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How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief

Robert E. Charney*

I. INTRODUCTION — FROM HUTS TO HUTTERITES

While it is relatively easy to agree that religious “beliefs” should be immune from state interference, the protection of religious “practices” — the external manifestations of those beliefs — has engendered considerably more controversy. As a nation which prides itself on tolerance and pluralism, Canada has struggled since before Confederation¹ to find the proper balance between inclusion and exclusivity, between equality and special status, between neutrality and accommodation. Even before the advent of the *Canadian Charter of Rights and Freedoms*,² some statutes offered exemptions to accommodate the religious beliefs of minorities,³

* General Counsel, Constitutional Law Branch, Ontario Ministry of the Attorney General. The views expressed in this paper are solely those of the author and do not represent the position of the Ministry of the Attorney General of Ontario. The author was counsel for Ontario in the Supreme Court of Canada in the *Hutterian Brethren* case. The author would like to thank Candice Telfer for her research and editing assistance in the preparation of this paper. The title of this paper is, of course, from Meredith Willson’s *The Music Man*.

¹ See s. 93 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, guaranteeing denominational school rights that existed at Confederation. Since the right is based on the pre-Confederation statutes in each province when it joined Confederation, the scope of the right is different in every province. In Ontario, these rights were primarily found in the pre-Confederation *Separate Schools Act*, 26 Vict., c. 5 (often referred to as the “*Scott Act*”) of 1863, which guarantees public funding of Roman Catholic schools in Ontario. There is a long line of cases interpreting the rights guaranteed by s. 93 in Ontario, for example: *Tiny (Township) Roman Catholic Separate Schools Sect. No. 2 v. Canada*, [1927] S.C.J. No. 63, [1927] S.C.R. 637 (S.C.C.); *Reference re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] S.C.J. No. 44, [1987] 1 S.C.R. 1148 (S.C.C.); *Ontario Home Builders’ Assn. v. York Region Board of Education*, [1996] S.C.J. No. 80, [1996] 2 S.C.R. 929 (S.C.C.); *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.); *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, [2001] S.C.J. No. 14, [2001] 1 S.C.R. 470 (S.C.C.).

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

³ For example, the *School Attendance Act, 1919*, 9 Geo. V, c. 77 excused school pupils from compulsory attendance on days regarded as “holy” by the church or religious denomination to which they belonged (s. 20(2)); the *Ontario Fair Employment Practices Act, 1951*, 15 Geo. VI, c. 24,

and about a dozen such exemptions appear in Ontario and federal legislation today.⁴

In order to deal successfully with religion, the state must first identify what it is and who may claim protection in its name. In *Syndicat Northcrest v. Amselem*,⁵ the Supreme Court of Canada held that religious beliefs are personal and so cannot be subject to an objective evaluation. Justice Iacobucci, writing for the majority, broadly defined freedom of religion to include not only belief or conduct “objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion”, but also personal “religious” or “spiritual” beliefs “irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials”.⁶ Accordingly, the majority concluded that “a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion”.⁷

While the Court recognized that the government may inquire into the sincerity of a claimant’s religious belief, it ruled that such inquiries “must be as limited as possible” and are intended “only to ensure that a

a precursor of the *Human Rights Code*, exempted religious organizations from compliance; the Ontario *Labour Relations Act* was amended in 1970 (R.S.O. 1970, c. 232) to exempt employees who objected because of religious beliefs from joining unions and paying union dues (s. 39).

⁴ *Education Act*, R.S.O. 1990, c. E.2, s. 21 (exemption from compulsory attendance on “holy” days); *Human Rights Code*, R.S.O. 1990, c. H.19, ss. 18, 24 (religious organizations do not infringe discrimination prohibition in limiting services and employment to their own members); *Human Rights Code*, *id.*, s. 18.1, *Marriage Act*, R.S.O. 1990, c. M.3, s. 20(6) and federal *Civil Marriage Act*, S.C. 2005, c. 33, s. 3 (allow registered officials to refuse to solemnize or allow sacred space to be used to solemnize marriages on the basis of religious objection); *Labour Relations Act*, 1995, R.S.O. 1995, c. 1, Sch. A, s. 53, *Colleges Collective Bargaining Act*, 2008, S.O. 2008, c. 15, s. 13 and *Canada Labour Code*, R.S.C. 1985, c. L-5, s. 70 (exempt members of bargaining unit from paying union dues on the basis of religious objection); *Immunization of School Pupils Act*, R.S.O. 1990, c. I.1, s. 3(3) and R.R.O. 1990, Reg. 262, s. 3 (exempt parents who have filed a statement of conscience or religious belief from immunizing their children); *Farm Registration and Farm Organization Funding Act*, 1993, S.O. 1993, c. 21, s. 22 (exemption from farm registration fees on the basis of religious objection); R.R.O. 1990, Reg. 616, s. 6 (exempts drivers of horse-drawn vehicles from displaying the slow-moving vehicle sign on the basis of religious objection); *Pension Benefits Standards Act*, 1985, R.S.C. 1985, c. 32 (2nd Supp.), ss. 14 and 15 (exempt employees from contributing to pension plans on the basis of religious objections); *Royal Canadian Mounted Police Regulations*, S.O.R./88-361, s. 64 (members may be exempted from some uniform requirements on the basis of religious belief); *Employment Insurance Regulations*, S.O.R./96-332, s. 89 (allows special social insurance number assignments for persons who because of religious beliefs are unwilling or unable to complete applications for registration).

⁵ [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter “*Amselem* (S.C.C.)”].

⁶ *Id.*, at paras. 43-49.

⁷ *Id.* However, as will be discussed later in this paper, Bastarache J. in his dissenting opinion advocates an objective test requiring an established and identifiable “nexus” between personal beliefs and religious precepts (para. 135).

presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings.”⁸

This test appears to offer broad protection for freedom of religious thought and conduct, yet it presents three immediate difficulties. The first is the theoretical question of why (and perhaps “whether”) “freedom of religion” is being placed on a higher plane than its section 2(a) sidekick “freedom of conscience”. The second is the policy question of whether the religious practices of a “religion of one”⁹ merit the same constitutional protection as the practices of a religious community. The third is the practical question of whether the state can successfully inquire into the sincerity of any claimant’s religious beliefs given the restrictions imposed on that inquiry by the Court in *Amselem*.

The three questions are interrelated. If both “freedom of conscience” and “freedom of religion” are equally protected under Charter section 2(a), then the scope for using section 2(a) as a basis for claiming an exemption from regulation will be virtually unlimited and the relevance of any inquiry into religious sincerity will be more attenuated.¹⁰ If, on the other hand, freedom of religion is given more protection than freedom of conscience, then the state must have some way of distinguishing between a sincere religious belief and a sincere conscientious belief. If there are collective aspects to freedom of religion, then the state may have a higher or more compelling interest in protecting or accommodating the practices of an organized or communal religion over a “religion of one”, and should have greater latitude to require objective verification of shared and corroborated religious beliefs.

The focus of this paper is on the third question: state testing of sincerity of religious belief. This last question is of significance to government because the Court’s broad, subjective definition of religion gives virtually every individual who opposes government regulation a potential freedom of religion argument if that person can successfully assert a personal religious claim. Given sufficient (often economic) incentives, individuals will lie about their religious beliefs in order to avoid state regulation or to take advantage of special exemptions. My

⁸ *Id.*, at para. 52, *per* Iacobucci J.; see also para. 142, *per* Bastarache J., dissenting.

⁹ *Id.*, at para. 189, *per* Binnie J., dissenting.

¹⁰ See *Amselem* (S.C.C.), *supra*, note 5, at para. 39; Richard Moon, “Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*” (2005) 29 S.C.L.R. (2d) 202, at 215 [hereinafter “Moon, ‘Religious Commitment and Identity’”].

concern is that the restrictions imposed by the Court in *Amselem* on the state's inquiry into sincerity make it virtually impossible for the province to reliably weed out persons with "fictitious" or "capricious" claims and this restriction may actually make it more difficult for the state to tolerate religious exemptions. What is required is a test that, in appropriate circumstances, enables the government to offer exemptions to members of religious communities while ensuring that the government's objective can still be effectively achieved.

The state's ability to reliably test for religious sincerity became a central concern in Alberta's decision to terminate the religious exemption from photo-ID driver's licences, a decision which led to the *Hutterian Brethren* case decided by the Supreme Court last term. In upholding the photographic requirement without any religious exemption, the Court missed an opportunity to re-evaluate the strict requirements of *Amselem* and to provide the province with more flexibility to offer religious exemptions in the future.

II. *SYNDICAT NORTHCREST V. AMSELEM* — THE ODYSSEY BEGINS

The appellants in *Amselem* were Orthodox Jews who owned residential condominium units in a building in Montreal. The terms of the condominium's by-laws prohibited decorations, alterations and constructions on the balconies of individual units. The appellant Amselem set up a "succah" on his balcony for the purposes of fulfilling a biblically mandated obligation during the nine-day Jewish religious festival of Succot.¹¹ After Mr. Amselem put up his succah in September 1996, the syndicate of co-ownership, Syndicat Northcrest, requested its removal, claiming the succah was in violation of the condominium's by-laws. As an alternative in future years, the Syndicat proposed to allow Mr. Amselem, in conjunction with the other Orthodox Jewish residents of the building, to set up a communal succah in the building's gardens.

¹¹ The Court describes the succah as follows:

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

Amselem (S.C.C.), *supra*, note 5, at para. 5.

The appellants rejected the Syndicat's proposed accommodation:

They explained why a communal succah would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs which, they claimed, called for "their own succah, each on his own balcony" ...

[The appellants] undertook to set up [their succahs] "in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way".¹²

When the Syndicat, in turn, refused the appellants' counter-proposal, the appellants set up their succahs in defiance. The Syndicat then "filed an application for permanent injunction prohibiting the appellants from setting up succahs and, if necessary, permitting their demolition. The application was granted by the [Quebec] Superior Court."¹³

A majority of the Supreme Court of Canada allowed Mr. Amselem's appeal, holding that the condominium by-law violated his freedom of religion by preventing him from building his own succah on his balcony. Since he held a sincere religious belief that building a succah had religious significance (whether or not he believed that he was *obliged* to build his own succah), the practice was protected by freedom of religion. In contrast, the condominium's reasons for prohibiting the succah amounted to no more than "the potential annoyance caused by a few succahs being set up for a period of nine days each year", a concern that the Court characterized as "quite trivial".¹⁴ The majority concluded that "the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable".¹⁵

Since the dispute in *Amselem* was between two private parties, it was not a Charter case, but arose under section 3 of the Quebec *Charter of Human Rights and Freedoms*,¹⁶ a compendious provision guaranteeing:

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.

¹² *Id.*, at paras. 14-16.

¹³ *Id.*, at para. 17.

¹⁴ *Id.*, at para. 86.

¹⁵ *Id.*, at para. 87.

¹⁶ R.S.Q., c. C-12.

The focus of the analysis was “freedom of religion”, which, the Supreme Court stated, is subject to the same principles whether “an individual alleges that his or her freedom of religion is infringed under the Quebec Charter or under the *Canadian Charter of Rights and Freedoms*”.¹⁷ Throughout its decision, the Court indicates that the principles established in *Amselem* will also apply to cases brought against the state under the Charter.

This particular aspect of the *Amselem* case has proven to be short-lived. As we will see when we consider the *Hutterian Brethren* case, the Court soon realized that there are important differences, at least at the justification stage, between the kind of claims brought against private parties under human rights legislation and claims against legislation brought under the Charter. This is because the relationship between private parties (*e.g.*, co-owners of a condominium in the *Amselem* case) and the relationship “between a legislature and the people subject to its laws”¹⁸ are different and require a different balancing of interests. The significance of the distinction between private acts and public policy did not arise in the *Amselem* case, and so it is not entirely surprising that the majority did not give it any consideration. I will return to this distinction later in this paper.¹⁹

One particularly interesting aspect of *Amselem* was the doctrinal debate which unfolded in the trial court between two rabbis, both qualified as experts in Jewish law. The trial judge preferred the testimony of Rabbi Levy, who was of the opinion “that there is no religious obligation requiring practising Jews to erect their own succahs”, and that “[t]here is no commandment as to where they must be erected.”²⁰ Rabbi Ohana, the expert for Mr. Amselem, agreed that there is neither an obligation to have one’s own succah, nor a rule on where the succah should be located. However, he opined that without one’s own succah at home, the practising Jew is required to go somewhere else for the proper observance of Succot. This transforms the joyous festivity²¹ into actual labour or obli-

¹⁷ *Amselem* (S.C.C.), *supra*, note 5, at para. 37.

¹⁸ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567, at para. 69 (S.C.C.) [hereinafter “*Hutterian Brethren* (S.C.C.)”].

¹⁹ See text at note 54, *infra*.

²⁰ *Amselem* (S.C.C.), *supra*, note 5, at para. 65, citing *Syndicat Northcrest c. Amselem*, [1998] J.Q. no. 1959, at paras. 88-90 (Que. S.C.) [hereinafter “*Amselem* (Que. S.C.)”].

²¹ The Superior Court of Quebec describes Succot as “une occasion de réjouissance”. As a point of interest, *Le grand dictionnaire terminologique*, of the Office québécois de la langue française translates “réjouissances” as “cakes and ale”, online at: <http://www.granddictionnaire.com/btml/fra/r_motclef/index800_1.asp>.

gation, thus losing sight of the whole spirit and purpose of Succot.²² The Quebec Superior Court found this opinion to be “too subjective”.²³ Notwithstanding this Talmudic dispute between the experts, it was accepted that Mr. Amselem (although not all of the other appellants) held the personal religious belief that he was obliged to erect the succah on his own property.²⁴

The majority of the Supreme Court concluded that the trial court was wrong to try to resolve the dispute between two competing religious authorities on a question of Jewish law in order to determine whether the claimant’s beliefs were “objectively defined religious obligations”.²⁵ Justice Iacobucci, writing for the majority, explained that

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.²⁶

Therefore it did not matter whether Mr. Amselem’s belief was an official doctrine or an idiosyncratic interpretation of the obligations imposed by his faith.

Noticeably lacking from this definition of religion is any connection to a community of fellow-believers. This emphasis on individualism was no mere oversight, as Iacobucci J. explained that freedom of religion “revolves around the notion of personal choice and individual autonomy and freedom”²⁷ and “one that is integrally linked with an individual’s self-definition and fulfilment and is a function of personal autonomy and choice”.²⁸ The collective aspects of freedom of religion played no part in Iacobucci J.’s analysis of section 2(a).²⁹

²² *Amselem* (Que. S.C.), *supra*, note 20, at paras. 91-93.

²³ *Id.*, at para. 93; *Amselem* (S.C.C.), *supra*, note 5, at para. 23.

²⁴ *Amselem* (S.C.C.), *id.*, at para. 24.

²⁵ *Id.*

²⁶ *Id.*, at para. 39.

²⁷ *Id.*, at para. 40.

²⁸ *Id.*, at para. 42.

²⁹ Benjamin L. Berger, “Law’s Religion: Rendering Culture” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: U.B.C. Press, 2008) 264, at 269 [hereinafter “Berger, ‘Law’s Religion’”]. Berger reviews a number of earlier decisions on religion and concludes “that the dominant thread in the Court’s definition and discussion of religion is its focus on religion as a fundamentally individual phenomenon” (at 268). “Since *Big M*, the clear and consistent jurisprudential message has been that religion has constitutional relevance because it is an expression of human autonomy and choice” (at 274). The test for religious sincerity established by the majority in *Amselem* is consistent with Berger’s view that “for the law, what counts as religious is that which is

Significantly, the communal aspects of freedom of religion do appear to play a role in Bastarache J.'s dissenting opinion. Professor Moon suggests that Bastarache J.'s requirement that the individual's belief be part of an established religious belief system

may rest on the view that freedom of religion protects religious or cultural minorities within the community, and not simply, individual conscience in moral or spiritual matters. ... Justice Bastarache may be drawing on a different conception of religion, and religious commitment; one that emphasizes the social and institutional character of religion, and regards religious belief not simply as a personal matter, but as tied to an established system and an institutional structure.³⁰

The individual/communal dichotomy would return to play a greater role in the *Hutterian Brethren* case.

It was on the basis of this private/individual conception of religion that the majority rejected any judicial inquiry into the objective validity of the claimant's religious beliefs:

... these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.³¹

The majority posited a definition of freedom of religion which eschewed any relationship to official religious dogma:

... freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or

meaningful to the individual; institutions and collective traditions are only of derivative importance to the law" (at 270). In "An Exemption for Sincere Believers: The Challenge of *Alberta v. Hutterian Brethren of Wilson Colony*" 56 McGill L.J. (forthcoming 2011), Sara Weinrib argues that despite the individualistic language in *Amselem*, the decision also requires individual beliefs to emerge from community identification to merit s. 2(a) protection.

³⁰ Moon, "Religious Commitment and Identity", *supra*, note 10, at 208-209. This connection to "an established system and an institutional structure" bears a close resemblance to the conception of religion recognized in the denominational school rights protected by s. 93 of the *Constitution Act, 1867*; see *supra*, note 1.

³¹ *Amselem* (S.C.C.), *supra*, note 5, at para. 43.

belief is required by official religious dogma or is in conformity with the position of religious officials.³²

Therefore the state is restricted to testing the “sincerity” (*e.g.*, honesty) of the claimant’s religious belief, but even this test is seriously circumscribed. The Court’s decision rejects the only two objective criteria that may practicably be available to the state to test sincerity: consistent practice and expert opinion. Thus, while the court may consider whether the claimed religious belief is “consistent with his or her other *current* religious practices”,³³ past practices are out of bounds. The court should not

... 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.³⁴

Nor is expert evidence relevant to this determination:

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.³⁵

Even the Court’s permitted examination of current religious practices could create an unfair test for a sincere believer whose current religious practices fall short of his or her sincere beliefs. Human nature being what it is, I suspect that the practices of even the most devout among us will

³² *Id.*, at para. 46.

³³ *Id.*, at para. 53 (emphasis added).

³⁴ *Id.*

³⁵ *Id.*, at para. 54.

often fall short of his or her spiritual aspirations. Few individuals could withstand a charge of religious hypocrisy if the state had the ability to thoroughly examine their conduct and measure it against their beliefs. Freedom of religion is guaranteed to sinners as well as saints,³⁶ and, if the Court's concerns about past practice are taken seriously, they might just as well apply to current practices.

The real difficulty with the Court's test in *Amselem* is that the test works only when the conduct in question — here, the building of a succah — is *exclusively* religious. It is highly unlikely that anyone would build or dwell in a succah for any reason other than religious belief, and, in any event, the potential harm from such conduct is, as Iacobucci J. found, insignificant. Since there are no ulterior motives for building a succah, it was easy for the majority to create a religious sincerity test that weighed heavily on the side of the claimant. However, given the Court's express desire to avoid a "religious inquisition",³⁷ how can the government actually test religious sincerity in cases where the conduct at issue is not exclusively religious and where the potential harm is more significant? How can the state create a religious exemption that will apply only to the true believers, but will not exempt false claims of religious belief, such as claims based on personal, political or philosophical concerns (which may qualify as "conscience" but not "religion", yet may be easily confused with or disguised as "religion"), and "overnight" conversions of convenience designed to evade regulatory compliance or even to engage in criminal behaviour? How can the state establish a test for religious sincerity that can operate on an administrative level without the need for lengthy trials or inquisitions?

The test set out in *Amselem*, however appropriate for the context of that case, may actually make it more difficult for the province to offer a religious exemption for minority communities because it makes it too easy for persons with "fictitious" or "capricious" claims³⁸ to also qualify for an exemption. The state does not have a "window into men's souls".³⁹

³⁶ In this regard see *Daly v. Ontario (Attorney General)*, [1997] O.J. No. 5040, 38 O.R. (3d) 37 (Ont. Gen. Div.), which considered whether Roman Catholic separate schools had the right to prefer Roman Catholics when hiring teachers. In response to the argument that the evidence demonstrated that Roman Catholic separate schools did not consistently hire Roman Catholic teachers, the Court stated (at 82): "A constitutional guarantee is an ideal but must function in a human context. This means that it will almost certainly never be fully realized. The failure of a human institution to achieve perfection surely cannot defeat the ideal of the guarantee."

³⁷ *Amselem* (S.C.C.), *supra*, note 5, at para. 52.

³⁸ *Id.*

³⁹ Queen Elizabeth I: "I have no desire to make windows into men's souls."

Unless the province can rely on the kind of objective criteria apparently rejected by the Court in *Amselem*, it cannot practically offer a religious exemption without threatening the integrity of the regulatory scheme. To illustrate this point I will digress from the Supreme Court of Canada, and examine briefly the case of Mr. Bothwell.

III. *BOTHWELL V. ONTARIO*⁴⁰ — A BELIEVER IN SEARCH OF A RELIGION

Ontario has required a digital photo driver's licence card since 1995⁴¹ in order to provide enforcement agencies with a reliable means of identifying drivers and to reduce the number of unqualified and unauthorized drivers on the road. In addition to improving road safety, the photo ID assists in maintaining public security when laying traffic charges, investigating motor vehicle collisions and conducting other enforcement duties. Digital photo driver's licences enable officers to identify those drivers who are suspended or who have falsified, altered or counterfeited licences. Without a photo on the driver's licence, police cannot rely on the driver's licence as proof of identity because people can easily forge and tamper with the licence. The lack of a photo makes it difficult for the province to effectively employ driver's licence suspensions to combat drinking and driving and *Highway Traffic Act* offences. The digital photo driver's licence is difficult to tamper with and has become the North American standard for driver's licences.

Although digital photos are essential to the integrity and security of Ontario's driver licensing scheme, Ontario established a policy that permitted Permanent Valid Without Photo ("PVWP") licences where a driver objected on religious grounds to having his or her photo taken. This exemption is not granted lightly. To be considered for a permanent exemption from the photo requirement on religious grounds, an individual must complete an Application for Photo Exemption form. For an application to be approved, the applicant must establish that she is a member of a registered religious organization that prohibits its members from being

⁴⁰ *Bothwell v. Ontario (Minister of Transportation)*, [2005] O.J. No. 189, 24 Admin. L.R. (4th) 288 (Ont. S.C.J.) [hereinafter "*Bothwell*"].

⁴¹ Mandatory photo requirements were first introduced in 1986. At that time, a photo card with a Polaroid photo was required. The photos are authorized by s. 32(13) of the Ontario *Highway Traffic Act*, R.S.O. 1990, c. H.8: "The Minister may require as a condition for issuing a driver's licence that the applicant therefore submit to being photographed by equipment provided by the Ministry."

photographed for religious reasons, and the application for an exemption must be supported and substantiated by the individual's religious leader and the provision of actual scriptural passages to substantiate the religious prohibition. In other words, the onus is on the applicant to demonstrate a shared and corroborated religious belief.

Ontario's PVWP criteria are designed to provide objective and demonstrable guidelines that permit exemptions for individuals who object on religious grounds to having their photo taken, without opening the door to a large number of permanent exemptions that could threaten the integrity of the driver's licensing regulatory scheme. In the absence of these criteria, individuals who are tempted to misuse the driver's licence identification card for illegal purposes may succeed in obtaining exemptions. From an administrative perspective, the PVWP criteria enable the province to deal with exemption applications without compromising the important objectives of driver's licence photos. While strict, the policy concern is that an alternative process could open the door to fraudulent applications and make PVWP licences too accessible to individuals who object to the photo requirement not based on religious belief but rather based on other concerns such as privacy or because they intend to evade regulatory compliance or engage in criminal activity.

Since the PVWP policy was introduced in 1986, Ontario has received approximately 75 applications for permanent exemptions from the photo requirement.⁴² Ontario has to date not granted an exemption, as applicants either have not met the Ministry's criteria or have not completed the application process.⁴³

Prior to the change to digital photographs in 1995, Mr. Bothwell had a driver's licence with a Polaroid photograph. When he applied for a licence renewal in 1997, he noted that the licensing office was using a digital camera with a cable connected to a computer. He refused for religious reasons to having a digital photograph taken and applied for a PVWP. His application was denied because he was unable to establish that he was a member of a registered religious organization that prohibits

⁴² It is reasonable to assume that relaxing the criteria to allow for exemptions on the basis of individual belief without corroboration by a religious leader would invite more applications.

⁴³ I am informed that the closest that anyone ever got to an exemption in Ontario was a member of the Old Order Amish, who applied for an exemption on the basis that his religion prohibited photographs. The application was accompanied by a letter from an elder of his church who confirmed the religious prohibition on photographs, but stated that the religion also prohibited driving a car, and expressed the position that if the applicant was prepared to violate religious precepts by driving a car, he should have no objection to having his photo taken. The application was therefore denied. I do not know whether this story is apocryphal.

its members from being photographed for religious reasons. Mr. Bothwell was a parishioner in the Anglican Church. When he found out about the government's exemption policy "he began to search for a congregation to join that had a religious objection to photographs, without success".⁴⁴ Accordingly his application for an exemption was not supported or substantiated by a religious leader, and it was denied.

Mr. Bothwell claimed that Ontario's PVWP criteria were inconsistent with the "sincerity" test established by the Supreme Court in *Amselem*. He pointed out that, according to *Amselem*, the only issue was whether his objection to digital photographs was based on a sincere religious belief, and he swore that it was. That he had previously consented to Polaroid pictures, that he was not a member of religious organization that prohibited him from having a digital picture taken, that he could find no religious leader to support or substantiate his religious claim, were, according to *Amselem*, all irrelevant and inappropriate considerations.

Yet Mr. Bothwell's claim to a religious exemption was defeated by hubris. During the course of his court case, Mr. Bothwell participated in a news conference with his lawyer where he voluntarily submitted to having his picture taken, even though he was "aware that major news outlets ... bank their digital photos and post them on the Internet".⁴⁵ This fact, together with a number of other inconsistencies in his conduct and testimony, led the Divisional Court to conclude that his objection to the digital photograph on his driver's licence was not based on a sincere religious belief.

While the Court's conclusion in *Bothwell* would appear to contradict my point — that it is virtually impossible for the state to challenge a claim of religious sincerity — the fact is that in the *Bothwell* case the province got lucky because Mr. Bothwell slipped up. Had Mr. Bothwell not voluntarily participated in the press conference, it is unlikely that the cumulative evidence in his case would have been sufficient to undermine his claim of a sincere religious belief on a strict application of the principles established in *Amselem*. Future, more sophisticated claimants are unlikely to make the same overt mistakes as Mr. Bothwell. Even Mr. Bothwell is unlikely to make the same mistake again.

Finally, the province must be able to establish a test that can be applied by the staff at the Ministry of Transportation responsible for reviewing the exemption applications without the need to engage in a

⁴⁴ *Bothwell*, *supra*, note 40, at para. 24.

⁴⁵ *Id.*, at para. 43.

protracted inquiry or investigation. While Mr. Bothwell's inconsistencies were exposed in the context of a cross-examination by skilled counsel (arguably the very sort of "inquisition" rejected by Iacobucci J. in *Amselem*), they would never have come to light if he had not brought a court case challenging the government's application process. Indeed, the fact is that in Mr. Bothwell's case the requirement that the applicant demonstrate "a shared and corroborated religious belief" on his application for a PVWP licence did succeed in filtering out an individual who the Court ultimately concluded, on the basis of the evidence before the Court, was not a sincere religious believer. In the absence of the objective criteria on the PVWP application, the government would have had no basis for denying his application and it is likely that Bothwell would have succeeded in obtaining his PVWP.⁴⁶

Governments must have some way to reliably test for religious sincerity, preferably without the need to hire private investigators to catch the claimant in some inconsistent conduct or behavioural lapse. And this brings us back to the case of the *Hutterian Brethren*.

IV. HUTTERIAN BRETHREN OF WILSON COLONY — THE RESURRECTION OF PROPORTIONALITY

Driver's licence photographs were introduced in Alberta in 1974. Until 2003 Alberta permitted a religious exemption from its photo-ID driver's licence requirements. Unlike in Ontario, there was a minority religious group in Alberta, the Hutterian Brethren, whose members regularly applied for this exemption. Approximately 250 of them qualified for it. The Hutterian Brethren hold a genuine religious belief that having

⁴⁶ The concern regarding false claims for religious exemptions is not unique to driver's licences or to Canada. For example, in Israel women are permitted to apply for an exemption from mandatory military service on the basis of religious "modesty" which would preclude them from wearing an army uniform. A recent newspaper report indicates that, confronted with growing claims for religious exemptions, the Israeli government has hired investigators to watch suspected draft evaders to see if they are engaged in conduct which is inconsistent with their religious claims. The report indicates that in one year the surveillance program caught 520 women who, confronted with evidence that their religious claims were false, signed up for military service.

Catching draft-dodgers is fairly straightforward. "It takes one weekend," said Lt.-Col. Gil Ben Shaoul, deputy commander of Israel's military recruitment service. "We find them in bars. We know some of them are models and singers and they use this way to get out of the army." Ben Shaoul said the military contracted private investigators after officers reported too many women claiming to be religious yet vague on Jewish prayers and holidays.

Diaa Hadid, "Israeli army out to catch young female draft evaders" *The Toronto Star* (March 19, 2009), A15.

their photograph willingly taken violates the Second Commandment⁴⁷ and is therefore a sin. The province took no issue with the sincerity of that religious belief. The Hutterian Brethren also hold a genuine belief in communal property, and, as a result, live together in rural colonies. The Wilson Colony had 142 members. The evidence was that although the colonies attempt to be self-sufficient, certain members must drive regularly on provincial highways in order to facilitate the sale of agricultural products, purchase supplies and transport members to medical appointments. The members of the Wilson Colony claimed that

... if they are unable to drive it will be impossible for them to continue this communal way of life, and that they are therefore being forced to choose between two of their religious beliefs: adhere to not having their photo taken or adhere to living a communal life and perform their assigned duties within the colony.⁴⁸

In 2003 Alberta moved to new digital photo technology, and determined that it could no longer continue to offer the religious exemption from the photo requirement. The purpose of the mandatory photograph was primarily to reduce identity theft. The photograph taken at the time of the issuance of the licence is included in the province's database and facial recognition technology is used to compare the photograph to all other photographs in the system to ensure that no one has more than one licence in the system. Since the driver's licence has become the generally accepted identity document in our society, it has become a "breeder document" for identity theft and the creation of false identities. Facial recognition technology ensures that a person renewing or replacing a driver's licence is the person to whom the licence is issued and will disclose whether a licensee holds another licence under a different name.

When the case was argued before the Alberta Court of Appeal, the issue arose as to whether the exemption of *only* the Hutterian Brethren would threaten the security of the photo-licence scheme. The Hutterian Brethren are a discrete community with a long-established and easily verified sincere religious objection to being photographed. Alberta acknowledged that its concern was not with the few Hutterian Brethren in the province, but "it worries that a large number of other applicants will

⁴⁷ "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* (S.C.C.), *supra*, note 18, at para. 24.

⁴⁸ *R. v. Hutterian Brethren of Wilson Colony*, [2007] A.J. No. 518, 77 Alta. L.R. (4th) 281 at para. 6 (Alta. C.A.) [hereinafter "*Hutterian Brethren* (C.A.)"].

try to take advantage of the photo exception if it is reintroduced. It claims that some of these applicants may attempt to exploit the system by making false religious claims”.⁴⁹ This is indeed a valid concern. Given the value of a photoless driver’s licence to persons seeking to circumvent licence suspensions or who would use the photoless licence to commit identity theft or other fraud, it is likely that unscrupulous persons would try to take advantage of a general religious exception. The easier it is to get away with a false claim, the more false claims will be made. The province relied on the Supreme Court’s decision in *Amselem* to support its reluctance to maintain a general religious exemption:

In addition, the Province says that its ability to verify the credence of religious beliefs has been significantly reduced by the decision of the Supreme Court of Canada [*Amselem, supra*, note 5]. In that case, a majority of the court held that religious beliefs are personal and are not subject to an objective evaluation ... Rather, all that is required is a sincere religious belief which calls for a particular line of conduct ... According to the Province, the subjective nature of this inquiry significantly restricts its ability to probe the beliefs of an individual seeking a non-photo exception and increases the likelihood of falsified claims. Furthermore, it says that the finding in *Amselem* prevents a Registrar from requiring a letter from a religious leader verifying the applicant’s beliefs, and that requirements to this effect in other provinces are unconstitutional on that basis. As a result, the only way to ensure the integrity of the licensing system is to impose the absolute photo requirement.⁵⁰

The most obvious alternative to a general religious exemption would be a specific exemption for the Hutterian Brethren, or an exemption which would apply only to individuals who, like members of the Wilson Colony, could demonstrate a shared and corroborated religious belief. However, as Alberta argued in the Court of Appeal, these alternatives appeared to be precluded by the individual/subjective analysis established in *Amselem*.

The Supreme Court unanimously concluded that Alberta’s photo-ID requirement infringed the section 2(a) rights of the members of the Hutterian Brethren of Wilson Colony, but the majority held that the infringement was justified under Charter section 1. No one questioned that the first element of the Charter section 2(a) was met — that “the claimant sincerely believes in a belief or practice that has a nexus with

⁴⁹ *Id.*, at para. 49.

⁵⁰ *Id.*, at para. 50.

religion”. The majority proceeded on the assumption that the second element of Charter section 2(a) was also met — that “the impugned measure interferes with the claimant’s ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial”.⁵¹

The majority recognized that the broad scope of freedom of religion means that:

[m]uch of the regulation of a modern state [will have] more than a trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs.⁵²

The province’s objective — to prevent identity theft and fraud and the various forms of mischief which identity theft may facilitate — was pressing and substantial, and the universal photo requirement was rationally connected to that purpose.

The majority concluded that “the evidence discloses no alternative measures which would substantially satisfy the government’s objective while allowing the claimants to avoid being photographed”. This was because permitting “an unspecified number” of religious exemptions would mean that the “one-to-one correspondence between issued licences and photos in the data bank would be lost”;⁵³ and this disparity could be exploited by persons committing identity theft.

Nor did the legislature have a “duty to accommodate” the religious practices of the members of the Wilson Colony when it established mandatory digital photographs. The Chief Justice explained that “a distinction must be maintained between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1 justification analysis that applies to a claim that a law infringes the *Charter*”.⁵⁴ The

⁵¹ *Hutterian Brethren (S.C.C.)*, *supra*, note 18, at para. 32.

⁵² *Id.*, at para. 36. The same observation can also be made about collective agreements, which have recently found constitutional status by virtue of the Supreme Court’s decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.). Much of the regulation of a modern state will be inconsistent with “significant terms” of collective agreements, and like religious beliefs, the province cannot know the details of every such agreement (or potential agreement) when it enacts legislation or regulations; see Robin K. Basu, “Revolution and Aftermath: *B.C. Health Services* and Its Implications” (2008) 42 S.C.L.R. (2d) 165, at 206. I find a certain irony that, as a result of *Health Services*, the terms of a collective agreement now enjoy greater constitutional protection (are more sacrosanct) than religious practices following *Hutterian Brethren*, notwithstanding the fact that freedom of religion is expressly guaranteed by Charter section 2, but the term “collective bargaining” appears nowhere in the Charter.

⁵³ *Hutterian Brethren (S.C.C.)*, *id.*, at para. 60.

⁵⁴ *Id.*, at para. 66.

concept of “reasonable accommodation” was developed for, and makes sense applied to, the *Human Rights Code* context where the dispute is between individual parties —employer and employee, landlord and tenant, retailer and consumer — who must “adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party”.⁵⁵

In contrast, “a very different kind of relationship exists between a legislature and the people subject to its laws”:

By 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. A law’s constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law’s impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court’s ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.⁵⁶

While not new,⁵⁷ this is a significant point and recognizes the inherent difficulty in providing exemptions from legislation. It must be

⁵⁵ *Id.*, at para. 68.

⁵⁶ *Id.*, at para. 69.

⁵⁷ The Supreme Court of Canada has previously recognized that legislation cannot be “customized” to meet individual needs, and failure to customize or tailor government benefits to the needs of each individual does not infringe the Charter. See *Martin v. Nova Scotia (Worker’s Compensation Board)*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504, at para. 82 (S.C.C.):

Of course, government benefits or services cannot be fully customized. As a practical matter, general solutions will often have to be adopted, solutions which inevitably may not respond perfectly to the needs of every individual. This is particularly true in the context of large-scale compensation systems, such as the workers’ compensation scheme under consideration.

remembered that the *Amsellem* case arose in the context of a private relationship between a condominium corporation and a unit owner, and this provides an additional reason why the Court's analysis in *Amsellem* was not well suited to the legislative context. As we saw in *Amsellem*, the actions of the condominium corporation related to private aims, with no broader public policy dimension. In such cases the Court must consider the concept of "accommodation" in the context of the particular interests of the parties before it. In the private context the Court can engage in a process that "takes into account the specific details of the circumstances of the parties and allows for dialogue between them".⁵⁸ The test for religious sincerity developed by the Court in *Amsellem* is a test that should be applied to disputes between private parties when one party is seeking the accommodation of exclusively religious conduct with insignificant potential harm on the other party's private interest. This is not the appropriate test to be applied in the legislative context to persons seeking exemptions from laws of general application, where the risk of false claims is high and the potential harm to the public interest is significant. The "broader societal context" referred to by the majority demands a different test for religious sincerity than the one developed in *Amsellem*.

The final stage in the Charter section 1 analysis — is the law proportionate in its effect? — had previously been viewed by Professor Hogg as a "redundant" step in the section 1 analysis: "So far as I can tell ... this step has never had any influence on the outcome of any case."⁵⁹ In resurrecting the proportionality analysis, the Chief Justice explained that "the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'."⁶⁰ Thus, even where there are no alternative means reasonably capable of satisfying the

And *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, at para. 55 (S.C.C.):

Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Canadian Charter*. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group.

⁵⁸ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256, at para. 131 (S.C.C.), *per* Deschamps and Abella JJ.

⁵⁹ Peter W. Hogg, *Constitutional Law of Canada*, vol. 2, looseleaf (Toronto: Thomson Carswell, 2007), at 38-44 [hereinafter "Hogg, *Constitutional Law*"].

⁶⁰ *Hutterian Brethren* (S.C.C.), *supra*, note 18, at para. 76.

government's objective, a law might still fail the proportionality analysis because "the deleterious effects are out of proportion to the public good achieved by the infringing measure".⁶¹

Significantly, Abella J.'s dissenting opinion, while reaching the opposite conclusion on proportionality, joins the majority in emphasizing the importance of this step in the section 1 analysis, stating that "most of the heavy conceptual lifting and balancing ought to be done at the final step — proportionality. Proportionality is, after all, what s. 1 is about."⁶² Justice Abella's decision on proportionality reads like a looking-glass version of the majority's. Where, for example, McLachlin C.J.C. gives as her example of the importance of proportionality a hypothetical law which is minimally impairing but still fails proportionality, Abella J.'s hypothetical is a law "which is not minimally impairing but may, on balance, given the importance of the government objective, be proportional".⁶³

After finding that the "salutary effects" of the universal photo requirement for driver's licences supported some restriction on freedom of religion, the majority went on to analyze the "deleterious effects" of that limitation on the Wilson Colony members' exercise of their religious freedom. It is at this point that the communal aspects of freedom of religion entered into the analysis, making it clear that the impact of such restrictions on religious communities may be more significant than the impact of the same law on a "religion of one".

The Chief Justice's opinion recites a number of considerations which the Court — and I would argue the state — must consider in undertaking this analysis. Is the practice — like prayer — central to the religious belief? Is it mandatory or optional? Does the limit amount to direct state compulsion on matters of belief or practices, or is it merely the incidental and unintended effect of a law of general application intended for the public good? Does the law prevent the religious practice, or does it just make the practice less convenient or more costly? These are all important questions, and to say, as *Amselem* does, that they are all infringements of Charter section 2(a) does not tell us that they should all be treated the same way under Charter section 1. That is one of the problems with *Am-*

⁶¹ *Id.*, at para. 78.

⁶² *Id.*, at para. 149.

⁶³ *Id.*, Notwithstanding the miraculous resurrection of proportionality by the Court, Professor Hogg continues to express his skepticism, indicating that "[t]he distinction between the first and the fourth steps remains, for me at least, a difficult one," although he acknowledges that his "is a lonely view": Hogg, *Constitutional Law*, *supra*, note 59, at 38-44–38-44.2.

selem; it failed to make these important distinctions when setting out the test for religious sincerity. By acknowledging that these various considerations are important to the section 1 justification analysis, the Court must recognize that they are all legitimate considerations for the legislature to take into account when it decides whether a religious exemption is appropriate and practical in the circumstances.

The majority does consider the effect on the Wilson Colony's "communal life", but finds that the evidence did not "support the conclusion that arranging alternative means of highway transport would end the Colony's rural way of life".⁶⁴ These alternatives will impose financial costs on the community "but they do not rise to the level of seriously affecting the claimants' right to pursue their religion".⁶⁵

In her dissenting opinion, Abella J. places somewhat more emphasis on the community or collective aspects of religious freedom. She states that the Hutterites' inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community.⁶⁶

Chief Justice McLachlin's decision indicates that while she agrees with Abella J. that:

... religious freedom has both individual and collective aspects, I think it is important to be clear about the relevance of those aspects at different stages of the analysis in this case. The broader impact of the photo requirement on the Wilson Colony community is relevant at the proportionality stage of the s. 1 analysis, specifically in weighing the deleterious and salutary effects of the impugned regulation. The extent to which the impugned law undermines the proper functioning of the community properly informs that comparison. Community impact does not, however, transform the essential claim — that of individual claimants for photo-free licences — into a group right.⁶⁷

It is not clear to me that there is really any disagreement between the Chief Justice and Abella J. on this point. Justice Abella's dissenting opinion does state that both the individual and community⁶⁸ aspects of religion

⁶⁴ *Hutterian Brethren (S.C.C.)*, *id.*, at para. 97.

⁶⁵ *Id.*, at para. 99.

⁶⁶ *Id.* at para. 114; see also para. 130. Justice Abella also relies on the European Court of Human Rights for the importance of protecting the "religious community, in its collective dimension" at para. 131, citing *Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, ECHR 2001-XII.

⁶⁷ *Id.*, at para. 31.

⁶⁸ This is variably referred to as the "group", "collective" and "community" aspect of religion, although these terms are used interchangeably.

are engaged in this case, and then indicates that “[t]he nature of the religious right asserted will also be of relevance to the balancing of benefits and harms”⁶⁹ under Charter section 1, which seems to be the same mode of analysis followed by the Chief Justice, albeit with a different result.

Justice Abella’s analysis of the deleterious effects of the mandatory photo requirement does place particular emphasis on “the autonomous ability of the respondents to maintain their communal way of life”.⁷⁰ She is critical of the majority for failing “to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community”.⁷¹

The inextricably intertwined relationship between the Hutterian religion and the Wilson Colony community means that the deleterious effect of the mandatory photo requirement on the Wilson Colony members will far exceed the impact of that same requirement on the idiosyncratic Mr. Bothwell. Justice Abella’s decision implicitly recognizes this distinction when she concludes:

The mandatory photo requirement is a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community, a community that has historically preserved its religious autonomy through its communal independence.⁷²

Justice LeBel’s dissenting reasons place even greater emphasis on the communal aspects of religious freedom:

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. As Justice Abella points out, the regulatory measures have an impact not only on the respondents’ belief system, but also on the life of the community. The reasons of the majority understate the nature and importance of this aspect of the guarantee of freedom of religion. This may perhaps explain the rather

⁶⁹ *Id.*, at para. 132.

⁷⁰ *Id.*, at para. 164.

⁷¹ *Id.*, at para. 167.

⁷² *Id.*, at para. 170.

cursory treatment of the rights claimed by the respondents in the course of the s. 1 analysis.⁷³

Thus, the decisions in *Hutterian Brethren*, and in particular the dissenting opinions, recognize an important facet of religious freedom — the maintenance of religious relationships and communities — that was noticeably absent from the Court’s decision in *Amselem*.

V. A ROLE FOR CHARTER SECTION 27 — REDISCOVERING THE LOST ARK

It is perhaps an oversight that neither Abella J. nor LeBel J. makes direct reference⁷⁴ to the one section of the Charter that provides an explicit textual basis to support their heightened concern for protecting “communities of faith”. Section 27 of the Charter states:

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

This rarely relied-on section of the Charter⁷⁵ is consistent with Abella and LeBel JJ.’s special concern for the community aspects of religion. Yet section 27’s acknowledgment of the importance of protecting and enhancing Canada’s multicultural heritage is nowhere to be found in the very individualistic definition of freedom of religion contained in *Amselem* or, more importantly, in the Court’s test for religious sincerity.

⁷³ *Id.*, at para. 182.

⁷⁴ Justice Abella does refer to Wilson J.’s partial dissent in *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.), which does rely on Charter s. 27, *id.*, at para. 130.

⁷⁵ In only a handful of cases, the Supreme Court of Canada has applied s. 27 to the interpretation of either the substantive rights guarantees under the Charter, or the s. 1 justification analysis. In *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 757 (S.C.C.), it canvassed these decisions:

This Court has where possible taken account of s. 27 and its recognition that Canada possesses a multicultural society in which the diversity and richness of various cultural groups is a value to be protected and enhanced. Section 27 has therefore been used in a number of judgments of this Court, both as an aid in interpreting the definition of Charter rights and freedoms (see, e.g., *Big M Drug Mart*, *supra*, per Dickson J., at pp. 337-38, *Edwards Books*, *supra*, per Dickson C.J., at p. 758; and *Andrews v. Law Society of British Columbia*, *supra*, per McIntyre J., at p. 171) and as an element in the s. 1 analysis (see, e.g., *Edwards Books*, per La Forest J., at p. 804, and Wilson J., at p. 809).

The two more recent applications are both in dissenting opinions: *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731, at 815-19 (S.C.C.), per Cory and Iacobucci JJ. (dissenting) and *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609, at paras. 84-85 (S.C.C.), per L’Heureux-Dubé J. (dissenting).

Whether or not the state *must* give heightened protection to religious communities, surely, given the text of section 27, it cannot be faulted for doing so. *Amselem* suggests that the state is precluded from making this distinction — from tailoring a religious exemption so that it can be met by members of the Hutterian Brethren, but not by Mr. Bothwell (even if he were a sincere believer).

The distinction made by section 27 is not between large communities and small communities. You do not get much smaller than the 250 or so Hutterites in Alberta, and they certainly qualify as part of Canada’s multicultural heritage. The distinction is between *bona fide* religious communities and “religions of one”. While section 2(a) of the Charter protects both individuals and groups, section 27 is concerned with communities. At the very least, section 27 should mean that the government objective of promoting “communities of faith” is consistent with Charter values and deserving of additional weight in the section 1 balancing process. If this is correct, then the government must be permitted to establish religious exemptions which test for more than sincerity of belief. Religious exemptions should also be permitted to test for membership in a *bona fide* religious community. This additional requirement may not always be necessary, but *Amselem* is wrong to suggest that it should never be permitted.

As section 27 recognizes the state’s interest in protecting religious communities, the state should be permitted to require evidence of a “shared and corroborated religious belief” in situations where (1) the risk of false or insincere claims for a religious exemption is real; (2) permitting false claims for exemptions could compromise the government objective; and (3) the impact of denying sincere claims will be to undermine or threaten a community of faith that is a part of Canada’s multicultural heritage.

The role of Charter section 27 may also help to explain why “freedom of religion” attracts greater protection than “freedom of conscience”. Professor Moon raises the conundrum created by the Court’s attempt in *Amselem* to distinguish “conscience” — involving “secular, socially based” beliefs — from “religion” — involving “the belief in a divine, superhuman or controlling power”.⁷⁶ Professor Moon points out that:

if freedom of conscience and religion are part of a single integrated right, that protects deeply-held commitments or beliefs about right and

⁷⁶ *Amselem* (S.C.C.), *supra*, note 5, at para. 39.

truth, there was no need for the Court to embark upon the difficult task of determining when a belief or practice is religious rather than secular.⁷⁷

But Moon concludes that Iacobucci J.'s decision in *Amselem*

is workable only if the protection of ... section 2(a) is confined to spiritual beliefs and practices or only if such beliefs/practices receive special protection under ... s. 2(a). For it is difficult to see how a court could take such a broad approach to freedom of conscience, and extend protection to any belief/practice that an individual might consider important or valuable, but not obligatory. ... It simply cannot be the case that any practice (not tied to a religious belief system) that an individual considers important but not morally necessary, is protected under the Charter and subject to restriction by the state only on substantial and compelling grounds.⁷⁸

And I would add to this observation the concern I have raised from the beginning: if all conscientious objections were constitutionally protected, what test would the state apply to determine sincerity of conscientious belief? How would the state, or even the Court, measure how “important” or “valuable”, or even “obligatory”, the particular conscientious belief was to the individual who claimed it? Moon's answer to this conundrum is that religion is different precisely because of the community and cultural aspects of freedom of religion:

Religious beliefs and practices may deserve special legal or constitutional protection not because they are an expression of individual autonomy or because they are divinely mandated but because they connect the individual to a cultural community or because they are part of his or her deeply-rooted cultural identity.⁷⁹

I agree with this observation, and point to section 27 of the Charter as the textual affirmation of this special constitutional status.

The cultural aspects of freedom of religion also serve to answer another question that has bothered me about the *Amselem* decision. The fact is that not all people who participate in religious practices do so “to

⁷⁷ Moon, “Religious Commitment and Identity”, *supra*, note 10, at 214.

⁷⁸ *Id.*, at 215. See also *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 178 (S.C.C.): “Indeed, it would be inconsistent with the rule of law to allow compliance with a criminal prohibition to be determined by each individual's personal discretion and taste.”

⁷⁹ *Id.*, at 216.

foster a connection with the divine”,⁸⁰ to use Iacobucci J.’s words. There are, for example, individuals who self-identify as secular, atheist Jews, who build a succah (or participate in other Jewish rituals) every year in order to preserve their cultural identity and connection to their cultural community.⁸¹ Application of Iacobucci J.’s analysis in *Amselem* would result in the sincere believer in a divine being having the right to construct a succah on his balcony; but if his neighbour were a secular atheist seeking to build a succah in order to preserve his cultural identity, the condominium corporation could prevent him from constructing the very same succah. This result strikes me as inconsistent with freedom of religion, and contrary to the values expressed in Charter section 27. I accept that the building of a succah is more “important” to the Orthodox Jew than to the secular atheist Jew, but given the trivial impact on the condominium corporation, I do not see why freedom of religion cannot accommodate both.

This last point requires an explanation of what may appear to be a contradiction of my earlier observation that the building of a succah is an “exclusively religious” practice. How can I make that claim but then argue that a secular atheist may also want to build a succah? The answer is that the word “religious” should not be restricted to conduct connected to “spiritual fulfilment” or a “connection to the divine”. It should also include conduct connected to a religious community or religious custom — or, to use Professor Berger’s term, to religion as “religious culture”.⁸² If we are to take section 27 of the Charter seriously, atheists should also have the right to participate in the customs and practices of their religious communities.

⁸⁰ *Amselem* (S.C.C.), *supra*, note 5, at para. 39.

⁸¹ The observance of religious ritual by secular members of a religious group is not unique to the Jewish religion, and is likely applicable to most ethno-religious groups in Canada.

⁸² Berger, “Law’s Religion”, *supra*, note 29, at 288.