

# Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*

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# Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*

Benjamin L. Berger\*

## I. INTRODUCTION

Constitutional rights, and the tests that the judiciary creates for applying and interpreting those rights, are conventionally viewed as tools available for responding to social disputes that have been shifted into the register of constitutional litigation. Yet constitutional rights and doctrines of constitutional interpretation do not merely respond to social and legal disputes, nor do these disputes appear before the bar of the law in a pure form, uninflected by the law and legal categories. The content, informing assumptions, and internal logic of constitutional rights and adjudication have what we might call certain “back stream effects” on the structure, and approach to the resolution, of social disputes. These back stream effects take at least two forms. First, constitutional design, the content of rights and the choices made about the constitutional logic appropriate to analysis of these issues impact upon and give adjudicative shape to the disputes themselves. Second, choices made as to how to approach the analysis of constitutional rights claims impose different sets of adjudicative demands — perhaps, indeed, ethical demands — on those called upon to resolve these issues; that is, different approaches to analyzing rights claims and constitutional disputes call for different sets of questions to be asked and different virtues of judgment to be exercised.

Section 1 of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> sits at the heart of our constitutional lives. It would be a reasonable generaliza-

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

tion to state that — with the exception of matters analyzed under sections 7 and 15(1) — contemporary jurisprudence has shifted most constitutional disputes to debate and resolution under section 1. Section 1 has become the hungriest, the greediest, of Charter provisions, absorbing most issues of genuine constitutional dispute into its analytic grasp. From a comparative constitutional perspective, this trend is unsurprising. Section 1, along with the *Oakes*<sup>2</sup> test that has guided the judicial approach to its application, is but the Canadian iteration of the logic of proportionality that many have claimed lies at the heart of modern constitutionalism.<sup>3</sup> One theorist, sufficiently enamoured of the logic of proportionality and convinced of its centrality to modern constitutionalism, has labelled proportionality review the “ultimate rule of law”.<sup>4</sup> However ambitious the scope of one’s claim, it seems to be beyond reasonable dispute that the understanding of how to analyze what limits on constitutional rights can be demonstrably justified in a free and democratic society is the chief logical influence on our approach to Charter protections and adjudication.

In *Alberta v. Hutterian Brethren of Wilson Colony*,<sup>5</sup> the majority of the Supreme Court of Canada offered one of its most significant glosses on the approach to the section 1 analysis since it laid out the general analytic framework in *Oakes*. This change in the law will affect litigation of all constitutional rights. It will impact upon how the Courts go about striking the balance between governmental objectives and individual and collective rights. Yet these changes to the Court’s posture towards section 1 of the Charter arose in the context of a freedom of religion case and, apart from identifying this shift in approach to the *Oakes* test, this paper seeks to trace the back stream effects of this change in logic on the shape and adjudication of freedom of religion claims. I will identify an irony at the core of the judgment, one that inheres in the relationship between the majority’s understanding of the particular challenges of freedom of religion as a constitutional right and the approach that it prescribes for the analysis of section 1. This approach, I will argue, has the potential to emphasize precisely that which the majority finds so difficult about the

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<sup>2</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter “*Oakes*”].

<sup>3</sup> See, e.g., Aharon Barak, “Proportional Effect: The Israeli Experience” (2007) 57 U.T.L.J. 369; Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006); Robert Alexy, “Constitutional Rights, Balancing, and Rationality” (2003) 16:2 Ratio Juris. 131; Robert Alexy, *A Theory of Constitutional Rights*, Julian Rivers, trans. (Oxford: Oxford University Press, 2002).

<sup>4</sup> David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

<sup>5</sup> [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.) [hereinafter “*Hutterian Brethren*”].

constitutional protection of religious belief and action. With this in view, I will go on to note the different demands that this shift will place on adjudicators if this gloss on the *Oakes* analysis is to be more than a realignment of section 1 to be more deferential to government objectives. It is here that it will be illuminating to look across to the Court's other significant freedom of religion case in 2009, *C. (A.) v. Manitoba (Director of Child and Family Services)*,<sup>6</sup> and in particular, the dissenting judgment of Binnie J.

## II. FREEDOM OF RELIGION — THE MOST DIFFICULT RIGHT?

In an article published in 2001, Chief Justice McLachlin described equality as “the most difficult right”.<sup>7</sup> Surveying the struggles and shifts in the Court's jurisprudence on section 15(1) (and, more recently, section 15(2))<sup>8</sup> lends obvious support to this claim. Yet regard to the recent jurisprudence of the Court on section 2(a) and, in particular, to certain elements of the Chief Justice's majority judgment in *Hutterian Brethren* suggests that freedom of religion is now in contention for the dubious honour of this title.

The great difficulty of the constitutional protection of religion is emphatically not found in navigating the internal requirements of section 2(a). In *Hutterian Brethren*, the majority restated the basic test for a breach of section 2(a) as established in *Amselem*<sup>9</sup> and *Multani*:<sup>10</sup>

An infringement of s. 2(a) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious belief in a manner that is more than trivial or insubstantial. ...<sup>11</sup>

As I have written elsewhere, this test has made the section 2(a) protection so capacious as to be largely analytically vacant.<sup>12</sup> Although there

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<sup>6</sup> [2009] S.C.J. No. 30, [2009] 2 S.C.R. 181 (S.C.C.) [hereinafter “*C. (A.)*”].

<sup>7</sup> Beverley McLachlin, “Equality: The Most Difficult Right” (2001) 14 S.C.L.R. (2d) 17.

<sup>8</sup> *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.).

<sup>9</sup> *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter “*Amselem*”].

<sup>10</sup> *Multani v. Commission Scolaire Marguerite Bourgeoys*, [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.) [hereinafter “*Multani*”].

<sup>11</sup> *Hutterian Brethren*, *supra*, note 5, at para. 32.

<sup>12</sup> Benjamin L. Berger, “The Cultural Limits of Legal Tolerance” (2008) 21(2) Can. J. L. & Jur. 245, at 257. For interesting discussions of *Amselem*, see Richard Moon, “Religious Commitment

are certain notes sounded in the *Hutterian Brethren* case suggesting that courts should give somewhat more substance to the “trivial or substantial interference” with religion component of the test,<sup>13</sup> it seems that most cases in which a claimant is making a good faith argument that his or her religious beliefs or practices have been interfered with will pass easily into the section 1 phase of the Charter analysis.

Freedom of religion is not, then, a difficult right owing to its doctrinal complexity. As one examines the case law and certain statements made in McLachlin C.J.C.’s majority reasons in *Hutterian Brethren*, it becomes clear that it is not the legal right itself that is difficult; rather, it is the very fact of according religious beliefs distinct constitutional protection that generates the challenges to which the Court is so alive in this case. Although the Court does not articulate it in precisely this fashion, what is difficult about freedom of religion is that it purports to protect multiple and diverse cultures, understood as broad-ranging systems of beliefs and practices whose significance flows from a complex set of symbols, histories, narratives and commitments that lend a distinctive meaning to the world for those who participate in them. What is difficult about freedom of religion is the sheer scope of possible conflict between religion and government objectives combined with the enormous challenge of adjudicating the internal meaning and significance of a given religious practice or belief not shared by the secular state. Chief Justice McLachlin makes a number of claims about the unique challenges of freedom of religion that support this understanding of what, precisely, is so challenging about religious freedom. Noting that the difficulty common to all constitutional rights is that the choices made by government about how to pursue important public objectives may trench on these rights or freedoms, McLachlin C.J.C. explains that “[f]reedom of religion presents a *particular challenge* in this respect because of the broad scope of the *Charter* guarantee.”<sup>14</sup> When it comes to religion, “[m]uch of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief” and “[g]iving effect to each of their religious claims could seriously undermine the universality of many regulatory programs.”<sup>15</sup>

It follows in McLachlin C.J.C.’s reasoning that

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and Identity: *Syndicat Northcrest v. Amselem*” (2005) 29 S.C.L.R. (2d) 201 and Bruce Ryder, “State Neutrality and Freedom of Conscience and Religion” (2005) 29 S.C.L.R. (2d) 169.

<sup>13</sup> See, e.g., *Hutterian Brethren*, *supra*, note 5, at para. 34.

<sup>14</sup> *Id.*, at para. 36 (emphasis added).

<sup>15</sup> *Id.*, at para. 36.

[b]ecause religion touches so many facets of daily life, and because a host of different religions with different rites and practices co-exist in our society, it is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application.<sup>16</sup>

True though this claim is, such considerations simply establish the vast *scope* of possible conflict between various religious beliefs and practices and state authority; the ultimate difficulty of freedom of religion only comes into sharp focus when one adds to this question of scope a second element. This second element is the foreignness and consequent inscrutability (or density) of the *meaning*, and consequential *significance*, of a given religious belief or practice. Chief Justice McLachlin puts it squarely: “There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture.”<sup>17</sup> The Chief Justice maps some of the cross-cultural hurdles that face a judge who wishes to appreciate the significance of a given breach of section 2(a):

Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherent than others.<sup>18</sup>

In her majority reasons, McLachlin C.J.C. adds one further element to the picture of the distinctive difficulty of religious freedom claims, an element that draws the first two together. She notes that when the significance of a religious practice is at the high end of the spectrum for the individual or community, there may be precious little room to be found for a middle ground or for some form of “accommodation”. Herein lies yet another distinctive difficulty with section 2(a) claims:

Freedom of religion cases may often present this “all or nothing” dilemma. Compromising religious beliefs is something adherents may understandably be unwilling to do. And governments may find it difficult to tailor laws to the myriad ways in which they may trench on different people’s religious beliefs and practices.<sup>19</sup>

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<sup>16</sup> *Id.*, at para. 90.

<sup>17</sup> *Id.*, at para. 89.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, at para. 61.

On this view, it is the intrinsic nature of religion combined with the simple fact of affording constitutional protection to religion that makes religious freedom and equality claims so intensely challenging. There are scholars who, seized with a sense of the challenges and possible hypocrisies of seeking to afford specific constitutional protection to religion, have argued that the constitutional protection of religious freedom is impossible,<sup>20</sup> or that religion ought not to be given special constitutional status, preferring to subsume freedom of religion into more generalized principles of equality and liberty, disavowing any peculiar relevance to the *religious* component of freedom of religion.<sup>21</sup> Others have claimed that one cannot make sense of freedom of religion without acknowledging precisely the unique nature, however challenging, of religion itself.<sup>22</sup> The Supreme Court of Canada does not weigh in on one side or the other of this debate. The inescapable fact is we have express protection of religious freedom in our Constitution. But what *Hutterian Brethren* offers us is a sharp sense of what the majority of the Court sees as so intensely challenging about claims of religious freedom: owing to the constitutional protection of religion, the courts are faced with a vast scope of possible claims, the true significance of which for a community or individual involved typically lies outside the ken of the courts, and about which a stark choice must sometimes be made.

### III. THE SHIFT IN ANALYZING SECTION 1

The Court's ruling in *Hutterian Brethren* was inevitable. It is not that the result on the merits was assured. Indeed, the result seems far from inevitable. Many, myself included, struggle to see the justifiability of this breach of section 2(a) given the size of the affected community, apparently available alternatives, the genuineness of the belief involved, its

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<sup>20</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton and Oxford: Princeton University Press, 2005).

<sup>21</sup> Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007); Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001); Michael W. McConnell, "The Problem of Singling out Religion" (2000) 50 DePaul L. Rev. 1.

<sup>22</sup> See, e.g., Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge: Harvard University Press, 2000); Jeremy Webber, "Understanding the Religion in Freedom of Religion" in Peter Cane, Carolyn Evans & Zoe Robinson, eds., *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 26.

centrality to the lived religion of the community, and the in-built under-inclusiveness of the legislation.<sup>23</sup>

For those attentive to the developing law on section 2(a) of the Charter, what was inevitable was a change, gloss or reinterpretation of section 1 as it applied in religious freedom cases. In my view, despite the gap in time between the two cases, the *Hutterian Brethren* decision is most usefully read as the companion case to *Amselem*. In *Amselem*, the Court's broad definition of religion and enunciation of the capacious test internal to section 2(a) was designed to get judges out of the business of assessing the internal dictates of religions and the *bona fides* of claimed religious commitments and practices. This is not to say that *Amselem* meant that courts would have no screening role to play in section 2(a). A common misreading of *Amselem* is that the Court held that judges must defer to the subjective assertions of applicants claiming a breach of their section 2(a) right. Judges retain a role in assessing the *sincerity* of the claim. Evidence of community practice, religious precept and historical observance remains relevant to that assessment. It is nevertheless true, however, that the ultimate test would be a subjective one, meaning that much would sail easily through section 2(a) into the rapacious arms of section 1. The opening up of the definition of religiously protected belief and practice in section 2(a) meant a shifting of the analytic burden in religion cases to section 1. Legal systems are like softly inflated balloons: if you squeeze on one side, you can expect a bulge elsewhere. The decision in *Hutterian Brethren* would prove to be the bulge in section 1.

The Court had flirted with the idea of injecting the concept of reasonable accommodation into the *Oakes* analysis in *Multani*,<sup>24</sup> however, in *Hutterian Brethren*, the Court rejected this approach.<sup>25</sup> Instead, McLachlin C.J.C. ushered in a new orientation to the proportionality component of the *Oakes* test. This modified or revised approach boils

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<sup>23</sup> I refer here to the fact that the photographic requirement applied only to those with driver's licences, leaving hundreds of thousands of Albertans outside the face-recognition database at the centre of the government's scheme.

<sup>24</sup> *Supra*, note 10, at paras. 52-53. On the relationship between reasonable accommodation and minimal impairment in the context of religious freedoms, see José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998) 43 McGill L.J. 325, at 360.

<sup>25</sup> *Hutterian Brethren*, *supra*, note 5, at paras. 66-71. Relying on the distinction between s. 52 and s. 24(1) of the Charter drawn in *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.), the Court held that "where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis based on the methodology of *Oakes*" (at para. 71) but left open the possibility of using notions of reasonable accommodation to assess the Charter-infringing government *action* or administrative *practice*.



down to two elements: (1) a more deferential posture towards the minimal impairment test; and (2) a corollary admonition that more matters falling to section 1 should be decided under the third and final branch of the proportionality test — the overall balancing of the salutary effects of the offending legislation against the deleterious effects of the breach on the rights of the affected community.

The Chief Justice leaves the rational connection test untouched, stating that “[t]he rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily.”<sup>26</sup> The question to be asked at the rational connection stage “is simply whether there is a rational link between the infringing measure and the government goal”.<sup>27</sup> Yet a new sense of the approach to section 1 emerges when the majority addresses minimal impairment. The shift is not in the articulation of the test; McLachlin C.J.C. explains that the question to be asked at the minimal impairment stage is “whether there are less harmful means of achieving the legislative goal”.<sup>28</sup> This is neither new nor contentious. The magic lies in the emphasis that the Court places on the words “achieving the legislative goal”. Chief Justice McLachlin carefully emphasizes that “the legislative goal, which has been found to be pressing and substantial, grounds the minimal impairment analysis”.<sup>29</sup> Leaning heavily on this idea of the pressing and substantial goal anchoring the rational connection and, most importantly, the minimal impairment analysis, the Chief Justice offers the two key phrases for section 1 analysis post-*Hutterian Brethren*: “the minimum impairment test requires only that the government choose the least drastic means *of achieving its objective*. Less drastic means which do not actually achieve the government’s objective are not considered at this stage.”<sup>30</sup>

Perhaps the best way of thinking about this change in emphasis is as an admonition to hold the government’s pressing and substantial objective *stable and fixed* when conducting a minimal impairment analysis. Chief Justice McLachlin suggests that courts were too frequently relaxing the government’s objective in order to accommodate a less impairing alternative, thereby finding a limit unconstitutional. Although she “has-ten[s] to add” that “the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the

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<sup>26</sup> *Hutterian Brethren*, *supra*, note 5, at para. 48.

<sup>27</sup> *Id.*, at para. 51.

<sup>28</sup> *Id.*, at para. 53.

<sup>29</sup> *Id.*, at para. 54.

<sup>30</sup> *Id.*, at para. 54 (emphasis in original).

impugned measure”,<sup>31</sup> the clear message is that there is little flex in the joints at this stage of the analysis. A proposed alternative that is less impairing but that also does not achieve the government’s objective (*i.e.*, does not “give sufficient protection, in all the circumstances, to the government’s goal”)<sup>32</sup> is not *really* a minimally impairing alternative. The question to be asked at the minimal impairment stage is “whether there is an alternative, less drastic means of achieving the objective *in a real and substantial manner*”.<sup>33</sup>

If an applicant proposes a less impairing alternative that involves limiting or qualifying the government’s pressing and substantial objective, “[r]ather than reading down the government’s objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.”<sup>34</sup> In this admonition one sees the second element of the shift in approach to section 1 — the funnelling of more matters to be determined at the overall balancing stage. The Chief Justice cites Dickson C.J.C.’s description of the third and final step of the proportionality analysis, noting that despite the importance that he gave to this branch of the test, “it has not often been used”.<sup>35</sup> Indeed, when legislation has failed under section 1, it has most often foundered on the minimal impairment test.<sup>36</sup> The majority

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<sup>31</sup> *Id.*, at para. 55 (emphasis in original).

<sup>32</sup> *Id.*, at para. 55.

<sup>33</sup> *Id.*, at para. 55 (emphasis added). “Where no alternative means are reasonably capable of satisfying the government’s objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law” (at para. 76).

<sup>34</sup> *Id.*, at para. 76.

<sup>35</sup> *Id.*, at para. 75. Hogg has gone so far as to state that, on his view of the logic of the *Oakes* test, this stage of the analysis “has no work to do, and can safely be ignored” (Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, 5th ed., vol. 2 (Toronto: Thomson Carswell, 2007) at 38-44). Chief Justice McLachlin explicitly takes up and rejects Hogg’s argument, at paras. 75-78, for reasons that I will explain below. See also Leon E. Trakman, William Cole-Hamilton & Sean Gatién, “*R. v. Oakes* 1986-1997: Back to the Drawing Board” (1998) 36 *Osgoode Hall L.J.* 83, at 103, in which the authors state that this branch of the *Oakes* test “plays a wholly vestigial role within section 1 decisionmaking”, reporting that, on a review of the s. 1 cases decided in the first 10 years after *Oakes* “[i]n every instance in which the minimal impairment test was passed, the proportionality test was passed. In every instance that the minimal impairment test was failed, the proportionality test was either failed or not considered.” (emphasis in original) *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.) is one case in which the Court departed from this pattern, failing the infringement at the final, overall balancing stage. However, in this case the Court did not conduct a full proportionality analysis, skipping directly, rather, to the final branch. See also *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.), in which the overall balancing step played an important role in the majority’s analysis.

<sup>36</sup> Hogg states that “[t]he requirement of least drastic means has turned out to be the heart and soul of s. 1 justification.” (Hogg, *id.*, at 38-36.) In a lecture delivered to the University of Manitoba, Faculty of Law, Rothstein J. observed that “[m]inimal impairment has consistently been the main battleground of section 1.” (“Section 1: Justifying Breaches of *Charter* Rights and Freedoms”

concludes that this is lamentable and requires correction. Chief Justice McLachlin explains that unlike the pressing and substantial objective analysis and the rational connection and minimal impairment stages, which are both centred on the legislative purpose, “[o]nly the fourth branch takes full account of the ‘severity of the deleterious effects of a measure on individuals or groups’.”<sup>37</sup> Resolving matters at the final stage is to be preferred because this overall balancing “allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation”.<sup>38</sup> The new approach to section 1 justification thus involves holding stable the government’s objective when assessing minimal impairment and seeking to funnel issues more readily to the third and final “overall balancing” test.

Justice LeBel offered the most thorough and vigorous objection to this approach to *Oakes*.<sup>39</sup> In his estimation:

For all practical purposes, the reasons of the Chief Justice treat the law’s objective as if it were unassailable once the courts engage in a proportionality analysis. No means that would not allow the objective to be realized to its fullest extent could be considered as a reasonable alternative.<sup>40</sup>

Justice LeBel preferred a more “holistic” approach to the proportionality of offending legislation, arguing that the majority had drawn inappropriately sharp lines between the various considerations under *Oakes*. “An alternative measure,” LeBel J. explained, “might be legitimate even if the objective could no longer be obtained in its complete integrity.”<sup>41</sup> To properly assess the proportionality of a law might involve “looking for a solution that will reach a better balance, even if it demands a more

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(1990-2000) 27 Man. L.J. 171 at 178.) See Trakman, *et al.*, *id.*, at 100, in which the authors report that, in the decade following *Oakes*, 86 per cent of infringements that failed the *Oakes* analysis failed at the minimal impairment stage, whereas “every piece of legislation that survived scrutiny under the minimal impairment stage was held to have passed the *Oakes* test”. On the subsequent use and trends in s. 1, see generally Errol Mendes, “The Crucible of the *Charter*: Judicial Principles v. Judicial Deference in the Context of Section 1” (2005) 27 S.C.L.R. (2d) 47.

<sup>37</sup> *Hutterian Brethren*, *supra*, note 5, at para. 76.

<sup>38</sup> *Id.*, at para. 77. This statement reflects, of course, the Court’s important elaboration of this final stage of the analysis in *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 889 (S.C.C.): “there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.” (emphasis in original)

<sup>39</sup> Justice Abella also penned dissenting reasons, which will be discussed below.

<sup>40</sup> *Hutterian Brethren*, *supra*, note 5, at para. 197.

<sup>41</sup> *Id.*, at para. 195.

restricted understanding of the scope and efficacy of the objectives of the measure”,<sup>42</sup> an approach that LeBel J. viewed as more faithful to the Court’s recent jurisprudence.<sup>43</sup>

#### IV. IMPLICATIONS FOR THINKING ABOUT RELIGIOUS FREEDOM AND THE IRONY OF *HUTTERIAN BRETHERN*

The shift in orientation signalled by the majority judgment is not confined to cases involving claims of religious freedom. *Hutterian Brethren* is a case of substantial and general Charter significance. Yet in the course of making these subtle changes to the law of section 1, the majority of the Court also made important statements about the law of freedom of religion. Although this rich judgment, and the dissenting reasons, provide much to meditate upon with respect to freedom of religion and religious equality, I wish to draw out what I view as the single most significant theme from the Court’s reasons before identifying the irony nestled in the decision.

When it arrived at the final “overall balancing” stage of the proportionality analysis, the majority of the Court found that the deleterious impacts on the religious freedom of the community were outweighed by the salutary effects of the legislation. The government’s legislative goal, namely, “to maintain an effective driver’s licence scheme that minimizes the risk of fraud to citizens as a whole”,<sup>44</sup> was weighty, whereas the deleterious effects of the legislation upon the Hutterian Brethren of Wilson Colony, “while not trivial, fall at the less serious end of the scale”.<sup>45</sup>

The reasoning that leads to this conclusion that the mandatory photograph for driver’s licences had minimal deleterious effects on the Wilson Colony offers a clear window into an issue of the utmost consequence: the law’s perspective on the true nature and constitutional value of religion. In an article written in 2007, I argued that religion is inevitably processed through the values, assumptions and meaning-giving horizon of Canadian constitutionalism, meaning that religion never ap-

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<sup>42</sup> *Id.*, at para. 195.

<sup>43</sup> Justice LeBel points to *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 199 (S.C.C.), as an example of a case in which, in finding a less impairing alternative to the government’s scheme, the Court recast the government’s objective “at a lower level than the state might have wished”. “The Court,” he explains, “assessed the objectives, the impugned means and the alternative means together, as necessary components of a seamless proportionality analysis.”

<sup>44</sup> *Hutterian Brethren*, *supra*, note 5, at para. 101.

<sup>45</sup> *Id.*, at para. 102.

pears to the law on its own cultural terms but, rather, is always rendered through the lens of the culture of the constitutional rule of law.<sup>46</sup> Specifically, I argued that religion is ultimately understood as most significant to the law — and therefore attracts its protection — inasmuch as it appears as a matter of belief rather than action, private rather than public life, and, perhaps most crucially, as a matter of autonomy and choice.<sup>47</sup> When the Court turns to the analysis of the deleterious effects of this photo requirement on the Colony members' section 2(a) interests, the centrality of choice to the law's understanding of religion is plain.<sup>48</sup>

Chief Justice McLachlin explains that assessing the effects of a limit on freedom of religion requires an assessment of the impact “in terms of *Charter* values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy”.<sup>49</sup> In this, the Court sounds much as it did in *Big M*,<sup>50</sup> wherein principles of equality and dignity were cast as key components of why religion enjoys constitutional protection. Despite reference to these other values, and equality in particular, in *Hutterian Brethren*, the Court cements the centrality of choice in the logic of the constitutional protection of religion. Having listed these *Charter* values, McLachlin C.J.C. explains that “[t]he most fundamental of these values, and the one relied on in this case, is liberty — the right of choice on matters of religion.”<sup>51</sup> In assessing the gravity of the deleterious effects of a legal limit on section 2(a) interests “the question,” the majority holds, “is whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices.”<sup>52</sup> Gauging the seriousness of a given limit on religious liberty turns on assessing whether an individual or community is left with this “meaningful choice” to follow their religion. A law whose purpose is to interfere with religious practice cannot be saved. So much is clear from *Big M* and remains true

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<sup>46</sup> Benjamin L. Berger, “Law’s Religion: Rendering Culture” (2007) 45:2 *Osgoode Hall L.J.* 277.

<sup>47</sup> *Id.*, at 291-301. But *cf.* Richard Moon, “Government Support for Religious Practice” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: U.B.C. Press, 2008) 217, in which Moon interprets the recent jurisprudence somewhat differently, as suggesting that religious freedom rests on a conception of cultural identity rather than autonomy or choice.

<sup>48</sup> Indeed, despite the differences in approach between the majority and dissenting judgment, the reasons in *C. (A.)*, *supra*, note 6, equally confirm the centrality of autonomy and choice to the constitutional analysis of religious freedom.

<sup>49</sup> *Hutterian Brethren*, *supra*, note 5, at para. 88.

<sup>50</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

<sup>51</sup> *Hutterian Brethren*, *supra*, note 5, at para. 88.

<sup>52</sup> *Id.*

post-*Hutterian Brethren*.<sup>53</sup> When, however, a law passed for a legitimate public purpose has incidental effects on religion, everything turns on whether the religious adherent or community is left with a meaningful choice to follow their religious practices or beliefs.

Why are the deleterious effects of the mandatory driver's licence photograph "while not trivial ... at the less serious end of the scale"?<sup>54</sup> In the majority's words, it is because "[o]n the record before us, it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not the edicts of their religion."<sup>55</sup> Chief Justice McLachlin seems to accept that the legislation may mean that, owing to their religious commitments, Colony members may have to choose not to drive; as such, they will suffer a financial cost, inconvenience and some disruption to their communal way of life. Yet these costs — "costs on the religious practitioner in terms of money, tradition or inconvenience"<sup>56</sup> — were not so severe as to deny the community a meaningful choice to practise their religion. At the end of the day, the deleterious effects of the limit on section 2(a) are minimal because they "do not negate the choice that lies at the heart of freedom of religion".<sup>57</sup> *Hutterian Brethren* confirms for us that, as far as Canadian constitutionalism is concerned, freedom of religion is ultimately a matter of autonomy and choice.

The focus of this paper, however, has been the structural reorientation and glosses on the section 1 analysis. And it is here that one finds a troubling, if interesting, irony in the judgment. Recall that the majority identified certain distinctive difficulties posed by the constitutional protection of religious freedom. The nature of religion is such that potential points of conflict with government programs are myriad, while the perspectival chasm between a given religious group or individual and a court can incline claims of religious freedom to an "all or nothing" structure and makes discerning the internal meaning or significance of a belief or practice to a tradition deeply difficult for a court.

The irony of the *Hutterian Brethren* judgment is that pushing the analysis of the justifiability of limits on religious freedom to the final "overall balancing" stage of the *Oakes* test conditions and deepens the

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<sup>53</sup> *Id.*, at para. 92.

<sup>54</sup> *Id.*, at para. 102.

<sup>55</sup> *Id.*, at para. 98.

<sup>56</sup> *Id.*, at para. 95.

<sup>57</sup> *Id.*, at para. 99.

very aspects of section 2(a) issues that the Court identifies as most problematic.

Consider first the point that religious freedom and equality claims lend themselves to a kind of “all or nothing” high-stakes structure. Toughening up the minimal impairment test and herding section 2(a) breaches to the overall balancing seems to consolidate and aggravate this concern. As a structural matter, by the time one has arrived at the balancing stage of the *Oakes* test, the opportunity for the Court to invite and consider inventive resolutions that do not take an all-or-nothing form has disappeared. We are left to duelling impacts. At this point, a court may only conclude “you may do this” or “you may not”, having lost that invaluable result: “you *might* be able to do this, but you didn’t get it quite right.” Emphasis on the final step in the *Oakes* analysis encourages positional absolutism, particularly on the part of the government. Holding firm to a lofty objective, a government will find itself in the arguably enviable position of holding up its pressing, substantial and well-tailored public-oriented objective for comparison with the impacts of this law on an idiosyncratic and foreign belief. In this respect, viewed from the perspective of how constitutional analysis can condition cultural disputes, LeBel J.’s approach seems preferable.

And what of the majority’s reservations regarding the difficulty of appreciating the true significance of a religious practice or belief? Analysis of a limit under section 2(a) permitted courts to remain largely agnostic as to the internal meaning of a religious practice, tradition or precept. To conclude that a government had failed to give due regard to the existence of sincerely held religious beliefs or practice did not require that courts grapple with the internal meaning of that belief or practice, nor with possible competing claims within a community about the centrality, marginality or symbolic valence of that religious observance. The flight from a more robust analysis internal to section 2(a) was, in part, an effort to remove the courts from such debates. Resolving matters under minimal impairment or a more flexibly applied proportionality analysis was arguably more consistent with this approach. Focusing matters squarely on the final stage of the proportionality analysis, by contrast, would seem to demand a meaningful reckoning with the actual significance of the practice or belief with which the legislation interferes. Applicants will be encouraged to adduce evidence of the significance of the practice within the worldview of the individual or community as part of an answer to a government’s section 1 case. If the focus on the “overall balancing” is to be more than a realignment in favour of government

deference, judges will have to engage with this very difficult task of seeking to understand religious belief and practice from the perspective of the applicant, precisely the messy business that the courts seem to wish to avoid.

But might not this substantive engagement with difference be a good thing? It all depends. The theoretical promise of deeper engagement must be evaluated in light of the practical realities and lived experiences of the adjudication of religion. In a situation in which substantive engagement is likely to prove reductionist with respect to one's worldview and culture, one might well prefer to place one's chips on a minimal impairment analysis. If the majority's analysis in *Hutterian Brethren* is taken as exemplary, this might be precisely the situation. I find myself here awfully close to arguing the merits of formalism — the formalism of minimal impairment; and, to be fair, faced with the prospect of being badly misunderstood on substantive terms, one finds a certain virtue in escape to formalism. If, however, the move to overall balancing involves a serious and sustained engagement with the meaning of a religious practice to an individual or community, it may be that, although sharpening the cultural conflict, this shift to overall balancing improves the quality of the engagement. It is here that the second back stream effect of changes in constitutional logic comes in — what this shift might imply for the demands on and ethics of judgment, the final point to which I now turn.

## V. THE ADJUDICATIVE DEMANDS OF THE CONSTITUTIONAL PROTECTION OF RELIGION

I asserted at the outset of this piece that constitutional rights and the manner in which constitutional reasoning is structured impacts not only on the shape that a cultural conflict will take before the courts, but also on the demands placed on judges called upon to adjudicate claims of religious freedom and equality. That is, the structure of constitutional reasoning has an effect on what emerge as the virtues of good judgment. I have alluded to this point in suggesting that the ultimate effect of moving matters to the third and final “overall balancing” component of the proportionality test within section 1 of the Charter will turn on the nature of judges' engagement with the religious beliefs that they are called upon to assess in coming to a meaningful conclusion regarding the deleterious effects of a limit on religious freedom.



Taking, at this stage, the majority's approach to the *Oakes* test as given, it is in respect of the need for thick engagement with the meaning of the religious practice at issue that the *Hutterian Brethren* decision arguably fell short. Although McLachlin C.J.C. allowed for collective considerations regarding the life of the community to inform the overall balancing test, one is left with a sense of a failure to grapple with what it *means* to the traditional life of this religious community to lose the self-sufficiency that it enjoyed by having members that are able to drive.<sup>58</sup> In its assessment of the deleterious effects of the limit on section 2(a), the majority lists a number of impacts that will fall at the lower end of the scale. Revealingly, impacts on "tradition" are listed alongside pecuniary impacts and matters of inconvenience.<sup>59</sup> One need not be a *Fiddler on the Roof* aficionado to pause here and reflect upon the extent to which community, metaphysics, ritual and tradition are all deeply mutually imbricated. Ultimately, the majority characterizes the "cost" of this legislation as, simply, "the cost of not being able to drive on the highway".<sup>60</sup>

The essence of Abella J.'s dissent is an objection to this apparent failure to grapple with the meaning of this legal predicament for the life of the Wilson Colony. Her judgment gestures towards the need in this case to take sensitive account of the meaning of a practice to the internal worldview and lived religion of a community if one is thinking seriously about the deleterious effects of a legislative limit on section 2(a). Justice Abella quotes from *Hofer v. Hofer*,<sup>61</sup> in which Ritchie J. wrote that "the Hutterite religious faith and doctrine permeates the whole existence of the members of any Hutterite Colony", and that "[t]o a Hutterian the whole life is the Church."<sup>62</sup> Just as Ritchie J. emphasized the importance

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<sup>58</sup> For a sense of the collective nature of the lives of Hutterite communities, see Alvin J. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: U.B.C. Press, 2004) [hereinafter "Esau"]. Bruce Ryder communicates well the potential importance of the collective aspect of religion, observing that

[r]eligious and conscientious belief systems are closely related to community formation and people's sense of membership in their communities. These communities are sources of strength, support, and normative authority that provide a counterpoint to the role of the state in people's lives.

Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: U.B.C. Press, 2008) 87, at 94.

<sup>59</sup> *Hutterian Brethren*, *supra*, note 5, at para. 95.

<sup>60</sup> *Id.*, at para. 96.

<sup>61</sup> [1970] S.C.J. No. 53, [1970] S.C.R. 958 (S.C.C.). [hereinafter "*Hofer*"]. For an outstanding history of this case and the relationship between the Hutterite Church and Canadian law, see Esau, *supra*, note 58.

<sup>62</sup> *Hofer*, *supra*, note 61, at 968.

to these communities of “independence from the surrounding world”,<sup>63</sup> Abella J. took note of scholarly work that describes the “intensely self-sufficient and deeply religious nature of the Hutterian Community”.<sup>64</sup> At the core of her dissent is Abella J.’s conclusion that

[t]o suggest, as the majority does, that the deleterious effects are minor because the Colony members could simply arrange for third party transportation, fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community.<sup>65</sup>

Result aside, the essential analytic difference between the majority and the dissent lies in the steps taken to wrestle with the internal understandings of the affected community in assessing the deleterious effects of the limit.

The shift in emphasis within the *Oakes* test effected in *Hutterian Brethren* does not, however, *create* the adjudicative demands that I am discussing here. The adjudicative challenge and ethical demands posed are intrinsic to the constitutional protection of religion. Simply put, the challenge is this: how is one to justly and fairly assess how to respond to beliefs and practices that come from a way of understanding and being in the world that is profoundly foreign to one’s own and, perhaps, to most with which one has come into contact? This question poses the essential struggle of religious freedom in a constitutional democracy. Yet to be fully accurate, the issue is not simply one of foreignness or unfamiliarity, though this captures a great deal of the difficulty. Ultimately, the challenge of adjudicating issues of religious difference often comes down to the need to engage with and attempt to sensitively examine beliefs and practices that one may instinctively view as absurd or even find to be tragically, disastrously mistaken.

As I say, this is an adjudicative challenge endemic to the constitutional protection of religion. It can never be wholly avoided. My argument here, however, is that shifting matters to the “overall balancing” phase of the *Oakes* analysis draws this challenge into particularly high relief. The point is a simple one: if claims of religious freedom will now more often turn on this balancing, the requirement to give meaningful content to the “deleterious effects” of an impugned limit places the need to sensitively, thoroughly assess the internal significance of a practice or belief at the heart of the constitutional issue. To be clear, my point

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<sup>63</sup> *Id.*

<sup>64</sup> *Hutterian Brethren*, *supra*, note 5, at para. 166.

<sup>65</sup> *Id.*, at para. 167.

is independent of any result in a particular case. One may well do a fine job of seeking to understand the impacts of a limit within the culture of the affected religion, and may reflect that understanding sympathetically back to the community and the public at large in reasons for judgment, yet nevertheless conclude that the impugned limit on section 2(a) is justified. The fairness and, with it, the legitimacy of the process turns, however, on this engagement and display.

It is here that reference to last year's other leading Supreme Court of Canada case raising matters of religious freedom is illuminating. I cite the case for a limited purpose and the decision demands its own full attention, so I provide here only a brief sketch of the issue. In *C. (A.) v. Manitoba (Director of Child and Family Services)*,<sup>66</sup> a decision released less than a month after *Hutterian Brethren*, the Court was faced with a case involving an almost 15-year-old girl suffering from Crohn's disease and in need of a life-saving blood transfusion. As a devout Jehovah's Witness, she had, some months before, signed an advance medical directive expressing her wish not to receive blood transfusions. The Manitoba legislation presumed competence for those 16 years or older and provided that no medical procedure could be undertaken against the child's wishes unless this presumption was rebutted. A.C. was assessed and all accepted that she was legally competent — she was, in essence, a mature minor. Yet as a child under the age of 16, the legislation vested the treatment decision in a judge who was to balance a range of factors, ultimately issuing the order that comported with the best interests of the child. A.C. challenged the legislation on the basis that, as a competent minor who had expressed her wish to follow the dictates of her religion, the legislative scheme violated her section 2(a), section 7, and section 15(1) rights.

Inasmuch as they both concluded that A.C. was entitled to a greater role in the decision-making process than the courts below had afforded her, Abella J. (writing for the majority) and Binnie J. (in dissent) shared some common ground. Yet Abella J. declined to rule that the legislation was unconstitutional, instead flexing her statutory interpretation muscles to hold that the best interests of the child standard in the legislation required that a judge take account of the child's wishes on a "sliding scale of decision-making autonomy"<sup>67</sup> calibrated to the child's maturity.<sup>68</sup>

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<sup>66</sup> *Supra*, note 6.

<sup>67</sup> *Id.*, at para. 115.

<sup>68</sup> Note, however, that Abella J. also states that "[t]he more serious the nature of the decision, and the more severe its potential impact on the life or health of the child, the greater the degree

Justice Abella held that this interpretation of the input required by the best interests test rendered the legislation constitutionally sound. Justice Binnie, by contrast, would have found that these provisions breached A.C.'s section 2(a) freedom (as well as her section 7 and section 15(1) rights), and could not be justified under section 1. In Binnie J.'s view, "input" into the decision, no matter how substantial, was simply not sufficient. For him, Abella J.'s position

ignores the heart of A.C.'s argument, which is that the individual autonomy vouchsafed by the *Charter* gives *her* the liberty to refuse the forced pumping of someone else's blood into her veins regardless of what the judge thinks is in her best interest.<sup>69</sup>

In coming to this conclusion, Binnie J.'s decision stands out as a remarkable example of the ethical struggle that I suggest is demanded by the adjudication of religious freedom. The first words of his judgment are, simply, "[t]his is a disturbing case."<sup>70</sup> Elaborating, Binnie J. explains that A.C. "claims the right to make a choice that most of us would think is a serious mistake, namely to refuse a potentially lifesaving blood transfusion. Her objection, of course, is based on her religious beliefs."<sup>71</sup> The tension in his judgment is palpable:

The *Charter* is not just about the freedom to make what most members of society would regard as the wise and correct choice. If that were the case, the *Charter* would be superfluous. The *Charter*, A.C. argues, gives her the freedom — in this case religious freedom — to refuse forced medical treatment, even where her life or death hangs in the balance.<sup>72</sup>

He goes on to acknowledge the foreignness — indeed, the apparent folly — for many of the particular religious beliefs that the Court is being asked to protect. Justice Binnie recognizes what I have argued is at the heart of the difficulty of cases involving religious difference: "Individuals who do not subscribe to the beliefs of Jehovah's Witnesses find it difficult to understand their objection to the potentially lifesaving effects of a blood transfusion."<sup>73</sup> Such is the chasm of cultural understanding

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of scrutiny that will be required" (*id.*, at para. 22). Does this suggest that as the stakes of the decision rise, the decisional autonomy accorded to the child diminishes?

<sup>69</sup> *Id.*, at para. 166 (emphasis in original).

<sup>70</sup> *Id.*, at para. 162.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*, at para. 163.

<sup>73</sup> *Id.*, at para. 191.

that the constitutional protection of religion asks that we venture across. “It is entirely understandable that judges, as in this case, would instinctively give priority to the sanctity of life”,<sup>74</sup> Binnie J. concedes. “Religious convictions may change. Death is irreversible. Even where death is avoided, damage to internal organs caused by loss of blood may have serious and long lasting effects.”<sup>75</sup> Yet he also draws to the surface a familiar value that may be of assistance in understanding the stakes of this decision that some would view as absurd: “strong as is society’s belief in the sanctity of life, it is equally fundamental that every competent individual is entitled to autonomy to choose or not to choose medical treatment.”<sup>76</sup>

Having laid bare the difficulty and stakes of the adjudicative task presented in the case, Binnie J. makes an obvious effort to go some distance to understanding what is involved in this decision from the perspective of the religious claimant. When he turns to his analysis of freedom of religion, he dedicates a paragraph to the following:

Jehovah’s Witnesses believe that blood represents life and that respect for this gift from God requires the faithful to abstain from accepting blood to sustain life. They say that the Bible’s prohibition applies equally to eating, drinking and transfusing blood and is not lessened in times of emergency. They believe that observance of this principle is an element of their personal responsibility before God. In *Malette*, the Ontario Court of Appeal recognized that “[i]f [Mrs. Malette’s] refusal involves a risk of death, then according to her belief, her death would be necessary to ensure her spiritual life” (p. 429).<sup>77</sup>

Having sought to understand and display the shape of the commitment from the perspective of the religious claimant, Binnie J. captures the essence of the adjudicative challenge when he addresses section 7. He notes that

[t]he Court has ... long preached the values of individual autonomy. In this case, we are called on to live up to the s. 7 promise in circumstances where we instinctively recoil from the choice made by A.C. because of our belief (religious or otherwise) in the sanctity of life.<sup>78</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*, at para. 192.

<sup>77</sup> *Id.*, at para. 213.

<sup>78</sup> *Id.*, at para. 219.

With all of this in mind, Binnie J. concludes at the now-all-important final stage of his section 1 analysis that “A.C. has demonstrated that the deleterious effects are dominant”.<sup>79</sup>

Justice Binnie’s dissent in *C. (A.)* is an exemplary set of reasons in the Court’s developing jurisprudence on the constitutional protection of religious difference. He displays the difficulty of the demands that section 2(a) places upon a judge; he overtly seeks to understand the meaning of the religious practice or belief to the adherent; he exemplifies in his reasons the judge’s need to stand faithful to constitutional values, but the concurrent obligation to genuinely entertain a constitutional margin for commitments and practices beyond the familiar or untroubling. One could have found the limit in *C. (A.)* to be justified and still have displayed all of these virtues. Had this been the result, it would have been with the stakes and commitments for all on full display. Having engaged in this hard work of cross-cultural engagement, the matter becomes far more difficult, far more fraught; however, even for those who would disagree with the result, the difficult, contestable work of judgment in cases involving religious difference would have been manifest.

Returning to the back stream effects of the structural realignment of *Oakes* that took place in *Hutterian Brethren*, the *C. (A.)* case shows the demands implicit in taking seriously the task of meaningful balancing of the salutary and deleterious effects of a breach of section 2(a). If the Court’s shift of emphasis to the deleterious effects stage of the analysis is to be anything other than a realignment of section 1 to provide greater deference to government objectives, this potential lies in judges using this legal analytic moment to recognize, accept and perform the enormously challenging ethical tasks involved in adjudicating the interaction of religious difference and the law.

## VI. CONCLUSION

*Hutterian Brethren* will have significance to Charter cases well beyond the realm of section 2(a). The Court’s desire to move cases beyond the minimal impairment stage and have more matters resolved in the context of the overall balancing of salutary and deleterious effects is a potentially significant change in the way in which courts will respond to constitutional disputes. Yet in addition to drawing this shift in section 1 jurisprudence to the surface, this article has sought to demonstrate the

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<sup>79</sup> *Id.*, at para. 237.

ways in which changes in constitutional reasoning are not solely about *responses* to constitutional struggles but actually influence the shape and understanding of these conflicts. In the context of the now active area of the adjudication of claims involving freedom of religion, the Court's shift in approach to section 1 signalled by *Hutterian Brethren* presents the irony of amplifying those aspects of the section 2(a) right that the Court itself finds most challenging. Focusing on the balancing of deleterious and salutary effects conditions and cements the all-or-nothing structure that the Court laments as endemic to religious freedom claims while arguably inviting the kinds of questions that the Court sought to avoid in its decision in *Amselem*.

I have also argued that doctrinal changes to constitutional analysis have the potential to impose or emphasize different demands on those charged with adjudicating Charter claims. In the case of this shift in section 1 analysis as it applies to claims involving religious difference, *Hutterian Brethren* and *C. (A.)* both point to the unique and uniquely challenging ethical burdens involved in adjudicating across cultural difference. Although not created by the realignment of *Oakes* in *Hutterian Brethren*, these adjudicative demands are drawn into high relief by the admonition to wrestle with the deleterious effects of limits on religious freedom. And perhaps one can identify a certain potential here. If taken seriously, this subtle change to proportionality review in Canadian constitutional law could lead to a more transparent and honest — albeit more demanding and perhaps harrowing — mode of reasoning about religious difference within the Canadian constitutional rule of law that is more just and satisfying for religious claimants.

Freedom of religion cases have emerged as rich sources for mining the assumptions, logic and trends in contemporary Canadian constitutional law. *Hutterian Brethren* stands as yet another case, along with *C. (A.)*, that reflects back to us much about the nature and struggles of our constitutional lives.