *A.C.*, *supra* note 75, ¶ 143 (Abella J.).

<sup>170</sup> *Ibid.*, ¶ 171 (Abella J.). To my knowledge, this also constituted the first time that ECtHR case law was used for freedom of religion.

<sup>171</sup> 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)

<sup>172</sup> See, for example: *Bruker*, *supra* note 108; *A.C.*, *supra* note 75. 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 75, ¶ 153.

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world of majority law<sup>173</sup>. In her view, the absence of an exemption to the universal photo requirement proved to be *dramatic*<sup>174</sup> 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*<sup>175</sup>. Justice Abella goes on to say that the ECtHR has espoused a similar liberal conception of freedom of religion in *Kokkinakis*<sup>176</sup> and *Şahin*<sup>177</sup>. I cannot adopt that view, however, for two reasons. Firstly, freedom of religion was

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<sup>173</sup> 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 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]

<sup>174</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 114 (Abella J.) [my emphasis].

<sup>175</sup> *Ibid.*, ¶ 127 (Abella J.), citing *Big M Drug Mart*, *supra* note 36, at 759 and *Edwards Books*, *supra* note 47 at 346.

<sup>176</sup> *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A [**Kokkinakis**].

<sup>177</sup> 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* (Utrecht, 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,

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* (hereafter ECHR). 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',<sup>178</sup> the later dealt with the collision between the manifestation of religious beliefs and the established secular (*laik*) State<sup>179</sup>. 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 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*<sup>180</sup> 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

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as well as under art. 2 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.

<sup>178</sup> Article 3 of the 1975 Constitution (Greece).

<sup>179</sup> 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.

<sup>180</sup> *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, ECHR 2001-XII [*Metropolitan Church of Bessarabia*]

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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*<sup>181</sup>, and this, despite the fact that freedom of religion (without regard to denomination) was recognised in Article 31 of the Moldovan Constitution of 1994<sup>182</sup>. The government argued that the case concerned an ecclesiastical conflict and that any recognition of the Metropolitan Church of Bessarabia would provoke conflict within the Orthodox Church<sup>183</sup>. 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<sup>184</sup>. 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<sup>185</sup>. 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

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<sup>181</sup> *Religious Denominations Act*, (Law no. 979-XII of 24 March 1992) as cited in *Metropolitan Church of Bessarabia*, *supra* note 180, ¶ 13. The Metropolitan Church of Bessarabia could therefore not operate or practice as a church: see *Ibid*, ¶ 104-105.

<sup>182</sup> *Metropolitan Church of Bessarabia*, *supra*, ¶ 89.

<sup>183</sup> *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.

<sup>184</sup> *Ibid*, ¶ 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 180, ¶ 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 69, ¶ 184.

<sup>185</sup> 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 69, ¶ 181-182.

photo requirement, the State may be seen as curtailing certain 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<sup>186</sup>. 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<sup>187</sup>. 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"<sup>188</sup> 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<sup>189</sup>. 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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<sup>186</sup> See *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 165, where *Hofer v. Hofer*, [1970] S.C.R. 958 [**Hofer**] illustrated the community's self-sufficiency.

<sup>187</sup> *Hutterian Brethren of Wilson Colony*, *supra*, ¶ 177.

<sup>188</sup> *Ibid.*, ¶ 181.

<sup>189</sup> 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."

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## 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*<sup>190</sup>, 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 section 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 section 52 of the *Charter* whereas if the government action or administrative practice violates *Charter* rights, the remedy is found under section 24(1) of the *Charter*<sup>191</sup>. 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<sup>192</sup> and even more so since the *Bouchard-Taylor Report* in Québec in 2007<sup>193</sup>. Reasonable accommodation should remain, however, a legal obligation rather than a political tool to address

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<sup>190</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶¶ 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.

<sup>191</sup> *Ibid.*, ¶¶ 66-67.

<sup>192</sup> See, for example: Woehrling, « L'obligation d'accommodement raisonnable », *supra* note 48; 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).

<sup>193</sup> See, for example: 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 [Gaudreault-DesBiens, « Quelques angles morts »]; 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 48; 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., *Appartenances religieuses, appartenance citoyenne : un équilibre en tension* (Québec, Les Presses de l'Université Laval, 2009).

public opinion<sup>194</sup>. 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<sup>195</sup>; 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.”*<sup>196</sup>

An ultimate aspect of undue hardship was developed later in *Central Okanagan School District No. 23 v. Renaud*<sup>197</sup> and *Commission scolaire de Chambly v. Bergevin*<sup>198</sup>, as noted by Bosset and Eid<sup>199</sup>, 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 co-extensive terms.”<sup>200</sup> Nevertheless, reasonable accommodation has been employed beyond the realm of *bona fide* occupational requirements since *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*<sup>201</sup> and *British Columbia (Superintendent of Motor*

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<sup>194</sup> 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.

<sup>195</sup> *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536, ¶ 22 [*O'Malley*].

<sup>196</sup> *O'Malley*, *supra* note 195, ¶ 23.

<sup>197</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [*Central Okanagan School District*].

<sup>198</sup> *Commission scolaire de Chambly v. Bergevin*, [1994] 2 S.C.R. 525 [*Bergevin*].

<sup>199</sup> Bosset & Eid, « Droit et religion », *supra* note 48, ¶ 13.

<sup>200</sup> *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.

<sup>201</sup> *Meiorin*, *supra* note 164, as cited in *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 [*Multani*], at ¶ 130.

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*Vehicles*) v. *British Columbia (Council of Human Rights)*<sup>202</sup>, 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 Woehrling, on the question of whether reasonable accommodation should extend to both direct and indirect discrimination<sup>203</sup>. Hence, certain conditions must be met in order to obtain an accommodation on the basis of freedom of religion, according to 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<sup>204</sup>.

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.*<sup>205</sup> and *Prud'homme v. Prud'homme*<sup>206</sup>, where two fundamental freedoms were balanced under the proviso of section 9.1 of the *Québec Charter*<sup>207</sup>, the minority in *Amselem* held it inapplicable due to the impossible balancing of rights and further complicated by the subjective nature of the test at hand<sup>208</sup>. While Stéphane Bernatchez treated this point as an unresolved question, which is disputed by some<sup>209</sup>, 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*<sup>210</sup>. 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 based on the validity of an administrative decision. Although the majority observed the correspondence between the concepts of reasonable accommodation and

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<sup>202</sup> *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 201, at ¶ 130.

<sup>203</sup> See *Meiorin*, *supra* note 164, at 32 as cited by Woehrling, « Religion à l'école », *supra* note 193, 668 and footnote 33.

<sup>204</sup> Woehrling, « L'obligation d'accommodement raisonnable », *supra* note 48, 384-398.

<sup>205</sup> *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591 [*Aubry*].

<sup>206</sup> *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663 [*Prud'homme*].

<sup>207</sup> *Québec Charter*, *supra* note 38, 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."

<sup>208</sup> *Amselem*, *supra* note 84, ¶ 154, citing *Devine v. Québec (Attorney General)*, [1988] 2 S.C.R. 790, 818 [*Devine*].

<sup>209</sup> See Bernatchez, « Enjeux juridiques », *supra* note 193, ¶ 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 41, 343 at 357-359; Woehrling, « L'obligation d'accommodement raisonnable », *supra* note 48, 357 and following.

<sup>210</sup> *Multani*, *supra* note 201.

minimal impairment<sup>211</sup>, Justices Deschamps and Abella JJ., in a concurring opinion, viewed that they belonged to two different analytical categories<sup>212</sup>. This 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 section 1 justification analysis that applies to a claim that a law infringes the Charter."<sup>213</sup> 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 section 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 section 52 of the *Constitutional Act*<sup>214</sup>. 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<sup>215</sup>, 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:

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<sup>211</sup> *Multani, supra* note 201, ¶ 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 48, 360.

<sup>212</sup> *Multani, supra* note 201, ¶ 129.

<sup>213</sup> *Hutterian Brethren of Wilson Colony, supra* note 69, ¶ 66.

<sup>214</sup> *Ibid.*, ¶ 66-67.

<sup>215</sup> *Ibid.*, ¶ 67-68.

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“[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 court. The broader societal context in which the law operates must inform the s. 1 justification analysis.”<sup>216</sup>

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”<sup>217</sup>.

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*<sup>218</sup> and *Hydro-Québec v. Syndicat des employé(e)s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*<sup>219</sup>, 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<sup>220</sup>. In *Hydro-Québec*, the interpretation and application of the undue hardship standard constituted the central question<sup>221</sup>, whereas the application of a termination employment clause was pivotal in *McGill Health Centre*<sup>222</sup>. Both cases converged on the issue of the employer’s obligation: “the employer’s duty to accommodate ends where the employee is no longer able to fulfill the basic obligations

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<sup>216</sup> *Ibid.*, ¶ 69 [my emphasis].

<sup>217</sup> *Ibid.*, ¶ 70-71.

<sup>218</sup> *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**].

<sup>219</sup> *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**].

<sup>220</sup> *McGill Health Centre*, *supra* note 218, ¶ 32; *Hydro-Québec*, *ibid.*, ¶ 17.

<sup>221</sup> *Hydro-Québec*, *supra* note 219, ¶ 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.”

<sup>222</sup> *McGill Health Centre*, *supra* note 218, ¶ 10, 25.

associated with the employment relationship for the foreseeable future.”<sup>223</sup> 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<sup>224</sup>. 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<sup>225</sup>.

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 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 Gaudreault-DesBiens, when referring with approval to Justices Deschamps and Abella’s minority opinion in *Multani*, a *qualitative difference* reigns between these concepts<sup>226</sup>. The importance of conceiving of these legal concepts as intellectually

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<sup>223</sup> *Hydro-Québec*, *supra* note 219, ¶ 19; see also *McGill Health Centre*, *ibid*, ¶ 37-38.

<sup>224</sup> *McGill Health Centre*, *ibid*, ¶ 33.

<sup>225</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 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.

<sup>226</sup> Gaudreault-Desbiens, « Quelques angles morts », *supra* note 193, 241 at 272. See also Bernatchez, « Enjeux juridiques », *supra* note 193, ¶ 40-42.



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 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<sup>227</sup>. 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<sup>228</sup>. 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 diversité culturelle*<sup>229</sup>. 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<sup>230</sup>. 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

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<sup>227</sup> Bosset & Eid, « Droit et religion », *supra* note 48, ¶ 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 201, ¶ 53, 65. See also Bernatchez, « Enjeux juridiques », *supra* note 193, ¶ 40-42.

<sup>228</sup> 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 193; 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.

<sup>229</sup> *Loi favorisant l'action de l'Administration à l'égard de la diversité culturelle*, Bill n°16 (Specific consultations – 07-08.10.2009), 1<sup>st</sup> Sess., 39<sup>th</sup> 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)

<sup>230</sup> Bosset & Eid, « Droit et religion », *supra* note 48, ¶ 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 193, ¶ 35-36.

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<sup>231</sup>.

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.

Balancing rights and obligations can be accomplished under the doctrine of reasonable accommodation, but also under the proportionality test, known 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*<sup>232</sup> sets out the appropriate standard of proof to adopt under section 1 of the *Charter*<sup>233</sup>. 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*

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<sup>231</sup> See *Québec Charter*, *supra* note 38, Preamble and art. 50.1.

<sup>232</sup> *Oakes*, *supra* note 55.

<sup>233</sup> Section 1 of the *Canadian Charter of Rights and Freedoms*, *supra* note 46, 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 38, 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]

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".<sup>234</sup>

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, foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a)."<sup>235</sup> 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<sup>236</sup>. 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<sup>237</sup>; 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<sup>238</sup>. Achieving balance between the salutary and deleterious effects under the ambit of section 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<sup>239</sup>.

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*<sup>240</sup>. 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*

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<sup>234</sup> *Oakes*, *supra* note 55, ¶ 69-70.

<sup>235</sup> *Edwards Books*, *supra* note 47, ¶ 96.

<sup>236</sup> *Edwards Books*, *supra* note 47, ¶ 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)

<sup>237</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 89.

<sup>238</sup> *Ibid.*, ¶ 96.

<sup>239</sup> *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 69, ¶ 88.

<sup>240</sup> 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"*].

*Wilson Colony*, I believe that 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<sup>241</sup>, the majority of the Supreme Court in *Amselem* effectively offered a "hypersubjective definition of religion"<sup>242</sup>. 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 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<sup>243</sup>. Applied to the context

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<sup>241</sup> *Amselem*, *supra* note 84, ¶ 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."

<sup>242</sup> Solange Lefebvre, "Between Law and Public Opinion" in Beaman & Beyer, *supra* note 194, 175 at 194.

<sup>243</sup> COMPACT OXFORD ENGLISH DICTIONARY "Sincere", 3<sup>rd</sup> ed. rev. (Oxford, Oxford University Press, 2008, online: [http://www.askoxford.com/concise\\_oed/sincere?view=uk](http://www.askoxford.com/concise_oed/sincere?view=uk) (site last accessed 05.11.2009).

of freedom of religion and sincerely held beliefs, sincerity requires the good faith of the claimant<sup>244</sup>. 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.”<sup>245</sup> 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 Ogilvie and Beaman, who argue that such a construction is unfounded<sup>246</sup>. In both *R. v. Jones*<sup>247</sup> and *Attis v. New Brunswick School District No. 15*<sup>248</sup>, claims of subjective sincerity were simply accepted or assumed<sup>249</sup>. 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, Ogilvie also points to *Bruker*<sup>250</sup> 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 section 2(a) has the potential to bring the courts into disrepute by appearing to be taking sides in a religious dispute.”<sup>251</sup> To this example, I add that of *Hutterian Brethren of Wilson Colony*, where sincerity of belief was acknowledged, but the majority of the Supreme Court cautioned that this alone did not guarantee protection<sup>252</sup>. 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, 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.”<sup>253</sup>

<sup>244</sup> *Amselem*, *supra* note 84, ¶ 51.

<sup>245</sup> Benjamin Berger, “Law’s Religion: Rendering Culture”, (2007) 45(2) *Osgoode Hall L.J.* 277, 308.

<sup>246</sup> *Amselem*, *supra* note 84, ¶ 44, 51.

<sup>247</sup> *Jones*, *supra* note 60, at 295.

<sup>248</sup> *Ross*, *supra* note 73.

<sup>249</sup> 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”**]; Lori G. Beaman, “Defining Religion: The Promise and the Peril of Legal Interpretation” in Moon, *supra* note 48, 192 at 205 [**Beaman, “Defining Religion”**].

<sup>250</sup> *Bruker*, *supra* note 108, ¶ 68-69.

<sup>251</sup> Ogilvie, “(Get)ting Over Freedoms”, *supra* note 249, 187-188. This was also suggested by Berger, “Law’s Religion”, *supra* note 245, 303.

<sup>252</sup> *Hutterian Brethren of Wilson Colony*, *supra* note 69, ¶ 8, 69.

<sup>253</sup> 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 249, 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.

When engaging in a test of sincerely-held beliefs, it becomes difficult to ignore that “[r]eligious beliefs or values have public implications.”<sup>254</sup> Lefebvre noted that it is important to reflect on the “reasonable” interval within which the sincerity of the belief should be located<sup>255</sup>. She adds that, although an individual can seek emancipation from religious constraints, an individual can alternatively also reaffirm conformity to religious orthodoxy<sup>256</sup>. 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”<sup>257</sup>. Berger has referred to this as the “deafness to the centrality of the community.”<sup>258</sup> 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, argues Berger<sup>259</sup>. Moreover, he has suggested that the community is essential to determining what inevitably can be considered religion<sup>260</sup>. 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<sup>261</sup>.

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<sup>254</sup> 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, Neutrality 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**”].

<sup>255</sup> Solange Lefebvre, “La liberté religieuse modelée par les effets paradoxaux de la modernité” in Gaudreault-Desbiens, *supra* note 193, 195 at 211.

<sup>256</sup> *Ibid.*, 202-203.

<sup>257</sup> Berger, “Law’s Religion”, *supra* note 245, 290.

<sup>258</sup> *Ibid.*, 290.

<sup>259</sup> Berger, “Law’s Religion”, *supra* note 245, 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.”

<sup>260</sup> Bruce Ryder, “State Neutrality and Freedom of Conscience and Religion” (2005) 29 *Sup. Ct. L. Rev.* (2d) 169 at 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**”].

<sup>261</sup> 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 254, 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**”].

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<sup>262</sup>. One needs only to turn to the opening sentences of *Bruker* to feel this operational shift<sup>263</sup>. While this “partial or ambiguous shift” has been observed by Moon, it can be attributed in part to a rise of secularism but also be understood through the courts’ ambiguous view of religion and its value<sup>264</sup>. 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<sup>265</sup>, as reflected by *Law v. Canada (Minister of Employment and Immigration)*<sup>266</sup>. However, he remarked that “perhaps the most contentious current point of debate is the relationship between culture *itself* and choice.”<sup>267</sup> While I agree that this reformulation of the problem focuses on culture’s understanding of ‘voluntariness and free will’<sup>268</sup>, I consider that this ultimately remains a question of how one goes about defining religion in law. I draw on 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

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<sup>262</sup> 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.

<sup>263</sup> *Bruker*, *supra* note 108, ¶ 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.”

<sup>264</sup> Richard Moon, “Government Support for Religious Practice” in Moon, *supra* note 48, 217 at 218-219.

<sup>265</sup> Berger, “Law’s Religion”, *supra* note 245, 298; Benjamin Berger, “Law’s Religion” in Moon, *supra* note 48, 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.”

<sup>266</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [**Law**]

<sup>267</sup> Berger, “Law’s Religion”, *supra* note 245, 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>, <Research and Working Papers>, [http://www.nawl.ca/ns/en/documents/Pub\\_Report\\_ReligArb05\\_en.pdf](http://www.nawl.ca/ns/en/documents/Pub_Report_ReligArb05_en.pdf) (site last accessed 05.11.2009), especially pages 17-20.

<sup>268</sup> To borrow Natasha Bakht’s terminology, *supra*, at 17-18.

members.”<sup>269</sup> 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.

## 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”<sup>270</sup> 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.”*<sup>271</sup>

This position is comprehensible since it follows the Court’s choice not to become the arbiter of religious dogma<sup>272</sup>; it is however regrettable, since it restricts the terms of the debate on components of religion. In light of *Amselem*, Beaman distinguishes between an expert providing

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<sup>269</sup> Moon, “Marriage of Law and Religion”, *supra* note 261, 62. See also Beaman, “Defining Religion” in Moon, *supra* note 48, 206.

<sup>270</sup> Berger, “Law’s Religion”, *supra* note 245, 286 (at footnote 29).

<sup>271</sup> *Amselem*, *supra* note 84, ¶ 54 [my emphasis].

<sup>272</sup> *Ibid.*, ¶ 50.



evidence about the sincerity of belief (“individual experiences”) and giving evidence about the content of a particular religion (“essences”)<sup>273</sup>. 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 drawing on both individual experiences and essences<sup>274</sup>, leading to inconsistent interpretations as to the weight attributed to evidence in religious claims<sup>275</sup>. According to Jamal, *Multani* provided an interesting approach to finding creative (and economical) sources *in lieu* of expert evidence<sup>276</sup>. The public domain of religion as addressed in *Multani* – also explained as a surgical approach to constructing an evidentiary record, according to the author<sup>277</sup> – 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 Lefebvre, who considered that recourse to Sikh chaplains signalled that religious experts’ opinions could be taken into account in judgments<sup>278</sup>. 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<sup>279</sup>.

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<sup>280</sup>. More recently, expert opinion evidence was employed to demonstrate the religious beliefs and attitudes in relation to gay marriage<sup>281</sup>. 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

<sup>273</sup> Beaman, “Defining Religion” in Moon, *supra* note 48, 202.

<sup>274</sup> Beaman, “Defining Religion” in Moon, *supra* note 48, 202.

<sup>275</sup> *Multani*, *supra* note 201, ¶ 36.

<sup>276</sup> 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.

<sup>277</sup> *Ibid.*, 306.

<sup>278</sup> Lefebvre, « Liberté religieuse modelée » in Gaudreault-DesBiens, *supra* note 193, 195 at 208.

<sup>279</sup> See Ogilvie, “Incredibly Shrinking Concept”, *supra* note 253, 202; Berger, “Law’s Religion”, *supra* note 245, 286; Ogilvie, “(Get)ting Over Freedoms”, *supra* note 249, 183-188; Beaman, “Defining Religion”, *supra* note 4, 202; Moon, “Religious Commitment and Identity”, *supra* note 254, 218.

<sup>280</sup> *Bruker*, *supra* note 108, ¶ 33.

<sup>281</sup> *Nichols v. M.J.*, 2009 SKQB 299 [*Nichols*], ¶ 17.

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 marriage is a sacred act<sup>282</sup>. 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<sup>283</sup>.

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*<sup>284</sup>. 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 practitioners 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 discord between ancestral rights and interpretation of freedom of religion. For example, although the *Charter* was not enacted when *Jack and Charlie v. The Queen*<sup>285</sup> was brought before the courts, the decision remains central in understanding how the parcelling of identity can occur, according to Beaman<sup>286</sup>. According to Leclair, the Aboriginal world is one where the sacred and the profane coincide<sup>287</sup>. 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<sup>288</sup>. 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<sup>289</sup>, the latter known as “autochtonité” according to Otis<sup>290</sup>. The coupling of

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<sup>282</sup> *Ibid.*, ¶ 17.

<sup>283</sup> *Ibid.*, ¶ 76.

<sup>284</sup> *Huang v. 1233065 Ontario Inc. (Ottawa Senior Chinese Cultural Association)*, 2006 HRTO 1 (CanLII), ¶ 55, 66.

<sup>285</sup> *Jack and Charlie v. The Queen*, [1985] 2 S.C.R. 332 [*Jack and Charlie*].

<sup>286</sup> Lori G. Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion” in Lori G. Beaman (ed.), *Religion and Canadian Society: Traditions, Transitions, 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 »**].

<sup>287</sup> Jean Leclair, “Le droit et le sacré ou la recherche d’un point d’appui absolu” in Gaudreault-Desbiens, *supra* note 193, 475 at 481.

<sup>288</sup> Beaman, “Aboriginal Spirituality”, *supra* note 286, at 234, 238; Otis, « Autochtonité », *supra* note 286, 772.

<sup>289</sup> See *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*], ¶ 30-31 as cited by Otis, « Autochtonité », *supra* note 286, 750 (footnote 21). The case of *Thomas v. Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.) [*Thomas*], as cited

Dia DABBY, « Of Eureka Moments and Magic Barometers: Freedom of Religion as the “First” Freedom in the Canadian Constitutional Context »

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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*<sup>291</sup>. 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<sup>292</sup>.

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

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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).

<sup>290</sup> 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 *Constitutional Act*) and not as a bearer of freedom of religion, which presupposes the absence of constraint: see Otis, “Autochtonité”, *supra* note 286, 762.

<sup>291</sup> *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).

<sup>292</sup> *Spence, supra* note 291, ¶ 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.*”

charged with robbing an East Indian person?”<sup>293</sup> 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 favoured by author K.C. Davis, where “the permissible scope of judicial notice should vary according to the nature of the issue under consideration.”<sup>294</sup> 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.”*<sup>295</sup>

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<sup>296</sup>. 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.

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<sup>293</sup> *Spence, supra*, ¶ 1. It should be noted that the question draws from *R. v. Parks*, (1993), 84 C.C.C. (3<sup>rd</sup>) 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?”

<sup>294</sup> *Spence, supra* note 291, ¶ 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.

<sup>295</sup> *Spence, supra*, ¶ 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.

<sup>296</sup> 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.

For the Court, Binnie J. surmises that the submissions put forth by the 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 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.”<sup>297</sup>*

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<sup>298</sup>. This attempt to regulate the doctrine of judicial notice is thorny, as certain authors have admitted<sup>299</sup>, 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 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.

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<sup>297</sup> *Spence*, *supra* note 291, ¶ 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.

<sup>298</sup> *Spence*, *supra*, ¶ 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.

<sup>299</sup> Robert G. Richards, “Some thoughts on Appellate Advocacy in Constitutional Cases”, (2006) 34 *Sup. Ct. L. Rev.* (2d) 19, 27.

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

Although children are recognised as rights holders by the Supreme Court of Canada<sup>300</sup>, their right to freedom of religion has posed a particular challenge when coupled with their “best interest”, since judgment must be passed in the absence of a “eureka moment”<sup>301</sup> determining a child’s competency. Recent issues such as a child’s right to refuse a blood transfusion for religious reasons in Manitoba<sup>302</sup> and British Columbia<sup>303</sup>, the wearing of religious symbols in schools in Québec<sup>304</sup>, a parent’s right to remove a child from ethics and religious culture class in Québec<sup>305</sup> or exempt a child from religious “instruction or exercise” in Alberta<sup>306</sup> as well as funding of religious schools in Ontario<sup>307</sup> 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<sup>308</sup>. Moreover, the Canadian Coalition for the Rights of the Child has argued, in its 2009 report, that the 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]*<sup>309</sup>. By playing on

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<sup>300</sup> *Children’s Aid Society*, *supra* note 71, ¶ 217.

<sup>301</sup> *A.C.*, *supra* note 75, ¶ 4.

<sup>302</sup> *Ibid.*, ¶ 4.

<sup>303</sup> *S.J.B. (Litigation Guardian of) v. British Columbia (Director of Child, Family and Community Service)*, (2005) 42 B.C.L.R. (4<sup>th</sup>) 321 [**S.J.B.**].

<sup>304</sup> *Multani*, *supra* note 201.

<sup>305</sup> *Lavallée*, *supra* note 225; see also *Loyola High School c. Courchesne*, 2010 QCCS 2631 at ¶ 14, where Dugré J. cancelled the Minister of Education’s decision because it was in his view erroneous and unreasonable on the one hand and on the other, because it infringed Loyola High School’s right to freedom of religion and freedom of religious expression as protected by article 3 of the *Québec Charter*.

<sup>306</sup> *Human Rights, Citizenship and Multiculturalism Amendment Act*, S.A. 2009 c. 26, amending R.S.A. 2000, c. H-14.

<sup>307</sup> 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).

<sup>308</sup> 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 146, 369; and Van Praagh, “Protection of “Our” Children”, *supra* note 260, at 174-175.

<sup>309</sup> CANADIAN COALITION FOR THE RIGHTS OF CHILDREN, *The Best Interests of the Child: Meaning and Application in Canada* (Report June 25<sup>th</sup> 2009), online:

Dia DABBY, « Of Eureka Moments and Magic Barometers: Freedom of Religion as the “First” Freedom in the Canadian Constitutional Context »

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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<sup>310</sup>. 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<sup>311</sup> and outside<sup>312</sup> of the Canadian context. This approach could also provide a counterargument to those who suggest that a child's right to freedom of religion carries little moral weight and does not constitute, strictly speaking, a fundamental right within the Canadian context<sup>313</sup>. 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 of child custody and access, as seen in *Young v. Young*<sup>314</sup> and *P. (D.) v. S. (C.)*<sup>315</sup>, where the Supreme Court had confirmed both

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[http://www.law.utoronto.ca/documents/conferences/BestInterestsChild-Report\\_en.pdf](http://www.law.utoronto.ca/documents/conferences/BestInterestsChild-Report_en.pdf) (site last accessed 23.09.2009), pp. 18-19.

<sup>310</sup> 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 189] 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)."

<sup>311</sup> See Milne, "Religious Freedom", *supra* note 308, 79-80; Van Praagh, "Adolescence, Autonomy and Harry Potter", *supra* note 146 and Van Praagh, "Protection of "Our" Children", *supra* note 260, at 174-175.

<sup>312</sup> 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"].

<sup>313</sup> 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.

<sup>314</sup> *Young v. Young*, [1993] 4 S.C.R. 3 [Young].

<sup>315</sup> *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141 [P. (D.)].

decisions on the basis on the best interests test<sup>316</sup>. 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.

## 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  
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

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<sup>316</sup> Milne, “Religious Freedom”, *supra* note 308, 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.

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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 draw 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<sup>317</sup>. 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<sup>318</sup> 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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<sup>317</sup> The very question of admitting "social facts" and "social framework facts" *as per* Monahan and Walker is challengeable and constitutes another subject of study.

<sup>318</sup> 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.