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Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom

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CALCULATIONS OF CONSCIENCE: THE COSTS AND BENEFITS OF RELIGIOUS AND CONSCIENTIOUS FREEDOM

HOWARD KISLOWICZ,* RICHARD HAIGH,**
AND ADRIENNE NG***

This article examines the Supreme Court of Canada's cost-benefit analysis of freedom of conscience and religion guaranteed by s. 2(a) of the Canadian Charter of Rights and Freedoms in Alberta v. Hutterian Brethren of Wilson Colony. The article finds that while the Supreme Court's reasoning was ultimately flawed, its use of cost-benefit analysis may be a positive development in the freedom of religion framework. The article also looks at the Court's treatment of the freedom of conscience guarantee in relation to freedom of religion. The article suggests that this treatment may foreshadow a more uniform approach to the broader freedom of conscience and religion than was provided for in previous decisions.

Cet article examine l'analyse coûts-avantages de la liberté de conscience et de religion de la Cour suprême du Canada garantie par l'article 2(a) de la Charte canadienne des droits et libertés dans Alberta c. Hutterian Brethren of Wilson Colony. Cet article estime que bien que le raisonnement de la Cour suprême fût en définitive sans fondement, l'utilisation de l'analyse coûts-avantages peut être un développement positif dans le cadre de la liberté de religion. L'article examine aussi la manière dont la cour a traité la garantie de la liberté de conscience relativement à la liberté de religion. L'article donne à penser que ce traitement peut laisser présager une approche plus uniforme à une plus grande liberté de conscience et de religion que ce qui avait été prévu dans les décisions antérieures.

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I. INTRODUCTION

Imagine a well-respected, reasonably intelligent mohel in Toronto. He has been performing circumcisions at bris ceremonies for many years, without a single problem. He also knows many other mohels, all professional, all well-regarded in their communities. None of them have had any problems either. The practice is well-known among the Jewish community. It has been performed at bris ceremonies for hundreds of years, and it functions on many different levels: as social, historical, and cultural practice, as creating and generating community, and as a response to physical health and welfare concerns.

The government then announces dramatic changes to the *Regulated Health Professions Act, 1991*.¹ Whereas before, s. 27(3) of the *Act* allowed certain exemptions to the requirement that no one except authorized health professionals shall perform "controlled acts"² (for example, in cases such as "[m]ale circumcision ... performed as part of a religious tradition or ceremony"³), the new government initiative states that henceforth, no exceptions to male circumcision are permitted. Section 9, and all other sections of the regulations that define the exemptions permitted by s. 27(3) of the *Act*, are removed. Now only doctors can perform circumcisions. On what basis? There is growing evidence that certain previously exempt controlled acts (such as "the taking of a blood sample from a vein,"⁴ or "[t]attooing for cosmetic purposes"⁵) have led to health risks. However, no evidence exists that circumcisions performed by mohels are causing problems. The government cites a growing number of health problems across the country as reason for bringing all health practices back "inside" the medical profession. These problems may be genuine concerns, but none of them relate to the practice of circumcision by mohels. The government states that other provinces are contemplating eliminating exemptions for so-called non-medical professionals as an attempt to universalize practices and stop certain alternative health practitioners from moving to the least restrictive jurisdictions and plying their trades there. Again, no evidence exists that mohels are moving anywhere. Nor are mohels in Toronto concerned with what is happening in British Columbia, Prince Edward Island, or, indeed, the United States.

Our reasonably intelligent mohel might wonder how the government can justify such a seemingly blatant attack on a previously extant religious freedom. After all, he had been performing the service for over 30 years without any problems whatsoever. And his small circle of mohel friends, all 300 of them in and around the City of Toronto, had been doing likewise, all without a single incident. He may even think that tattoo artists and lab technicians who take blood samples should be controlled further because he has read about some customers and patients suffering terrible infections and diseases from poor needle practices. But, in his view, mohels are different. Their rituals are centuries old. No one comes to them as a walk-in off the street, or for a quick circumcision.

¹ S.O. 1991, c. 18.

² *Ibid.*, s. 27.

³ *Controlled Acts*, O. Reg. 107/96, s. 9.

⁴ *Ibid.*, s. 11.

⁵ *Ibid.*, s. 8.

It is not a perfect analogy, but the Hutterites of Wilson Colony in Alberta must feel something similar to our imaginary mohel. Previously, Hutterites were granted an exemption from the photographic requirement on driver's licences due to their religious beliefs. In 2003, Alberta adopted new regulations that made photographs on driver's licences mandatory for everyone. The Alberta government told the Hutterites that the incidence of identity theft was on the rise. They told them that the national (or even global) problem of identity theft requires a one-size-fits-all approach. And they told them that since other provinces will soon be adopting mandatory photo licence requirements, Alberta needs to stay with the pack for fear of becoming a haven for identity thieves. We think that Alberta and the Supreme Court of Canada, who accepted their justifications in *Alberta v. Hutterian Brethren of Wilson Colony*,⁶ got it wrong.

The *Wilson Colony* decision provides an ideal platform from which to evaluate two aspects of Canadian freedom of religion jurisprudence. First, the case is marked by a strikingly clear use of cost-benefit analysis to resolve a dispute involving religion. We argue that, although the majority's cost-benefit analysis is faulty in several important respects, the adoption of a cost-benefit form of analysis may actually be a positive development in the freedom of religion framework. Second, although this particular dispute focused on the religious beliefs of a minority community, the Court's comments subtly draw in the "conscience" aspect of s. 2(a) of the *Canadian Charter of Rights and Freedoms*,⁷ indicating a more uniform approach to the broader freedom of conscience and religion than has been suggested in some past decisions. We take this as an opportunity to carefully think through the guarantee of freedom of conscience, arguing that there is no principled reason that matters of conscience should be treated differently from matters of religious belief and practice. In fact, freedom of conscience may act to open up judicial dialogue and allow judges room to decide moral matters on bases distinct from religious ones. We will analyze each of these issues in turn once we have provided the necessary background to this particular dispute.

II. BACKGROUND OF THE CASE

Since 1974, Alberta has required all driver's licences to bear a photograph of the licence holder.⁸ Those who objected to having their photo taken on religious grounds or who suffered from a temporary medical condition that affected their appearance were exempted from such a requirement and were granted a non-photo licence — called a Condition Code G (Code G) licence — at the Registrar's discretion.⁹

A little over half of the Code G licence holders in Alberta were members of Hutterian Brethren colonies. The Hutterites are religious groups that maintain "a rural, communal lifestyle, carrying on a variety of commercial activities."¹⁰ While not all Hutterites are of the same view, members of the Wilson Colony are against having their photograph taken. They

⁶ 2009 SCC 37, [2009] 2 S.C.R. 567 [*Wilson Colony* (S.C.C.)].

⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

⁸ *Wilson Colony* (S.C.C.), *supra* note 6 at para. 1.

⁹ *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, s. 14(1)(b).

¹⁰ *Wilson Colony* (S.C.C.), *supra* note 6 at para. 2.

sincerely believe that the Second Commandment (which states: “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))¹¹ prohibits them from having their photographs willingly taken.

In 2003, the exemption was abolished.¹² The new driver’s licensing system aims at minimizing the identity theft and fraud associated with driver’s licences. Every registered motorist must have a digital photographic image taken. The photograph is placed in the province’s facial recognition databank. Facial recognition software then compares this photograph to all others in the system, helping to ensure that the person obtaining or renewing a licence is actually the named person on the licence and that “no one has more than one licence in his or her name.”¹³ The Wilson Colony members challenged the universal photo requirement as violating their constitutionally protected religious freedom and equality rights. They claimed that the requirement would effectively prohibit Hutterites from holding driver’s licences, ultimately threatening the viability of their communal lifestyle.

Although the Hutterite faith stems from the same Anabaptist tradition as Amish and Mennonite faiths, Hutterites do not forego all modern conveniences as do the Amish. In particular, Hutterites rely on automobiles for travel. For instance, the Wilson Colony members use motor vehicles to obtain medical services, for firefighting within the community by volunteer firefighters, and in the commercial activities that sustain their community.¹⁴ The Alberta government had proposed a measure requiring a photograph of each Hutterite driver, but keeping it sealed or only available on the system’s databank (that is, not available for general public viewing). The Wilson Colony objected to any photo being taken whatsoever, proposing instead that photoless driver’s licences be issued to them marked “Not to be used for identification purposes.”¹⁵ This, they felt, would reduce the risk of their licences becoming the targets of identity theft. The Alberta government rejected this proposal. The Wilson Colony members then brought a *Charter* claim against the government.

At trial, LoVecchio J. proceeded on the basis that the universal photo requirement limited the s. 2(a) rights of Wilson Colony members and concluded that this limit could not be justified under s. 1 of the *Charter*.¹⁶ As is well known, there are two parts to any s. 1 analysis. The first part examines whether the impugned provision is “prescribed by law.” The second part of a s. 1 analysis employs the test developed in *R. v. Oakes*.¹⁷ The *Oakes* test consists of four criteria that must be satisfied in order to demonstrably justify that legislative provisions are a reasonable limit in a free and democratic society: a pressing and substantial objective, a rational connection between the legislation and its objective, minimal impairment of the right of freedom, and proportionality between the effects of the measures responsible for limiting the *Charter* right or freedom, and the objective that has been identified as

¹¹ *Ibid.* at para. 29.

¹² *Operator Licensing and Vehicle Control Amendment Regulation*, Alta. Reg. 137/2003, s. 3.

¹³ *Wilson Colony* (S.C.C.), *supra* note 6 at para. 120.

¹⁴ *Ibid.* at para. 118.

¹⁵ *Ibid.* at para. 13.

¹⁶ *Hutterian Brethren of Wilson Colony v. Alberta*, 2006 ABQB 338, 398 A.R. 5 at paras. 7, 33 [*Wilson Colony* (Q.B.)].

¹⁷ [1986] 1 S.C.R. 103 [*Oakes*].

pressing and substantial.¹⁸ Justice LoVecchio defined the government's objective as being the "prevention of identity theft" associated with driver's licences.¹⁹ While he found the objective to be pressing and substantial, and the universal photo requirement of the legislation to be rationally connected to the objective, he held that the requirement of minimal impairment was not met. To him, the Wilson Colony's proposal would satisfy the members' concerns and also meet the government's objectives, since an individual seeking to impersonate the holder would be constrained by the express words limiting the licence's use.²⁰

The Alberta government appealed to the Alberta Court of Appeal. In a 2-1 split decision, Conrad J.A. for the majority found that the limit on the Wilson Colony's s. 2(a) rights could not be justified under s. 1 of the *Charter*.²¹ Justice Conrad defined the government's objectives narrowly as (1) preventing one individual from acquiring two licences, and (2) ensuring that each individual acquires a licence in his or her actual name.²² While she found that the legislative objectives were pressing and substantial, she expressed doubt as to whether the universal photo requirement was rationally connected to the objectives. Justice Conrad, however, disposed of the case on the ground that the universal photo requirement did not minimally impair the right.²³ To her, "the impugned regulation offers only a very slight protection against the risk that a licence will be issued to an individual in a name other than his or her own, while completely infringing the respondents' rights."²⁴

In dissent, Slatter J.A. found that the regulation could be justified under s. 1 of the *Charter*. He defined the objectives much more broadly, as encompassing public safety, preventing misuse of driver's licences and identity theft, and ensuring the integrity of the licensing system.²⁵ Thus, when he proceeded through the *Oakes* test to the minimal impairment stage, Slatter J.A. concluded that any further accommodation by the government "would require it to significantly compromise a central feature of the security of the licensing system, and would amount to undue hardship."²⁶ At the final, proportionate effects stage of the analysis, Slatter J.A. observed that the members of Wilson Colony objected only to having their photos taken voluntarily, and suggested that this religious tenet was not at odds with the state compulsion implied by the photo requirement.²⁷

The Alberta government then appealed to the Supreme Court of Canada. The Court's decision consists of a single majority judgment (McLachlin C.J.C. on behalf of a majority of four judges) upholding the regulation and two separate dissenting judgments (Abella and LeBel JJ. opined separately, and Fish J. rendered a single sentence dissenting decision concurring with both Abella and LeBel JJ.). Given that the government admitted that s. 2(a) of the *Charter* was infringed, all seven judges glossed over the nature of the limit on the fundamental freedom of religion (although there were a few interesting parenthetical

18*Ibid.*

19

Wilson Colony (Q.B.), *supra* note 16 at para. 14.

20

Ibid. at para. 28.

21

Hutterian Brethren of Wilson Colony v. Alberta, 2007 ABCA 160, 417 A.R. 68 [*Wilson Colony* (C.A.)].

22

Ibid. at para. 30.

23

Ibid. at para. 42.

24

Ibid. at para. 46.

25

Ibid. at paras. 92, 97.

26

Ibid. at para. 124.

27

Ibid. at para. 126.

remarks, which we discuss in Part IV, below). The disagreement centred on whether such infringement could be justified under s. 1 of the *Charter*. More specifically, the root of the disagreement involved the last two steps of the s. 1 analysis: minimal impairment and proportionality of effects.

Chief Justice McLachlin opened her s. 1 analysis with significant deference to the government. She acknowledged that legislative schemes are complex and that, because of this, “a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter*.”²⁸ She also pointed out that these complex legislative schemes may often conflict with the broad scope of s. 2(a).²⁹

In the first step of the s. 1 analysis, McLachlin C.J.C. noted that while the impugned regulations were adopted without any legislative debate, they were considered to be “prescribed by law” under s. 1 of the *Charter*.³⁰ The Chief Justice then found that the government’s justifications easily met the *Oakes* test. In determining whether the law had a pressing and substantial objective, McLachlin C.J.C. relied on the broad formulation of Slatter J.A.’s dissent regarding the importance of minimizing identity theft, but reframed it as pertaining to the driver’s licensing system only, not as a more general policy protecting all Albertans. She then concluded that maintaining the integrity of the driver’s licensing system in a way that minimizes the risk of identity theft is “clearly a goal of pressing and substantial importance.”³¹ With respect to whether the law was rationally connected to the objective, McLachlin C.J.C. relied on the evidence of Joseph Mark Pendleton, Director of the Special Investigations Unit of the Alberta Ministry of Government Services (SIU), to establish that the universal photo requirement is rationally connected to its goal of protecting the integrity of the driver’s licensing system and preventing it from being used for purposes of identity theft.³² As to whether the law minimally impaired the rights of the Wilson Colony members, McLachlin C.J.C. again accorded the legislature a measure of deference, noting that, on complex social issues, legislatures may be better positioned than the courts to choose among a range of alternatives: “We must take the government’s goal as it is.”³³ She stated that all other alternatives — including the one proposed by the Wilson Colony — would compromise the province’s objective of minimizing the risk of misuses of driver’s licences for identity theft.³⁴ Thus, she concluded that the universal photo requirement minimally impairs the s. 2(a) rights of Colony members. Finally, the majority held that the benefits of the legislation outweighed its detrimental effects, finding three salutary effects and only one deleterious effect. The crucial positive effect was the enhancement of the security or integrity of the driver’s licensing scheme,³⁵ which stacks up against the key negative effect which was that Colony members would be forced to make alternative arrangements for highway transport. Although the majority acknowledged that the impacts of this latter effect, including

²⁸ *Wilson Colony (S.C.C.)*, *supra* note 6 at para. 35.

²⁹ *Ibid.* at para. 36.

³⁰ *Ibid.* at paras. 39–40.

³¹ *Ibid.* at para. 42.

³² *Ibid.* at paras. 50–52. For further discussion of Pendleton’s affidavit, see *infra* notes 96–102 and accompanying text.

³³ *Ibid.* at para. 63.

³⁴ *Ibid.* at para. 60.

³⁵ *Ibid.* at para. 80.

the financial costs and a departure from the Colony's self-sufficiency, were not trivial, it viewed this as not seriously affecting the Colony members' right to practice their religion.³⁶

Justice Abella rendered the most thoroughly reasoned dissent. For her, the majority's reasoning begins to fall apart at the minimal impairment analysis and "fully flounders"³⁷ at the proportionality stage. In the minimal impairment analysis, Abella J. referred to the Colony's proposal to have photoless driver's licences coupled with a statement that the licence is not to be used for identification purposes. Although the majority rejected this proposal on the grounds that it would "significantly compromise the government's objective,"³⁸ Abella J. found no cogent or persuasive evidence that such drastic interference would actually occur.

According to Abella J., even if one could accept that the government did not unreasonably impair the Wilson Colony's religious freedom, the negative effects of the legislation severely outweighed the positive effects. The benefit of adding approximately 250 photographs of Hutterites who may wish to drive is, on the one hand, only marginally useful to the prevention of identity theft.³⁹ On the other hand, the absence of an exemption for Hutterites is dramatic and harsh, as it forces members to make a choice between two evils: giving up the self-sufficiency of their community, or driving illegally.⁴⁰

For the most part, LeBel J. agreed with Abella J.'s reasoning. One of his specific concerns was how the majority treated the governmental objective. To him, independent judicial assessment is important, noting that a "stated objective is not an absolute and should not be treated as a given. Moreover, alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective."⁴¹ A court must assess "the objectives, the impugned means and the alternative means together, as necessary components of a seamless proportionality analysis."⁴²

The case reverses a tendency of the Supreme Court of Canada to hold that religious freedoms warrant strong constitutional protection under s. 2(a).⁴³ What makes it different from a series of precedents favouring a diversity of religious groups and views? Is the Court

³⁶ *Ibid.* at paras. 97-99.

³⁷ *Ibid.* at para. 150.

³⁸ *Ibid.* at para. 146 [emphasis omitted].

³⁹ *Ibid.* at para. 158.

⁴⁰ *Ibid.* at para. 163. For further discussion, see *infra* notes 123-26 and accompanying text.

⁴¹ *Ibid.* at para. 195.

⁴² *Ibid.* at para. 199.

⁴³ Based on a survey of Supreme Court freedom of religion cases, the last Supreme Court of Canada case to uphold government legislation purely on the basis that it did not infringe religious freedom was *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edwards Books*]. In the recent case of *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 the Court upheld legislation that allowed a court to order medical treatment where it is in the best interests of the child — the legislation was challenged partly on the basis that it infringed s. 2(a) of the *Charter*; however, the majority's primary focus was based on s. 7, devoting only two paragraphs to the analysis under s. 2(a). We recognize that the survey is open to critique: there have been other cases where a religious freedom claim was not accepted — see e.g. *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *Young v. Young*, [1993] 4 S.C.R. 3 — but we do not count cases such as these where there are competing constitutional rights at stake, or where the matter is determined on administrative law grounds or is effectively a private one involving legislative provisions such as the "best interests of the child." Our main point remains: *Wilson Colony* (S.C.C.), *ibid.* reverses the trend to accept religious practices that run up against laws of general application.

now calculating religious freedom differently? We try to make sense of this in the next Part of this article.

III. COST-BENEFIT ANALYSIS IN FREEDOM OF RELIGION CASES: CALCULATING BELIEF

Under the “proportionality” branch of the *Oakes* test (which, incidentally, the Court notes is viewed by Peter Hogg as a redundant duplication of the “pressing and substantial objective” branch),⁴⁴ the judgments in *Wilson Colony* examine and weigh the “salutary” and “deleterious” effects of the photo requirement.⁴⁵ Through this language, both the majority and the dissent employ a cost-benefit analysis in support of their conclusions. Though this form of analysis has appeared in religious freedom cases before,⁴⁶ it has rarely been set out as starkly, and seldom have the religious concerns of one group of citizens been seen as less weighty than the non-religious concerns of other citizens or government actors. The Court’s willingness to engage in a cost-benefit analysis, a familiar form to economists, invites two kinds of questions: (1) is this an appropriate form of analysis for freedom of religion cases? and (2) did the Court get the analysis right in this case? We deal with each question in turn.

A. IS COST-BENEFIT ANALYSIS APPROPRIATE IN FREEDOM OF RELIGION CASES?

It may seem odd to subject belief-based acts to the numerical strictures of a cost-benefit analysis. In their article “An Economic Approach to Issues of Religious Freedom,” Michael McConnell and Richard Posner, proponents of using cost-benefit analysis in religious freedom cases, admit that “[r]eligious reasoning and religious faith may seem antithetical to economic reasoning and values; religious freedom may seem unquantifiable even in principle and therefore beyond the reach of any economic or socio-scientific metric.”⁴⁷ Indeed, at least one commentator finds the “utilitarian” nature of the reasoning problematic.⁴⁸ In light of this, Christopher Eisgruber and Lawrence Sager have recently offered a more comprehensive critique of a “balancing” approach to religious freedom cases.⁴⁹ They focus on the American legal test, which requires a compelling state interest to justify encroachments on religious

⁴⁴ *Wilson Colony* (S.C.C.), *ibid.* at para. 75, citing Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., supp., vol. 2, looseleaf (Toronto: Carswell, 2007) at s. 38.12.

⁴⁵ *Wilson Colony* (S.C.C.), *ibid.* at paras. 72-99, McLachlin C.J.C., at paras. 150-76, Abella J., dissenting, at para. 200, LeBel J., dissenting.

⁴⁶ See e.g. *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 at paras. 82-85 [*Amselem*]. There, the Supreme Court addressed an appeal by Orthodox Jewish condominium co-owners who wished to install succahs (ritual huts) on their balconies for nine days per year, in apparent contravention of the building’s bylaws and declaration. The Court weighed the “aesthetic, economic, and security interests” asserted by the condominium syndicate against the religious freedom interests asserted by the appellants (at para. 83). In undertaking this analysis, the Court effectively held that the true cost (or “harm”) to the syndicate was minimal as compared to the religious liberty interests of the appellants (at para. 103).

⁴⁷ Michael W. McConnell & Richard A. Posner, “An Economic Approach to Issues of Religious Freedom” (1989) 56 U. Chicago L. Rev. 1 at 2.

⁴⁸ Jennifer Koshan, “Security Trumps Freedom of Religion for Hutterite Drivers” *ABlawg* (10 August 2009), online: The University of Calgary Faculty of Law Blog on Developments in Alberta Law <<http://ablawg.ca/2009/08/10/security-trumps-freedom-of-religion-for-hutterite-drivers/>>.

⁴⁹ Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, Mass.: Harvard University Press, 2007) at 81-87.

freedom.⁵⁰ While this test was eventually discarded by the U.S. Supreme Court in favour of one that upholds laws that burden religion but are “neutral and generally applicable,”⁵¹ there have been legislative attempts at both federal and state levels to revive the “compelling state interest” standard.⁵² Eisgruber and Sager view the balancing approach suggested by the “compelling state interest” test to be indeterminate and prone to ad hoc behaviour by judges. This is so, they argue, because the balancing approach rests on no “coherent normative foundation.”⁵³

As an alternative, Eisgruber and Sager propose a theory of “equal liberty.” Basically described, this theory insists on three tenets. First, no one should be devalued on account of their spiritual beliefs. Second, there is no constitutional reason to treat religion as deserving of special benefits. Third, all persons, regardless of their religious or non-religious viewpoints, are entitled to equal rights of “free speech, personal autonomy, associative freedom, and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow religious practice to flourish.”⁵⁴

There are, nonetheless, powerful arguments for maintaining the cost-benefit analysis that the Supreme Court uses (albeit, in our view, imperfectly⁵⁵) in *Wilson Colony*. First, given the balancing role of s. 1 of *Charter*, it might be hard for judges to avoid engaging in a balancing approach or a cost-benefit analysis. Though the s. 1 test is called by other names in Canada, it is really just the compelling state interest test in modified form. The weighing of state interests inheres in the rational connection, minimal impairment, and proportionality stages of the *Oakes* test.⁵⁶ Most prominently, when the courts weigh the salutary and deleterious effects of government action, the salutary effects will reflect the state’s interest. The comparison of the salutary effects to the action’s deleterious effects will determine whether the state interest is sufficiently compelling. This is now a firmly established part of Canada’s s. 1 jurisprudence in cases dealing with religious freedom and other constitutional rights.

The Supreme Court of Canada has demonstrated, as well, the ability to integrate the comparative analysis of the kind recommended by Eisgruber and Sager with an evaluation of the state’s justifications. The Court has simultaneously compared a claimant’s position with other religious and non-religious viewpoints while also weighing the benefits of state action against the seriousness of its encroachment on religious practices. *Multani v.*

⁵⁰ This test emerged in the American jurisprudence from *Sherbert v. Verner*, 374 U.S. 398 (1963) [*Sherbert*], a case discussed in more detail below (*infra* note 79 and following) involving the denial of unemployment benefits to a woman who had been fired because she refused to work on Saturdays for religious reasons.

⁵¹ See *Employment Division v. Smith*, 494 U.S. 872 (1990), which upheld the denial of unemployment benefits to persons dismissed from their jobs on the basis of their ceremonial use of peyote.

⁵² See *Religious Freedom Restoration Act*, 42 U.S.C. § 2000bb (2000). In his article “Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty” (2004) 118 Harv. L. Rev. 155 at 211, Douglas Laycock reports that, at that time, 12 state legislatures had adopted similar Acts, and that Alabama had put a similar provision into its state constitution. See e.g. Ariz. Rev. Stat. Ann. §§ 41-1493–1493.02 (West 2004); Conn. Gen. Stat. Ann. § 52-571b (West Supp. 2004); Fla. Stat. Ann. §§ 761.01-.05 (West Supp. 2004); Ala. Const. amend. 622. See also Eisgruber & Sager, *supra* note 49 at 46-47.

⁵³ Eisgruber & Sager, *ibid.* at 85.

⁵⁴ *Ibid.* at 53 [footnote omitted].

⁵⁵ See Part III.C, below.

⁵⁶ *Oakes*, *supra* note 17; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

*Commission scolaire Marguerite-Bourgeoys*⁵⁷ provides an excellent example. There, a Quebec school board's rule that prohibited weapons detrimentally affected the religious freedom of a Sikh student who wished to wear a kirpan (ceremonial dagger). The Court reasoned that the school board did not in fact apply a policy of absolute safety, but one of reasonable safety, as it allowed students to use potentially dangerous objects such as "scissors, compasses, baseball bats and table knives in the cafeteria," and did not install metal detectors in schools.⁵⁸ As such, the blanket prohibition on kirpans was seen as out of step with the school's policy. This unequal application of the no-weapons policy at once showed the discriminatory effects on Sikh students and undermined the school board's argument that it had a compelling interest in upholding the ban, which would have been consistent with a policy of absolute safety but not with one of reasonable safety. Thus, the consideration of the state's interest in a particular form of regulation did not prove unworkable in the context of a s. 1 analysis of religious freedom.

Furthermore, perhaps unexpectedly, perspectives on how best to deal with social diversity may end up supporting the kind of cost-benefit analysis advocated by McConnell and Posner. In her book *Making All the Difference: Inclusion, Exclusion, and American Law*, Martha Minow argues for a fundamental change in how legal thought constructs and understands differences between people.⁵⁹ One of the most fundamental difficulties in the legal treatment of claims from minority populations, she posits, is that differences between people are often attributed to the minority community. In other words, the majority group is "normal" and the minority group is burdened with "difference." Minow argues that all difference is relative; you are only as different from me as I am from you. As such, difference is actually best understood as "as a pervasive feature of communal life."⁶⁰ When this view is adopted, disagreements about the accommodation of differences in religious practices take new shape: "Accommodation of religious practices may look nonneutral, but failure to accommodate may also seem nonneutral by burdening the religious minority whose needs were not built into the structure of mainstream institutions."⁶¹ The most appropriate role for institutions of justice, in Minow's view, is to "consider ways to structure social institutions to distribute the burdens attached to difference."⁶²

Minow's views inspire a new vantage point from which to re-evaluate entrenched practices and preferences, with an eye towards a more effective distribution of justice. Though Minow may not have intended her approach to support the use of cost-benefit analysis, she nonetheless insists that it is unfair for minority groups to bear the full costs of difference, and that the most just solution is one that reshapes institutions such that the costs

⁵⁷ 2006 SCC 6, [2006] 1 S.C.R. 256 [*Multani*].

⁵⁸ *Ibid.* at para. 46.

⁵⁹ Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, N.Y.: Cornell University Press, 1990).

⁶⁰ *Ibid.* at 11. Significantly, the *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Supp.), c. 24, articulates the same view; its preamble states that "the Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society." The same view is arguably restated in the body of the *Act*, which states that "multiculturalism is a fundamental characteristic of the Canadian heritage and identity" (s. 3(1)(b)). Further, in speaking in favour of the *Act*, Hon. Gerry Weiner (Minister of State (Multiculturalism)) said: "This Bill deals with relationships among Canadians, about a fundamental characteristic of Canada": *House of Commons Debates*, No. 14 (11 July 1988) at 17385.

⁶¹ Minow, *ibid.* at 43.

⁶² *Ibid.* at 11 [footnote omitted].

of difference are distributed more evenly. The justice of such a distribution is supported by the view that all difference is relative; if difference does not belong to one group, but is rather a pervasive characteristic of an entire society, there is little fairness in concentrating the costs of that difference with specific minority groups. Inevitably, any redistribution of the costs of difference will lead to some form of new costs for dominant groups. Those who disagree with Minow will argue that taxpayers should not be made to shoulder the extra burdens associated with people's particularities. In this vein, the majority decision in *Wilson Colony* states that "[m]any religious practices entail costs which society reasonably expects the adherents to bear."⁶³ But, as Minow astutely observes and the Supreme Court admits, the costs of treating all people fairly always persist; the only real question is who bears them. The view of both Minow and the Supreme Court, in other words, requires an assessment of the various costs and benefits of religious freedom in particular situations. The real difference is in assessing the fairness of the unequal distribution of costs. This leads to differences in determining what kinds of government interests are sufficiently compelling to justify limits on freedom of religion, but not to a wholesale rejection of a cost-benefit analysis.

Perhaps the least explored potential advantage of using cost-benefit analysis as part of legal doctrine is that it may promote compromise by encouraging a thorough and detailed consideration of the costs of difference by the parties. Religious freedom claims can sometimes evolve into a "winner take all" framework. When negotiations break down between the parties and they prepare for litigation, they may come to see the potential outcome of the case as an all or nothing scenario: either the claimants have a protected right, or they do not. On the other hand, a cost-benefit framework encourages parties to enumerate all the costs and benefits of a particular government action; if parties know that the courts will conduct a cost-benefit analysis, there will be an incentive for each to provide a thorough, itemized accounting. When disputes are framed in this fashion, we think, parties can envisage more potential trade-offs and more bases on which to arrive at mutually acceptable solutions.

The view that legal doctrines provide a framework within which litigants may settle their disputes is not novel. In the 1970s, using divorce law as a case study, Robert Mnookin and Lewis Kornhauser famously observed that parties to a legal dispute negotiate settlements "in the shadow of the law."⁶⁴ Legal rights, on this theory, create bargaining endowments that parties can trade in order to arrive at a negotiated settlement. Following on this insight, we suggest that when a single, unclearly defined endowment is at stake (for example, the right to religious freedom conditioned by s. 1 of the *Charter*), parties have less room to achieve a negotiated settlement because the number of potential trade-offs is diminished. This limits the range of potential compromise solutions.

This does not mean, however, that no compromises are possible. In both *Amsalem*⁶⁵ and *Multani*, the Supreme Court noted some potential solutions that arose through negotiations but were eventually rejected by the parties. In *Amsalem*, the conflict centred on whether an Orthodox Jewish resident of a condominium style complex could erect a succah (ceremonial hut) on a balcony, in apparent contravention of the building's bylaws. The condominium

⁶³ *Supra* note 6 at para. 95.

⁶⁴ Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950 at 968.

⁶⁵ *Supra* note 46.

syndicate proposed that Mr. Amselem and his co-appellants erect a communal succah in the condominium's gardens but, ultimately, Amselem and his co-appellants elected to pursue the litigation instead.⁶⁶ Indeed, the dissenting judges stressed that Amselem had, for a time, responded positively to this offer; the dissenting judges agreed with the Quebec Superior Court and Court of Appeal that this was the most reasonable solution to the dispute.⁶⁷ Similarly, in *Multani*, the Court underscored the fact that Gurbaj Singh Multani had agreed, as a form of compromise, to wear his kirpan under specified conditions, but the school board would not accede to the compromise and continued its litigation.⁶⁸ In both *Amselem* and *Multani*, however, the compromise solutions failed, and litigation ensued. Interestingly, the Supreme Court's remedy in *Multani* ultimately endorsed the initial compromise struck between Multani's family and his school. This could be taken to argue against our notion that religious freedom litigation (and other rights-based claims) can escalate into winner take all disputes. But it is our position that once litigation begins, the conception of possible outcomes shifts from a range of possibilities to a set of binary, mutually exclusive, results: victory or loss. This, in turn, can lead parties to adopt entrenched positions, and make them less open to hearing the compromises proposed by the other side. An approach that divides disputes into smaller sub-issues and analyzes them in terms of the costs borne by all parties may be a more fruitful way of fostering dialogue and stimulating creative solutions at moments of conflict.⁶⁹

While we cannot say for certain that this approach would have worked for the Alberta government and the Wilson Colony, it may have opened up avenues of dialogue with the Wilson Colony members (and still could on a continuing basis). For example, if the province and the Colony members had spoken frankly about the potential costs to the Wilson Colony of outsourcing their transportation, perhaps a financial compromise could have been found. The province may have been willing to finance some or all of these added costs in order to avoid the risks of taking the matter to court. Likewise, if the province had enumerated the particular costs associated with a potential exemption, the Colony may have been willing to participate in offsetting them. The solutions may not have been acceptable to the Wilson Colony members, who attach religious significance to their self-sufficiency, or may not have had the means to offer an acceptable offset to the province. In any event, however, a real conversation could have occurred where the parties could have discussed whether these were practicable options, and this may in turn have led to more creative solutions. A comprehensive negotiation on all points seems a better option than seeing Colony members abandon Alberta and move elsewhere to find a more hospitable and tolerable place.

⁶⁶ *Ibid.* at paras. 13-14, 176.

⁶⁷ *Ibid.* at paras. 177-78.

⁶⁸ *Supra* note 57 at paras. 3-5.

⁶⁹ The idea of dividing matters into smaller sub-matters is proposed for quite different purposes in Ayelet Shachar's *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, U.K.: Cambridge University Press, 2001). Shachar argues that if states and cultural communities split jurisdiction of matters, this could encourage both to be more responsive to the needs of their constituents. The idea we propose is inspired by Shachar's work, but differs in that we propose that by breaking disputes involving religion down into their constituent costs, states, non-state actors, and minority communities may be able to come more easily to negotiated settlements.

B. WHAT IS THE PROPER COST-BENEFIT ANALYSIS IN FREEDOM OF RELIGION CASES?

If the employment of cost-benefit analysis in religious freedom doctrine can be helpful in encouraging settlement, it remains to be seen how best to conduct such an analysis. McConnell and Posner offer a sophisticated picture of the relevant considerations in applying cost-benefit analysis to questions of religious freedom.⁷⁰ They write that the important first step in conducting a cost-benefit analysis is establishing a baseline from which to assess whether a cost or benefit (often described as a “tax” or a “subsidy”) has been imposed. One can only determine whether a tax has been levied or a subsidy has been provided in comparison to what the affected parties’ position would be in the absence of the particular government action.⁷¹

Often, economic analysis uses the baseline of efficiency in order to assess government regulation. In an efficiency-based model, taxes or subsidies are only justified to the extent that the net benefit of the tax or subsidy outweighs its net cost. Writing in the American context, where the First Amendment guarantees religious freedom and prohibits governments from establishing a particular religion,⁷² McConnell and Posner show that there are fundamental problems with using an efficiency-based model in approaching religious issues. First, such a model could end up favouring the establishment of a particular religion: “For example, if it could be shown that inculcating public school students with the tenets of the Mormon faith would produce net social benefits, perhaps in the form of a more orderly and productive citizenry, such inculcation would be permitted.”⁷³ Second, the same kind of analysis could favour a direct ban on a particular religious activity or a religion if it could be shown that the aggregate disutility of the religion to society outweighed its benefits to adherents. Though the Canadian constitutional guarantee of religious freedom is worded differently these concerns would apply equally in Canada, where legislation motivated by considerations particular to a specific religious tradition has been invalidated⁷⁴ and the banning of specific religious practices would seem antithetical to the guarantee of conscientious and religious freedom enshrined in s. 2(a) of the *Charter*.

Thus, efficiency must be discarded as a baseline for evaluation. Instead, the most appropriate baseline for resolving questions of religious freedom is, as McConnell and Posner argue, “neutrality.”⁷⁵ By this they mean that religious institutions and activities ought to be compared with non-religious institutions and activities in order to engage in a proper cost-benefit analysis. Thus, “a regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on

⁷⁰ *Supra* note 47. But see Jeremy Webber, “The Irreducibly Religious Content of Freedom of Religion” in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 178 at 184-85. As a critique of McConnell and Posner’s view, Webber argues that McConnell and Posner’s attempt to use “neutrality” as a baseline for analysis ultimately reveals the distinctive qualities of religion, because religious beliefs and practices are given special, and not neutral, consideration. In this article, we take as given that religious and conscientious beliefs and practices require particular treatment because they are singled out for constitutional protection.

⁷¹ McConnell & Posner, *ibid.* at 7.

⁷² U.S. Const. amend. 1 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

⁷³ *Supra* note 47 at 9.

⁷⁴ See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [Big M].

⁷⁵ *Supra* note 47 at 10-12.

comparable nonreligious activities.”⁷⁶ This approach actually shares much in common with Eisgruber and Sager’s “equal liberty” theory of religious freedom discussed above.⁷⁷ This may be somewhat surprising given Eisgruber and Sager’s opposition to balancing-type approaches. However, like McConnell and Posner, Eisgruber and Sager’s view is fundamentally comparative; both views use the comparison of religious to non-religious activities as a litmus test.⁷⁸

The commonalities between the Eisgruber and Sager view and the McConnell and Posner view can be seen in the comparable results they each reach when analyzing *Sherbert*.⁷⁹ In that case, Mrs. Sherbert, a Seventh Day Adventist, lost her job because she refused to work on Saturday, and as a result was denied unemployment benefits on the basis that she “voluntarily” left her job.⁸⁰ In this context McConnell and Posner write: “The choices open to Mrs. Sherbert were two: declare her ‘availability’ for work on Saturdays and receive benefits, or refuse and be denied them. The substitution effect [that is, the provision of an incentive to change one’s religious practices] is plain.”⁸¹ Put otherwise, the system imposed a tax on religious adherents who celebrated a Saturday Sabbath that was not levied against others. Eisgruber and Sager are also concerned with inequalities, but focus on another aspect at play in *Sherbert*: South Carolina’s law contained an exemption for those who worshipped on Sundays, but not Saturday Sabbatarians.⁸² Thus, the law discriminated between religions. Both the McConnell and Posner and the Eisgruber and Sager lines of reasoning support the result reached by the U.S. Supreme Court, which held that the denial of benefits was unconstitutional. Eisgruber and Sager’s view, however, cannot explain why anyone should be entitled to an exemption on the basis of their day of worship in the first place; if there had been no exemption for Sunday worshippers, their approach would have supported an opposite result. This, we think, does not take sufficient account of the special, obligation-creating role that religion and other conscientious views have in shaping people’s life choices. Cost-benefit analysis, which compares costs experienced by religious persons with those borne by non-religious persons, is more apt to consider the unique needs of religious persons.

⁷⁶ *Ibid.* at 35. Compare Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87 at 95. Though he does not explicitly employ economic analysis, Ryder articulates the converse of this position in offering his view of the Canadian conception of equal religious citizenship: “[T]he ‘baseline’ for measuring state neutrality in Canada is the position of equal religious citizenship. Measures taken to promote the capacity of religious believers to fully and equally participate in Canadian society are consistent with state neutrality as long as they are extended in an even-handed manner to all adherents of religious or conscientious belief systems.”

⁷⁷ See Part III.A, above. This may be somewhat surprising, as Eisgruber and Sager treat McConnell as one of their principal detractors because, elsewhere, McConnell has approached the notion of neutrality quite differently: he argues that government action is neutral where it recreates a hypothetical world in which individuals can make choices about their religion unaffected by the state. In yet another argument, McConnell argues that religious and non-religious interests are fundamentally incomparable: see Michael W. McConnell, “Religious Freedom at a Crossroads” (1992) 59 U. Chicago L. Rev. 115 at 169-73; Michael W. McConnell, “The Problem of Singling Out Religion” (2000) 50 DePaul L. Rev. 1 at 35; Eisgruber & Sager, *supra* note 49 at 27, 101.

⁷⁸ See Eisgruber & Sager, *ibid.* at 53.

⁷⁹ *Supra* note 50.

⁸⁰ See *ibid.* See also *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536. The question of Sabbath observance was considered in the employment context, and the Court held that the employer had an obligation of “reasonable accommodation” towards its employees before dismissing them. Notably, however, this case arose out of a human rights claim, and not a claim based on the *Charter* right to religious freedom.

⁸¹ McConnell & Posner, *supra* note 47 at 40 [footnote omitted].

⁸² Eisgruber & Sager, *supra* note 49 at 97.

There are, however, important ambiguities in the cost-benefit analysis of the *Sherbert* scenario. On one hand, before the U.S. Supreme Court's ruling, *Sherbert* was disadvantaged because she paid into the unemployment insurance plan at the same rate as other employees, but was unable to access her insurance benefits for reasons related to her religion. On the other hand, after the ruling in *Sherbert*, Saturday Sabbatarians were insured against an additional risk (the loss of employment for religious reasons). As additional risks are brought within the scope of the insurance plan, the global cost of the insurance (and hence each employee's contribution) rises. Non-religious employees, however, could never make a successful claim for the loss of employment for religious reasons. Nonetheless, they are required to shoulder a portion of the increased cost for the maintenance of the insurance plan. Arguably, because they have little to no risk of losing their employment for religious reasons, they bear a disproportionate amount of the plan's new cost.

Most religious freedom claims do not involve such complex ambiguities. Cases in which "a burden that is imposed on everyone in society is particularly costly to the religious person" are more common.⁸³ McConnell and Posner cite the case of *Menora v. Illinois High School Association*,⁸⁴ in which a policy that prohibited the wearing of headgear during high school basketball games imposed a particular hardship on Orthodox Jews who observe the religious practice of keeping their heads covered. In economic terms, the "no-headgear" rule created a disincentive to follow religious practices bearing disproportionately on the religious. It made them pay more for safety than other players because, for other players, the costs of observing the rule were trivial.⁸⁵ In such cases, a cost-benefit analysis leads to the conclusion that the legal outcome should depend upon the strength of the government interest; the rule that imposes additional costs upon religious adherents can only be allowed to stand if it is justified by a sufficiently compelling reason.⁸⁶ In the *Menora* case, for example, the high school would have to show that the safety concerns that allegedly motivated the rule were real, and not merely trivial or speculative. A clear analogy can be drawn here to *Multani* — as discussed above, a policy prohibiting kirpans in a high school, which created a particular hardship for Sikh students, had to be analyzed in light of the state's objectives.

C. A COST-BENEFIT ANALYSIS IN *WILSON COLONY*

Though the Canadian and American freedom of religion jurisprudence differ significantly, they share in common the principle that governments may not legislate for religious purposes,⁸⁷ and that, in principle, all are free to observe their religious practices provided that they do not cause injury to others. Moreover, when McConnell and Posner wrote their article, the "compelling state interest" test was still the law in the U.S. with respect to religious freedom. In Canada, as seen above, a s. 1 analysis mandates a similar test. Accordingly, McConnell and Posner's observations are instructive in the Canadian context.

⁸³ McConnell & Posner, *supra* note 47 at 42.

⁸⁴ 683 F.2d 1030 (7th Cir. 1982) [*Menora*].

⁸⁵ McConnell & Posner, *supra* note 47 at 43.

⁸⁶ *Ibid.*

⁸⁷ See *Big M*, *supra* note 74. See also *Zylberberg v. Sudbury Board of Education* (1988), 65 O.R. (2d) 641 at 648 (C.A.); *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.); *Freitag v. Penetanguishene (Town of)* (1999), 47 O.R. (3d) 301 (C.A.).

The cost-benefit analysis in *Wilson Colony* falls somewhere between an easy and a hard case. From one perspective it resembles an easier case, where all people are required to pay a cost (in this case, having one's picture taken) but the cost is experienced as trivial for most but as high for members of a particular faith. In such a case, following McConnell and Posner's analysis, the Court's task is to weigh the government's interest against the costs. From another point of view, however, the case has some notable ambiguities. Public highways and the driver's licensing system are supported by the tax contributions of all residents, including, presumably, the members of Hutterian colonies. Any Albertan who wishes to use the public highways lawfully must obtain a driver's licence, which now requires a photograph to be taken of the licensee. If an exemption were made available to Hutterites, they would be deriving a benefit not available to other Albertans: namely, that of not having their photographs taken. This, in turn, would mean that their photographs would not be included in the province's database. While, as the government argued, not being included in the database increases the risk that one's identity could be misappropriated by an impostor, it may also confer an advantage. Some people may fear that the security of the provincial photo database could be compromised, and the photos and associated information it contains used for nefarious purposes. Or, less practical but equally troubling, that the stored digital photos represent a further decline in privacy and respect for one's own image. On this theory, beneficiaries of the religious exemption are spared a cost that others are forced to bear. Accordingly, their share of the financial burden required to maintain public highways and a driver's licensing system is disproportionately low.

On balance, though, if the easier and harder cases are seen as lying at opposite ends of a spectrum, the *Wilson Colony* case falls closer to the easier end. Most people would have no objection to their photos being stored along with their other personal information in the province's database — to our knowledge, this practice has raised no objections from the overwhelming majority of Albertans. Following the guidelines discussed above, it remains to be seen whether the Alberta government provided a sufficiently compelling interest to override the religious freedom of the Hutterian Brethren.

Chief Justice McLachlin (for the majority) engaged in a fairly straightforward cost-benefit analysis. Yet, two related aspects of the majority's analysis distort the cost-benefit calculus: characterizing the province's regulatory goal very narrowly, and giving a high degree of deference to the province on the efficacy of the universal photo requirement and the unavailability of alternative measures. In so doing, the majority also ignores several factors inherent in the driver's licensing system that are detrimental to its integrity, and fails to see how risks to the integrity of the system posed by a photo exemption for Hutterite drivers is exceedingly limited. We now turn to these issues.

1. THE MAJORITY'S FLAWED ANALYSIS: CALCULATING TECHNOLOGY

The majority viewed the province's regulatory goal as reducing identity theft *as it relates to the driver's licensing system*.⁸⁸ In other words, the majority understood the legislative measure not as one designed to reduce identity theft in general, but rather to specifically reduce the identity theft associated with driver's licences. In terms of the s. 1 analysis, this

⁸⁸ *Wilson Colony* (S.C.C.), *supra* note 6 at paras. 4, 9.

analytic manoeuvre effectively strips both the rational connection and minimal impairment tests of their force. If the government's goal is to reduce the identity theft associated with driver's licences, and the universal photo requirement is the only program in evidence that will properly secure the driver's licence system, then the regulation can only be seen as rational and minimally impairing the rights of the Hutterites. However, if the government's goal is cast as reducing identity theft in general, the fact that 700,000 Albertans do not have driver's licences⁸⁹ makes the program look less rational as it cannot possibly aid in protecting the identities of this large number of Albertans. As for the minimal impairment test, in cost-benefit terms, the taxes of the regulation are artificially minimized as the universal photo requirement is deemed to be the least intrusive means available to accomplish the province's goal. Admittedly, the majority does spend some time directly considering the costs of the regulation on the Wilson Colony.⁹⁰ Still, the notion that the universal photo requirement is the only way to achieve the government's goal (and thus the minimally intrusive way) pervades the majority's analysis.⁹¹ In the same sentence that the majority states that the regulation will prevent the Wilson Colony members from driving on the highway, it reminds us that the regulation is "attempting to secure a social good for the whole of society — the regulation of driver's licences in a way that minimizes fraud."⁹²

Further, perhaps paradoxically, the majority's analysis invests the universal photo requirement with all the benefits of reducing identity theft in general. The syllogism runs as follows: identity theft is a major problem, driver's licences can be used for identity theft, therefore securing the driver's licensing system is essential to reducing identity theft.⁹³ But there are crucial steps missing in this analysis. First, it is not clear how serious a problem driver's licence-related identity theft actually is. Thus, it is difficult (if not impossible) to gauge how much of an impact the universal photo requirement will have on identity theft in general. At the very least, there seems to be a much greater concern, in Canada, with identity theft through credit card fraud or stolen banking information.⁹⁴

Second, it is not clear how effective the universal photo requirement will be. Although the majority states that "the universal photo requirement enhances the security of the licensing system and thus of Albertans,"⁹⁵ it does not consider whether there are vulnerabilities in the system related to flaws in the software or human error in implementation. Instead, the

⁸⁹ *Ibid.* at para. 158.

⁹⁰ *Ibid.* at paras. 96-99.

⁹¹ *Ibid.* at para. 197.

⁹² *Ibid.* at para. 96.

⁹³ *Ibid.* at paras. 9-11.

⁹⁴ Statistics are very difficult to obtain. As the Court noted in *Wilson Colony* (S.C.C.), *ibid.* at para. 42, driver's licences can be used as "breeder" documents for other kinds of fraud. Nevertheless, it is telling that on the identity theft page of the Office of the Privacy Commissioner of Canada's website, "Identity Theft: What it is and what you can do about it," online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca/fs-fi/02_05_d_10_e.cfm>, there is only one reference to driver's licences and that is under the heading "Are you a victim of identity theft?" where the last bullet point states that if you are, you should obtain a new driver's licence. Most of the website is devoted to concerns over credit and bank cards. Similarly, on the RCMP's website, a listing titled "Identity Theft and Identity Fraud," online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/scams-fraudes/id-theft-vol-eng.htm>>, and a 2007 report on identity theft by RCMP Criminal Intelligence, *Identity Fraud in Canada — July 2007* (Ottawa: Criminal Intelligence, 2007), online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/pubs/ci-rc/if-fi/if-fi-eng.pdf>>, make only minimal references to driver's licences as sources of fraud.

⁹⁵ *Wilson Colony* (S.C.C.), *ibid.* at para. 80.

majority granted the province an exceptionally high degree of deference on evidentiary issues.

Indeed, the majority relied heavily on the Alberta government's evidence, much of which came from the testimony of Pendleton, the Director of the SIU. Pendleton's evidence is, at the very least, interesting. To begin with, he aims his concerns mainly at the corporations who "suffer" from defrauding, not the individuals who must reclaim their identity. "The term 'identity theft' is misleading," he says, "because the primary victim of an identity theft is ... not the person whose identity is stolen ... [but] third parties who extend credit ... to an impersonator who defrauds them."⁹⁶ It may be misleading, yet it remains the commonly used term. The language is emotive — a victim of identity theft rightly evokes much sympathy. Perhaps the Supreme Court relies on this "misleading" connotation in order to make its ultimate finding more palatable to those who might feel their sympathy would otherwise lie with a minority religious group rather than the corporate third party lender.

As to compelling evidence of the prevalence of identity theft, Pendleton provides a few government reports and documents that are limited in their usefulness. For example, the "Report to the Minister of Public Safety and Emergency Preparedness Canada and the Attorney General of the United States" is full of generalizations and vague concerns:

There are indications identity theft is growing rapidly.

...

On the basis of available data, it appears that identity theft is likely to continue to grow substantially over the next decade.

...

Canadian and United States law enforcement agencies are seeing a growing trend in both countries towards greater use of identity theft as a means of furthering or facilitating other types of crime.⁹⁷

Some hard facts are tendered, but they are relatively sparse: in the U.S., identity theft complaints reported to the Federal Trade Commission increased from 86,212 in 2001 to 161,836 in 2002 to 214,905 in 2003. In Canada, PhoneBusters national call centre received 7,629 identity theft cases in 2002 and 14,526 in 2003.⁹⁸ Both reflect a growth in identity theft figures, to be sure, but neither gives information on what document provided the original theft.

The only other evidence the Alberta government provides is also slight. Pendleton reports on two specific instances of identity theft leading to arrests in the U.S. In the first, an

⁹⁶ *Ibid.* (Evidence, affidavit of Joseph Mark Pendleton at para. 21 [Pendleton Affidavit]).

⁹⁷ Pendleton Affidavit, *ibid.* at 127, 129 (Exhibit C, Bi-national Working Group on Cross-Border Mass Marketing Fraud, *Identity Theft: A Report to the Minister of Public Safety and Emergency Preparedness Canada and the Attorney General of the United States* (October 2004), online: Public Safety Canada <<http://www.publicsafety.gc.ca/prg/le/bs/report-eng.aspx>>).

⁹⁸ Pendleton Affidavit, *ibid.* at 187 (Exhibit G, PhoneBusters statistics on identity theft complaints made to PhoneBusters 2002 and 2003, Royal Canadian Mounted Police and Ontario Provincial Police).

impersonator had, sometime in 2002, renewed an Alberta woman's driver's licence (not a Hutterite woman) without the latter's knowledge, taken it to Las Vegas, and apparently used it as identification when she was arrested on prostitution charges.⁹⁹ The second involved a situation shrouded in "governmental secrecy." As Pendleton describes it in his affidavit:

Although I am unable to discuss the circumstance in any detail because I received information from the RCMP subject to security classifications that do not permit it, in 1999 a false Alberta driver's licence was issued to an individual who several years later was arrested in the United States while attempting to carry out a terrorist attack.¹⁰⁰

Again, there is no suggestion that the Hutterites were involved in this. More important, in both of these examples, the licences were not photoless, which lessens the impact of the Alberta government's argument.

Some of the figures Pendleton produces are doubtlessly important. But all told, the evidence suffers from a few failings. First, the two specific examples tell us nothing about the governmental need for mandatory photographs on driver's licences. In particular, the so-called terrorist case where a person has been arrested — a case which is more than six years old and comes with no evidence of conviction — hardly provides a pressing and substantial reason for requiring photographs on licences. There is simply not enough information to show how a photo on a driver's licence would have prevented any of the harms alleged. In fact, much of the Alberta government's justification for the mandatory photograph seems targeted to placate the U.S. The universal digital photo licence may, the government claimed, obviate the need for passports at border crossings and ensure the free flow of goods across the Canada-U.S. border.¹⁰¹

Second, the statistics may be useful, but are not determinative. Reporting of matters is only one step in the process. How many of these reports turned out to be true? Where are the actual criminal statistics of wrongdoing? Pendleton's evidence is that "[t]wenty-five criminal investigations have resulted since the introduction of facial recognition software in ... 2004."¹⁰² That is hardly evidence of an epidemic.

This leads to a third concern. Figures based on rates of growth can tell a story, but gross figures are equally significant, and qualitative descriptions are also important. It would be extremely useful to know, for instance, how many of the over 14,000 calls received by PhoneBusters in 2003 were legitimate, and how many were nuisance or false identity theft reports (just as with fire alarms, there must be some cases where a false positive occurs). How many ended up being prosecuted, or provided proof of fraud? How serious were the

⁹⁹ Pendleton Affidavit, *ibid.* at para. 32.

¹⁰⁰ *Ibid.* at para. 33.

¹⁰¹ *Hutterian Brethren of Wilson Colony v. Alberta* (2007), 460 A.R. 293 (note) (Evidence, affidavit of Shaun Hammond, Assistant Deputy Minister of Transport, Safety Services Division, as part of Alberta's Application for Leave to Appeal at paras. 2-3); letter from John MacDonald, President, Canadian Council of Motor Transport Administrators (CCMTA) to the United States Department of Homeland Security (27 October 2005) at 2, where the CCMTA hoped that "enhanced" driver's licences will become acceptable documents for entry into both the U.S. and Canada, allowing "[t]he ability for people and goods to pass quickly," as such travel is "vital for the economies of both countries."

¹⁰² Pendleton Affidavit, *supra* note 96 at para. 17.

claims that were reported? Were they mainly underage teenagers hoping to buy alcohol, or were they something different? None of the evidence helped determine these basic questions.

A fourth and final concern is probably the most serious. Should we trust the government's own evidence to justify breaches of rights? Would it not be better to have some independent verification? The RCMP has recently come under severe attack for blindly adhering to a policy of Taser use, when there is at least some very credible independent evidence of the harms it can cause.¹⁰³ Is PhoneBusters any better? Is there not some academic criminological study that could shed light on the "growing incidence of identity theft"?

In the end, the Court was, as the *Globe and Mail* hinted in an editorial published shortly after the decision, too enamoured of the government's data.¹⁰⁴ The majority simply rode roughshod over the gaps and holes in the government's case, accepting that "Alberta's evidence demonstrates the ways in which the existence of an exemption from the photo requirement would increase the vulnerability of the licensing system and the risk of identity-related fraud."¹⁰⁵

It is not the first time that the Supreme Court has exhibited a slight case of technophilia.¹⁰⁶ In *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*,¹⁰⁷ the Court held that Parliament did not intend the *Copyright Act*¹⁰⁸ to have the effect of making internet intermediaries (such as internet service providers) "users" so as to be subject to royalties for copyright infringement. Justice Binnie, for the majority, acknowledged the new world we live in, where, because of the near instantaneous effect of the internet, a company in Bangalore is as easy for Canadians to reach as one in Mississauga.¹⁰⁹ He discussed the finer points of internet protocols and delivery mechanisms, exhibiting a detailed, technical knowledge of the engineering behind the internet.¹¹⁰ He recognized difficult areas of conflict between technology and law in

trying to apply national laws to a fast-evolving technology that in essence respects no national boundaries....

The issue of global forum shopping for actions for Internet torts has scarcely been addressed. The availability of child pornography on the Internet is a matter of serious concern. E-commerce is growing. Internet liability is thus a vast field where the legal harvest is only beginning to ripen.¹¹¹

The entire decision showed an exquisite, almost un-court like, appreciation of technology in general, and its internet manifestation in particular. In contrast, in *R. v. Bryan*,¹¹² a 2007 case

¹⁰³ See also Braidwood Commission on Conducted Energy Weapon Use, *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia* (Victoria: Braidwood Commission on Conducted Energy Weapon Use, 2009), online: Braidwood Inquiry <<http://www.braidwoodinquiry.ca/report>>.

¹⁰⁴ "No real risk of identity theft," Editorial, *The Globe and Mail* (28 July 2009) A10 ["No real risk"].

¹⁰⁵ *Wilson Colony* (S.C.C.), *supra* note 6 at para. 50.

¹⁰⁶ One of the authors has previously written about the Court's recent love-hate relationship with technology: see Richard Haigh, "The Technology of Political Communication: *R. v. Bryan* and the Knowledgeable Voter in the 21st Century" (2008) 42 Sup. Ct. L. Rev. (2d) 91.

¹⁰⁷ 2004 SCC 45, [2004] 2 S.C.R. 427 [*SOCAN*].

¹⁰⁸ R.S.C. 1985, c. C-42.

¹⁰⁹ *SOCAN*, *supra* note 107 at para. 1.

¹¹⁰ *Ibid.* at paras. 17-26.

¹¹¹ *Ibid.* at para. 41.

¹¹² 2007 SCC 12, [2007] 1 S.C.R. 527.

involving the threatened use of the internet to provide east-coast election results to the rest of the country before their polls closed, the majority seemed scared of, or ill-informed about, the world of modern technology. Justice Fish, on behalf of the majority, seemed positively antediluvian when he described telephone and email as “*modern* communications technology.”¹¹³ There was no awareness of social networking software, texting, or other more rapid and widespread forms of “guerrilla” communication. As Richard Haigh notes, the Court apparently

throws up its hands in ... surrender, refusing to acknowledge the enormous impact current technology has on the social and cultural ordering of society.

...

[It ignores] social network websites such as Facebook, MySpace, Flickr, Friendster, LinkedIn, Bebo and Twitter [as] important communicative tools today.

...

By standing on a principle of informational equality, in the midst of today’s culture of information sharing, [the Court] ends up standing on an island in a tsunami. If not yet precarious, this is a position that cannot long remain viable.¹¹⁴

In *Wilson Colony*, the Court seems to continue this disturbing trend, so much so that our newspapers are now aware of it. As the *Globe and Mail* reported:

The court seemed strangely in thrall to Alberta’s digital facial-recognition technology, and accepted the need for a perfect, identity-theft-proof system.

...

Religious freedom is by no means absolute, but Canadians should not necessarily have to bow before the god of technology, either.¹¹⁵

The paper has a point. For the majority, the problem of identity theft is nothing short of a technological pandemic. In fact, the term “identity theft” is referenced over 30 times in the majority’s decision. Many of those attest to its seriousness:

...a growing problem in Alberta and the country
 ...a serious and growing problem in Alberta and elsewhere
 ...a social problem that has grown exponentially in terms of cost to the community
 ...an emerging and challenging problem.¹¹⁶

The Alberta government’s statistics are used to reinforce this view.

¹¹³ *Ibid.* at para. 79 [emphasis added].

¹¹⁴ *Supra* note 106 at 102-104 [footnotes omitted].

¹¹⁵ “No real risk,” *supra* note 104.

¹¹⁶ *Wilson Colony* (S.C.C.), *supra* note 6 at paras. 1, 9, 37, 56, respectively.

And as the majority inflates the reliability and significance of the Alberta government's evidence, it simultaneously downplays the important effects that the denial of an exemption will have on the Wilson Colony. As Jonnette Watson Hamilton argues, the cost of not being able to hold a driver's licence is, for the Wilson Colony, not "merely the cost of not being able to drive on the highway,"¹¹⁷ or even the financial cost of hiring non-colony members as drivers. Rather, Watson Hamilton's survey of the literature relating to Hutterite groups¹¹⁸ suggests that Hutterian communal survival depends, in large measure, on colonies' abilities to control the terms of their engagement with non-Hutterites. If the Wilson Colony is forced to hire outside drivers, it loses some of this autonomy and, in its view, risks the assimilation that it deliberately avoids for religious reasons. Further, as Watson Hamilton astutely observes, the majority's analysis takes insufficient account of the religious aspect of the Wilson Colony's economic activities. For the Colony, the community members who drive the trucks bearing Hutterite agricultural products are contributing to the self-sufficiency that is seen as the community's "ark of salvation." The potentially grave costs to the Wilson Colony are undervalued in the majority's analysis, further calling into question the reliability of its cost-benefit calculations.

2. COMPETING STATISTICS AND THE DISSENTING VIEW: HOW TO CALCULATE THINGS DIFFERENTLY

Although the majority treated the problem of identity theft as a serious social ill and, on the basis of the province's evidence, linked the prevention of this problem to the use of photos on driver's licences, the evidence was not one-sided. In fact, the claimants and religious freedom interveners provided as much, if not more, hard data than the Alberta government. In their separate facts, both the Wilson Colony and the Canadian Civil Liberties Association (CCLA) attempted to show the miniscule impact of retaining the religious exemption. The Colony presented a loose set of calculations, which it based on the number of non-photo licences existing during the two-week period between issuing a temporary (non-photo) licence and receipt of a person's official (photo) licence.¹¹⁹ They are as follows: the current 2,394,917 valid driver's licences are valid for five years. Assume that an average of one-fifth, or 478,983, are renewed each year. If it is further assumed that these renewals are distributed evenly throughout the year, 18,422 new non-photo temporary licences are issued every two weeks. Since the average time taken to receive a final licence complete with

¹¹⁷ Jonnette Watson Hamilton, "Controlling Entry into the Marketplace in Order to Exercise of Freedom of Religion," *ABlawg* (17 August 2009), online: The University of Calgary Faculty of Law Blog on Developments in Alberta Law <<http://ablawg.ca/2009/08/17/controlling-entry-into-the-marketplace-in-order-to-exercise-of-freedom-of-religion/>>.

¹¹⁸ See Alvin J. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004); William Janzen, *Limits on Liberty: The Experience of Mennonite, Hutterite, and Doukhobor Communities in Canada* (Toronto: University of Toronto Press, 1990); Robert Macdonald, "The Hutterites in Alberta" in Howard Palmer & Tamara Palmer, eds., *Peoples of Alberta: Portraits of Cultural Diversity* (Saskatoon: Western Producer Prairie Books, 1985) 348; Howard Palmer, *Land of the Second Chance: A History of Ethnic Groups in Southern Alberta* (Lethbridge: Lethbridge Herald, 1972); Douglas E. Sanders, "The Hutterites: A Case Study in Minority Rights" (1964) 42 Can. Bar Rev. 225.

¹¹⁹ *Supra* note 6 (Factum of the Respondents at para. 108 [Respondents]). In the Wilson Colony factum, where a version of these calculations was carried out, the calculations were based on a two week average period between issuance of a temporary licence and receipt of its permanent form. In fact, the Alberta regulations allow any temporary licence to be valid for 30 days, so the figures quoted in this paragraph could be even higher. Counsel for the Wilson Colony chose a two-week period as a reasonable average time in which any given temporary licence is in use.

photo is about two weeks, it is safe to assume that approximately 18,000 non-photo licences are in circulation at any given time.¹²⁰ The CCLA looked at the relative order of magnitude of Hutterite licences to others. It calculated that as of 20 May 2003, when the categorical rule forbidding any Code G exemptions to photo licences was imposed, there were a total of 453 Code G licences out of more than 2.5 million licences in Alberta. Of these 453, 56 percent were issued to Hutterites, which amounts to 0.01 percent of issued licences. On this basis, restoring the religious exemption would preserve photos on 99.99 percent of Alberta driver's licences.¹²¹ Taken together, these numbers are significant. Under the Alberta government's own regime, 0.77 percent of licences are susceptible to identity theft simply because delayed accreditation means that 18,422 temporary photoless licences out of a total of 2,394,917 are in circulation, whereas only 0.01 percent of licences are susceptible to identity theft due to permanent exemptions. The difference is substantial — there are almost 80 times more licences in circulation without photos because of the normal processes of licence renewal than the number of additional photoless licences that would arise if the Hutterites were given the exemption.¹²²

If the problem of overall identity theft is as serious as the Alberta government made it out to be, why not work on fixing the time lag between the granting of a temporary licence and receipt of the permanent form? Or why not change the regulations so that temporary licences are forbidden? The very existence of temporary, photoless licences raises an interesting point, neglected in Pendleton's evidence: if, as he states, associations such as the Canadian Council of Motor Sport Administrators (CCMSA) and the American Association of Motor Vehicle Administrators (AAMVA) will soon make photo licences mandatory, why allow temporary photoless licences at all? Is there, in fact, an exemption for this period? If so, on what basis? If not, why does Alberta choose to ignore this aspect of the CCMSA and AAMVA requirements? To put all this in perspective, it seems to us that one identifiable problem (identity theft through exploitation of temporary licences) that is 77 times more likely than another problem (identity theft through illegally obtaining Hutterite licences) might require *some* government involvement. If "pressing and substantial" and "minimal impairment" are to have any meaning, one would hope that some weighing of relative priorities should occur.

In sum, the cost-benefit analysis carried out by the majority is unstable at best. It is rendered unreliable by the inflated benefits ascribed to the mandatory photo requirement, which are not put in proper perspective by taking into account all relevant factors. The costs of continuing the province's practice of granting an exemption to Hutterites who object to having their photos taken are overstated, especially considering that the risks to the integrity

¹²⁰ Respondents, *ibid.*

¹²¹ *Wilson Colony* (S.C.C.), *supra* note 6 (Factum of the Intervener, Canadian Civil Liberties Association at para. 9).

¹²² $18,422/2,394,917 = 0.77$ percent; $453 \times 56\% / 2,394,917 = 0.01$ percent. Of course, there is no way of knowing whether the period during which a temporary licence is in operation presents exactly the same risk of theft (on any given day) as a permanent licence, so the figure of 77 times the likelihood represents the worst case. Sophisticated thieves, for example, may spend time tracking the behaviour of potential targets, which would mean that temporary licence holders are at a lesser risk. On this, two points are worth noting, however: (1) that the near 80 times difference is significant, and not likely overcome completely by differences between a permanent and temporary licence; and (2) all photoless licences, regardless of the time spent in circulation, can be stolen, so a worst-case scenario seems to reflect the type of policy approach advocated by Alberta.

of the driver's licensing system inherent in the system itself far overshadow the risks attributable to a photo exemption for Hutterite drivers. Moreover, the costs to the Hutterite community are minimized, and their constitutionally protected freedom of religion is given short shrift.

In contrast, the dissenting judgment of Abella J. views the benefits of the system urged by the province in a more critical light. For example, she notes that, on the evidence, the universal photo requirement is "hardly fool-proof" and that there was no evidence presented by the province that the existing exemption for Hutterites had caused any harm to the integrity of the driver's licensing system.¹²³ Further, Abella J. puts the number of Hutterites who would likely seek an exemption from the photo requirement into the larger context of the approximately 700,000 Albertans who do not have driver's licences.¹²⁴ This underscores that the benefits claimed by the province in combatting identity theft are likely exaggerated.

In weighing the costs of the scheme, Abella J.'s judgment is more sensitive to the actual impact of the mandatory photo requirement on the Hutterite community. She emphasizes that the inability to hold driver's licences will threaten the Wilson Colony's ability to operate autonomously and self-sufficiently. This, for Abella J., is an element of their religious faith. Thus, an impediment to self-sufficiency is, in this case, a limit on freedom of religion.¹²⁵

On the whole, Abella J. found that the costs significantly outweighed the benefits. To put it in McConnell and Posner's terms, the government's objective was not sufficiently compelling to warrant the limit that the regulation imposes on freedom of religion. It is perhaps LeBel J., who wrote a separate dissenting opinion, who sums it up best:

Other approaches to identity fraud might be devised that would fall within a reasonable range of options and that could establish a proper balance between the social and constitutional interests at stake. This balance cannot be obtained by belittling the impact of the measures on the beliefs and religious practices of the Hutterites and by asking them to rely on taxi drivers and truck rental services to operate their farms and to preserve their way of life. Absolute safety is probably impossible in a democratic society. A limited restriction on the Province's objective of minimizing identity theft would not unduly compromise this aspect of the security of Alberta residents and might lie within the range of reasonable and constitutional alternatives. Indeed, the Province's stated purpose is not set in stone and does not need to be achieved at all costs.¹²⁶

In our view, the cost-benefit analysis carried out by the dissenting judges seems more accurate in this case, as it neither exaggerates the benefits of the regulation nor minimizes its costs.

Despite arguing earlier that a cost-benefit framework may encourage settlement, we recognize that negotiated solutions are not always feasible. In such cases, where liberty claims become the only way to resolve a problem, there is a risk, as illustrated in *Wilson Colony*, that judges may have difficulty understanding religious claims in terms of costs and

¹²³ *Wilson Colony* (S.C.C.), *supra* note 6 at paras. 155-56.

¹²⁴ *Ibid.* at para. 158.

¹²⁵ *Ibid.* at paras. 164-70.

¹²⁶ *Ibid.* at para. 201.

benefits. There is, however, another possibility under s. 2(a) of the *Charter* that could also open up a form of judicial dialogue, or at least allow room to deepen judicial understanding. It is a rarely used but distinct feature of s. 2(a) of the *Charter*: the guarantee of freedom of conscience. We turn to that next.

IV. DETERMINING CONSCIENCE UNDER THE *CHARTER*

A. A FRESH LOOK AT RELIGIOUS CLAIMS

Almost from the *Charter*'s beginnings in 1982, a constant theme in s. 2(a) jurisprudence has been a relative lack of consideration given to the word "conscience" as a fundamental freedom. Our hope is that this will change.

It is a fact that most judges in Canada come from a religious and cultural background that is likely Protestant, Catholic, or Jewish.¹²⁷ This need not be a problem — as Mark Modak-Truran argues, recognizing religious convictions as a "silent prologue" to a judge's decision-making should be seen as perfectly normal. What he proposes is a clear demarcation between a judge's deliberation (where religious convictions can inform) and a judge's written opinion (where religious beliefs should not be relied upon).¹²⁸ In theory, this approach has much to commend it. The difficulty, of course, is in knowing what a judge thinks while deliberating. Perhaps subconsciously, it is easier for judges to turn down religious freedom claims where the religious practice strays further from the orthodox, is removed from, or outside of, their own experience (as far as we are aware, for example, there has never been a Hutterite judge in Canada).

One way to alleviate this tendency is to think of all religious claims (or at least the significant number of them that can be described as individual autonomy, liberty-based claims) as belonging under the umbrella of conscience. Religious liberty is a distinct category of conscience-based liberty.¹²⁹ Framed in this way, it may be possible for judges to re-imagine these claims, making it easier for them to engage in the imaginative thinking that is

¹²⁷ Statistics on the religious backgrounds of Canadian judges are not available, but we expect results to be not wildly dissimilar from those in the U.S. A useful source for the U.S. statistics is Adherents.com, which lists the religious affiliation of all U.S. Supreme Court justices (up to 2005): Adherents.com, "Religious Affiliation of the U.S. Supreme Court," online: Adherents.com <http://www.adherents.com/adh_sc.html>. The list shows that the judges belong to a few main religious groups, mostly Christian: Episcopalian (32.4 percent), Presbyterian (17.6 percent), Catholic (10.2 percent), Unitarian (9.3 percent), Jewish (6.4 percent), Methodist (4.6 percent), Baptist (2.7 percent), Congregationalist (1.9 percent), Disciples of Christ (1.9 percent), Lutheran (0.9 percent), Quaker (0.9 percent), Huguenot (0.9 percent), Protestant (not further defined) (12 percent), and not a member of any church (0.9 percent). The site also notes that some major religions that have never been represented on the U.S. Supreme Court include Pentecostals, Mormons, Muslims, Buddhists, Jehovah's Witnesses, Mennonites, and Eastern Orthodox. The site also lists the religious affiliation of Canadian Prime Ministers, but not judges.

¹²⁸ See Mark C. Modak-Truran, "Reenchanting the Law: The Religious Dimension of Judicial Decision Making" (2004) 53 Cath. U. L. Rev. 709.

¹²⁹ But see Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008) at 168-73. Nussbaum offers a slightly different account. Similar to our claims, she argues that freedom of conscience should be a guiding concept. However, she follows Roger Williams to define conscience as "the faculty with which each person searches for the ultimate meaning of life" (at 168). This faculty "is of intrinsic worth and value, and is worthy of respect whether the person is using it well or badly" (at 168-69). Nussbaum recognizes that this formulation may work an unfairness against non-religious persons because the notion of an ultimate truth may itself have religious undertones. She suggests that such unfairness be mitigated "by extending the account of religion as far as we can, compatibly with administrability" (at 173).

evident in the best judges — to put oneself in someone else's conscientious shoes, for example, is easier than putting oneself in someone else's religious shoes¹³⁰ — we are all imbued with our own idea of conscience. The Supreme Court in *Wilson Colony* takes an incremental step in this direction; we hope to convince it to go further in the future.

B. “CONSCIENCE” IN *WILSON COLONY*

It is interesting that, though the case centred directly on a matter of religion, the two main opinions take time out to remind us that the s. 2(a) right contains conscience in addition to religion. Justice LeBel, in a separate dissenting opinion, also offers his own provocative reading of s. 2(a) that points out a possible connection between religion and conscience.

For the majority, McLachlin C.J.C. acknowledges the plethora of different religions and practices in a pluralist world, and finds that it is “inevitable that some ... will come into conflict with laws ... of general application.”¹³¹ She continues:

[T]his pluralistic context also includes “atheists, agnostics, sceptics and the unconcerned.” Their interests are equally protected by s. 2(a). In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important.¹³²

On its face, the majority's recognition of this right of conscience is uncontroversial; it merely reflects the reality that the non-religious may also find protection under s. 2(a), albeit one that may also be overborne by legitimate government interests. A more favourable reading would see it as part of a slow but steady move to reveal a different kind of s. 2(a) — one seen clearly by Wilson J. in *R. v. Morgentaler*,¹³³ but which has been clouded by majority decisions since. Justice Abella also devotes some space to discussing conscience. Her review of it is at the same time more conservative and more progressive than the majority's. After citing Dickson C.J.C.'s oft-quoted statement in *Big M* that “an emphasis on individual conscience and individual judgment ... lies at the heart of our democratic political tradition,”¹³⁴ she goes on to quote him further:

It is the centrality of the rights associated with freedom of individual conscience that

underlies their designation in the *Canadian Charter of Rights and Freedoms* as “fundamental”. They are the *sine qua non* of the political tradition underlying the *Charter*.¹³⁵

She continues with a number of quotations from *Big M* and the European Court of Human Rights in *Kokkinakis*¹³⁶ that refer to freedom of conscience and the principle of individual conscience. So, one could say that she offers nothing new regarding conscience, relying

¹³⁰ See e.g. *Multani*, *supra* note 57 at paras. 37–41, 71, 74, 76, 79. The kind of imaginative thinking we have in mind is that displayed, for example, by Charron J.'s understanding of the importance of a kirpan to the Sikh religion.

¹³¹ *Wilson Colony* (S.C.C.), *supra* note 6 at para. 90.

¹³² *Ibid.*, citing *Kokkinakis v. Greece* (1993), 260 A.E.C.H.R. 1 (Ser. A.), 17 E.H.R.R. 397 [*Kokkinakis*].

¹³³ [1988] 1 S.C.R. 30 [*Morgentaler*].

¹³⁴ *Big M*, *supra* note 74 at 346.

¹³⁵ *Wilson Colony* (S.C.C.), *supra* note 6 at para. 127, citing *ibid.*

¹³⁶ *Kokkinakis*, *supra* note 132.

heavily on past Supreme Court precedent, and less so on European jurisprudence. That she reminds us of the Court's earlier discussions on conscience, however, is important in itself (it is unfortunate, perhaps, that she did not refer to Wilson J.'s exegesis on conscience in *Morgentaler*¹³⁷). She also, therefore, seems to be signalling a similar message of openness to future discussions on conscience.

It is LeBel J., however, who is the most enigmatic, displaying unease with the entire concept of the s. 2(a) freedom based on religion. In doing so, he exhibits a judicial humanness that is rare:

Perhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of religion for the purposes of the *Charter*. One might have thought that the guarantee of freedom of opinion, freedom of conscience, freedom of expression and freedom of association could very well have been sufficient to protect freedom of religion. But the framers of the *Charter* thought fit to incorporate into the *Charter* an express guarantee of freedom of religion, which must be given meaning and effect.¹³⁸

This is a very telling statement. It seems as if LeBel J. is wishing that freedom of religion did not have to exist. For him, certainly, the other fundamental freedoms contained in s. 2 *almost* cover the field of religion by proxy. To those of us who wish for a resurrection of freedom of conscience, it gives an impetus of hope. In our view, "conscience" is the broader category of morality-based freedom, under which most individual claims of religious freedom could be grouped. And "conscience," as an independent freedom, begins with the text of the *Charter*.

C. A GUIDE TO THE CONSTITUTIONAL INTERPRETATION OF CONSCIENCE

Basic principles of statutory interpretation favour granting conscience independent status. Elmer Driedger's famous "one principle" approach says that legislative words should be read in their grammatical and ordinary sense in harmony with their context.¹³⁹ Each word in legislation is normally considered important, and uniformity and consistency are valued over stylistic variation and aesthetic appeal.¹⁴⁰ On this broad premise, conscience deserves being treated separately from religion.

Two linguistic canons of construction bear examination in the context of s. 2(a). The first is the presumption against the use of superfluous or meaningless words. Every legislative word is important and presumed to have a specific role to play in advancing government's purpose.¹⁴¹ The rule applies to individual words within a phrase, but also between parts of a legislative scheme. Thus, words that appear in one section of a statute are assumed to mean

¹³⁷ *Supra* note 133 at 37-38.

¹³⁸ *Wilson Colony* (S.C.C.), *supra* note 6 at para. 180.

¹³⁹ See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 20ff.

¹⁴⁰ *Ibid.* at 151.

¹⁴¹ *Ibid.* at 158. See also F.A.R. Bennion, *Statutory Interpretation: A Code*, 4th ed. (London: Butterworths, 2002) at 993; Randal N. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001) at 106-107. As Graham puts it, drafters are assumed never to use extraneous language and guard against the use of multiple, redundant words that may create confusion.

the same elsewhere. The opposite is also true: words that appear in one place together but do not appear in another place together are therefore intended to do different things.

All common law courts have approved this presumption. A straightforward example is the case of *A-G's Reference (No. 1 of 1975)* where the English Court of Appeal held that the words "aid, abet, counsel or procure" must each have a distinct meaning since otherwise Parliament would be indulging in tautology.¹⁴² In the Supreme Court of Canada, Lamer C.J.C. in *R. v. Proulx* pronounced that "[i]t is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage,"¹⁴³ and in *R. v. Kelly* the same Court declared it to be a "trite rule of statutory interpretation that every word in the statute must be given a meaning."¹⁴⁴ The Supreme Court of Canada also applies the same presumption in its interpretive approaches to the *Charter*.

Of course, the presumption can be rebutted where the meaning of the additional words is shown not to be superfluous or that repetition was deliberately intended. If either of two words could have been used on its own without any change in meaning, it is possible that the tautology was intended.¹⁴⁵ The argument is much less compelling, however, when dealing with specific examples of infrequently used constitutional language such as "religion" and "conscience." To begin with, there are many words more synonymous with religion than conscience: faith, belief, and worship immediately come to mind. "Creed" is even more likely, especially given that some statutes employ that term instead of religion.¹⁴⁶ More compelling still, the importance of every word in a constitutional document cannot be understated — if anything, surplusage in a constitution simply does not exist.

The other canon of construction that has relevance is the presumption of consistent expression. Legislative drafters are not stylists — elegant variation is to be avoided at all costs, taking a "far second place to certainty of meaning."¹⁴⁷ The same words should have the same meaning and different words should have different meanings. Where a different form of expression occurs, it is proper to infer that a different meaning is intended.¹⁴⁸ As the Supreme Court noted in *R. v. Barnier*, "'appreciating' and 'knowing' must be different, otherwise the Legislature would have employed one or the other only."¹⁴⁹ This presumption of consistency applies to patterns of expression found in disparate parts of a statute as well.¹⁵⁰ Again, it makes sense to treat this presumption as even more forceful in the case of constitutional provisions.

¹⁴² [1975] Q.B. 773 at 779 (C.A.).

¹⁴³ 2000 SCC 5, [2000] 1 S.C.R. 61 at para. 28.

¹⁴⁴ [1992] 2 S.C.R. 170 at 188.

¹⁴⁵ Bennion, *supra* note 141 at 994. Bennion illustrates this idea through reference to a statute which imposes a duty to "safeguard and protect" the welfare of a child. He argues that the phrase is an example of surplusage since either term would have been sufficient on its own.

¹⁴⁶ See e.g. *Human Rights Code*, R.S.O. 1990, c. H-19. Sections 1-6, for example, prevent discrimination on the basis of creed, but not religion — in other words, "creed" acts as a surrogate for "religion."

¹⁴⁷ Bennion, *supra* note 141 at 995.

¹⁴⁸ See Sullivan, *supra* note 139 at 162-63.

¹⁴⁹ [1980] 1 S.C.R. 1124 at 1135-36.

¹⁵⁰ See *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 60, where, for example, Parliament provides exclusive jurisdiction to the Admiralty Court by express provision in one section of an Act ("Admiralty Court has exclusive jurisdiction") it must not intend exclusive jurisdiction where such words are not used in another section of an Act.

With this in mind, the inclusion of conscience in s. 2(a) should not be ignored or glossed over. It is not an elegant variation of religion, redundant, or superfluous. To give the *Charter*'s terms full meaning, "conscience" must have independent content. In addition, since "religion" appears in s. 15 without being partnered with conscience, the different formulations increase the force of the presumption that the intention in s. 2(a) was to give conscience separate meaning. (Granted, it might be slightly more difficult to conceive of "conscience" as a ground of discrimination, but that only helps the claim for its independence.)

Nor is it correct to rely on the maxim *noscitur a sociis*, which holds that the meaning of a word can be determined by its association with other words, to restrict the interpretation of conscience. That maxim aids in containing the possibilities of meanings of words by providing a context for understanding: Randal Graham's example of the difference between a single word, "chips," and the phrase "fish and chips" shows how the single word is changed by circumstance — without "fish and," the word could be taken to mean wood chips or paint chips.¹⁵¹ Clearly, "conscience" should have some connection to religion (its inclusion in s. 2(a) instead of 2(b), for example, makes this clear), but this does not make it perfectly synonymous with religion in the same way that "fish" is not synonymous with "chips."

On the basis of proper canons of construction, therefore, there is little doubt that conscience, as a concept, should be dealt with independently of religion under s. 2(a). Despite this, few examples of its use occur in Canadian jurisprudence.

D. AN OVERVIEW OF CONSCIENCE AT THE SUPREME COURT OF CANADA

It was not long after the *Charter* was enacted that freedom of conscience appeared in a judicial decision. In the first big test of s. 2(a) of the *Charter*, *R. v. Big M Drug Mart Ltd.*,¹⁵² Laycraft J.A. at the Alberta Court of Appeal held that freedom of conscience in the *Charter* seems designed to include the "rights of those whose fundamental principles are not founded on theistic belief."¹⁵³ On appeal, the Supreme Court of Canada largely ignored the matter of conscience, since the case was easily (and arguably more properly) decided on the basis of freedom of religion. Chief Justice Dickson did, however, comment on the possibility of conscience as an independent right, in the dicta relied on by Abella J. above,¹⁵⁴ and then stated:

Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.¹⁵⁵

¹⁵¹ Graham, *supra* note 141 at 87.

¹⁵² (1983), 49 A.R. 194 (C.A.).

¹⁵³ *Ibid.* at para. 42.

¹⁵⁴ See *supra* notes 135-36 and accompanying text.

¹⁵⁵ *Big M*, *supra* note 74 at 346-47.

Around the same time, Tarnopolsky J.A. delivered the first comprehensive analysis of the parameters of conscience as an independent value in his 1984 decision in *R. v. Videoflicks Ltd.*¹⁵⁶ (a case more famously known by the style of cause adopted on appeal to the Supreme Court of Canada, *Edwards Books*¹⁵⁷). At issue was Ontario's response to the legislative void left by the Supreme Court's striking down of federal Sunday closing legislation (the *Lord's Day Act*¹⁵⁸). Justice Tarnopolsky employed an analytical approach familiar from earlier religious freedom cases, but broadened it to incorporate conscientious belief. Two elements governed his analysis. First, he recognized that some people attach religious significance to acts or symbols that do not carry any such meaning for others. He referred to the case of *New York v. Sandstrom*¹⁵⁹ where Lehman J., in a concurring opinion, used the "homely" example of the "partaking of food" as illustrating a human activity that can take on significant religious meaning.¹⁶⁰ Justice Tarnopolsky applied this reasoning to draw out the contours of conscience:

[E]ssentially the same reasoning would apply to the fundamental freedom of conscience, except that freedom of conscience would generally not have the same relationship to the beliefs or creed of an organized or at least collective group of individuals.¹⁶¹

Although he gave no parallel examples, nor developed a method of assessing conscience-based freedom claims, it is presumed that he might be referring to a vegetarian morally opposed to eating meat, who may find himself or herself subject to a law or regulation that failed to provide for a special diet. The second element of Tarnopolsky J.A.'s definition arose over a concern for the boundaries of the legal concept of conscience. He feared that freedom of conscience could easily be abused, which meant that, as with religion, it should not apply to a mere individual act or symbolic statement of any kind, but should be based on a set of beliefs that is binding on, or at least strongly felt by, someone. Conscience must direct, in a powerful sense, a person's behaviour. Yet it is also both individualized and compelling. "[I]t does not follow," Tarnopolsky J.A. wrote, "that one can rely upon the Charter protection of freedom of conscience to object to an enforced holiday simply because it happens to coincide with *someone else's* sabbath."¹⁶² Ultimately, he was prepared to accept that a businessperson's sincere belief, based solely on conscience, requiring him or her to close shop on a day other than the Sabbath, could qualify as a matter needing protection under the conscience branch of s. 2(a).¹⁶³ In the specific case before him, however, no such evidence was tendered.

At the Supreme Court, *Videoflicks* metamorphosed. The conscience branch of s. 2(a) was discussed in argument, but largely ignored in the decision. Chief Justice Dickson's majority decision favoured a detailed analysis of religious freedom. He made only a passing reference to conscience, observing that freedom of religion, unlike freedom of conscience, "has both

¹⁵⁶ (1984), 48 O.R. (2d) 395 (C.A.) [*Videoflicks*], aff'd *Edwards Books*, *supra* note 43.

¹⁵⁷ *Edwards Books*, *ibid.*

¹⁵⁸ R.S.C. 1970, c. L-13.

¹⁵⁹ 18 N.E.2d 840 (N.Y. 1939).

¹⁶⁰ *Ibid.* at 845.

¹⁶¹ *Videoflicks*, *supra* note 156 at 422.

¹⁶² *Ibid.* [emphasis added].

¹⁶³ *Ibid.*

individual and collective aspects.”¹⁶⁴ He also echoed Tarnopolsky J.A.’s concern over the possible abuse of the conscience branch.¹⁶⁵

The only Supreme Court of Canada decision to date that truly engages with the conscience branch of s. 2(a) is Wilson J.’s concurring opinion in *Morgentaler*, decided two years after *Edwards Books*. This case was Dr. Henry Morgentaler’s first attack on the constitutionality of the abortion provisions of the *Criminal Code*.¹⁶⁶ The majority found that the provisions offended s. 7 of the *Charter* and struck them down.

Justice Wilson agreed but for different reasons, including a finding that the provisions offended s. 2(a) of the *Charter*. Her opinion contains a lengthy exposition on the nature of conscience and its relationship to religion. Taking note of Dickson C.J.C.’s broad and expansive approach to *Charter* interpretation that began with *Big M*, she quoted at length from the passage cited above, noting that individual conscience is central to western notions of human rights and freedoms, to our democratic traditions, and to notions of dignity.¹⁶⁷ She ended the reference by concluding that Dickson C.J.C. takes religion as simply an example, albeit a primary one, of a “conscientiously-held belief.”¹⁶⁸ This theme was then expanded upon:

I do not think [Dickson C.J.C.] is saying that a personal morality which is not founded in religion is outside the protection of s. 2(a). Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(a).

...

It seems to me, therefore, that in a free and democratic society “freedom of conscience and religion” should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, “conscience” and “religion” should not be treated as tautologous if capable of independent, although related, meaning.¹⁶⁹

Justice Wilson found that the abortion provisions of the *Criminal Code* endorsed one value (the state forbidding a pregnant woman certain options) at the expense of another (a woman’s right to choose). A woman’s right to choose, however, is constitutionally protected by the freedom of conscience guarantee in s. 2(a). “[T]he decision whether or not to terminate a pregnancy,” Wilson J. concluded, “is essentially a moral decision, a matter of conscience ... [which] must be the conscience of the individual.”¹⁷⁰

Another opportunity to engage with the meaning of freedom of conscience arose a few years later in 1993. The Supreme Court had occasion to decide whether the assisted suicide

¹⁶⁴ *Edwards Books*, *supra* note 43 at 781.

¹⁶⁵ *Ibid.* at 760-61, citing *Videoflicks*, *supra* note 156 at 422.

¹⁶⁶ R.S.C. 1985, c. C-46.

¹⁶⁷ *Morgentaler*, *supra* note 133 at 176, citing *Big M*, *supra* note 74 at 345-47.

¹⁶⁸ *Morgentaler*, *ibid.* at 177-78. She fails to highlight the somewhat depressing end to Dickson C.J.C.’s sentence quoted from *Big M* at *supra* note 155, where he states that “other sorts of governmental involvement in matters *having to do with religion*” [emphasis added] which seems to bring back the requirement of a nexus between conscience and religion.

¹⁶⁹ *Morgentaler*, *ibid.* at 178-79.

¹⁷⁰ *Ibid.* at 175-76.

provisions of the *Criminal Code* were unconstitutional in *Rodriguez v. British Columbia (A.G.)*.¹⁷¹ On the face of it, this seemed like a perfect case to articulate a conceptual understanding of freedom of conscience. Although the decision to terminate life is not likely to fit within religious freedom, since many religious tenets seek to preserve the sanctity of life, it could well fall within a matter of one's conscience to determine when life ends. As Ronald Dworkin has argued, the conviction that human life is sacred, through our conscience, may paradoxically be a compelling reason to allow euthanasia.¹⁷²

Surprisingly, conscience-based arguments were not invoked by most of the key participants in the litigation. At trial, the only *Charter* provisions in issue were ss. 7, 12, and 15. These remained the only grounds at issue on appeal. During oral argument at the Supreme Court, L'Heureux-Dubé J. raised a question for the interveners, the Canadian Conference of Catholic Bishops, that hinted of a possible role for conscience to play. She seemed disappointed by its absence from debate:

I suppose you agree with whatever faith you represent that there is a freedom of conscience here. So, is it not a conscience decision? Your own conscience dictates what you are going to — so nobody has gone into that area too much. Nobody has discussed that.¹⁷³

The answer was non-committal; L'Heureux-Dubé J. did not push the point further.

Unfortunately, these few hints and opportunities were largely swept aside when it came to the decision itself. Writing for himself in dissent, Lamer C.J.C. casually referred to the importance of freedom of conscience just twice; the majority did not refer to it at all. For Lamer C.J.C., the question of whether choosing suicide is a right should be answered while “keeping in mind that the *Charter* has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions.”¹⁷⁴ He followed this by quoting, with approval, Dickson C.J.C.'s statement in *Big M* that individual conscience “lies at the heart of our democratic political tradition.”¹⁷⁵ Both are fine statements of purpose; however, he failed to take the concept any further. From the standpoint of using euthanasia to develop a concept of conscience-based freedom, the decision in *Rodriguez* is a disappointment. It could have offered much more to the discussion. In the end, perhaps the only legacy that the case leaves for freedom of conscience comes from Sue Rodriguez herself. In her testimony at trial, she made a plea that only makes sense on the basis of conscience:

Q: Why do you want to be able to exercise your right to commit suicide with the assistance of a physician?

¹⁷¹ [1993] 3 S.C.R. 519 [*Rodriguez*].

¹⁷² See Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993), especially c. 7.

¹⁷³ *Rodriguez*, *supra* note 171 (Oral argument, intervener, Canadian Conference of Catholic Bishops at 182).

¹⁷⁴ *Rodriguez*, *ibid.* at 553. See also Iain T. Benson, “Notes Towards a (Re)definition of the ‘Secular’” (2000) 33 U.B.C. L. Rev. 519 at 535, where Benson argues that Lamer C.J.C. gives no definition to the concept the “secular” and cites no authority for his position. Benson suggests that the *Charter*'s history and preamble support a contrary view to Lamer C.J.C.'s.

¹⁷⁵ *Big M*, *supra* note 74 at 346, cited in *Rodriguez*, *ibid.* at 554.

A: I feel that it's my right, and I want to die with dignity. I just feel that inner guidance tells me that it is the right thing for me to do and I should be allowed to do that.¹⁷⁶

Perhaps "inner guidance" is all that can be said about what conscience is, and how it is both similar to, and different from, religion.

*B.(R.) v. Children's Aid Society of Metropolitan Toronto*¹⁷⁷ was another case where freedom of conscience played a significant role. There, a litigant challenged the Ontario *Child Welfare Act*¹⁷⁸ provisions that allow the state to deem certain children to be in need of protection. The case involved a minor, Sheena B., who was given blood transfusions during a surgical procedure, contrary to the family's beliefs as Jehovah's Witnesses. The parents claimed, amongst other things, that the *Child Welfare Act* provisions contravened s. 2(a) of the *Charter*. Justices Major and Iacobucci for the minority found that, while the parents may feel that they have a religious right to prevent a blood transfusion, there is an equal and opposite infringement upon a minor's freedom of conscience, which "arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief."¹⁷⁹ Thus, freedom of conscience could, in the right circumstances, be used to negate freedom of religion and vice versa. This reasoning clearly gives some independent meaning to "conscience." As a minority view, however, it has received little support or mention since it was delivered.

Last, notions of conscientious freedom surfaced in *Amselem*, the succah case discussed above which involved religious freedom under the Quebec *Charter of human rights and freedoms*.¹⁸⁰ The majority of the Court noted that only "beliefs, convictions and practices rooted in religion" are protected from the guarantee of freedom of religion. These should be kept separate from practices that are "secular, socially based or conscientiously held."¹⁸¹ Although this may be taken as acknowledging conscience as something independent from religion, it is a weak endorsement at best. It is certainly a far cry from Wilson J.'s eloquent call for conscience as a distinct branch of s. 2(a) in *Morgentaler*. So where are we after *Wilson Colony*?

E. AN INDEPENDENT "CONSCIENCE"?

Richard Moon argues that after the Supreme Court of Canada's wide-ranging discussion in *Amselem*, the protection granted to conscience seems to be of a lower order than that of religion, despite its apparently equal footing in s. 2(a) of the *Charter*.¹⁸² In his view, the Court has determined that religious beliefs and practices are different from secular ones, deserve special protection and accommodation, and can only be restricted for compelling reasons. It is highly unlikely, he argues, that any court will extend protection to any belief or practice that "an individual might consider important or valuable, but not obligatory," and

¹⁷⁶ *Rodriguez, ibid.* (Oral argument, appellant).

¹⁷⁷ [1995] 1 S.C.R. 315 [*B.(R.)*].

¹⁷⁸ R.S.O. 1980, c. 66, as rep. by S.O. 1984, c. 55, s. 208.

¹⁷⁹ *B.(R.)*, *supra* note 177.

¹⁸⁰ R.S.Q. c. C-12.

¹⁸¹ *Amselem*, *supra* note 46 at para. 39.

¹⁸² Richard Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 Sup. Ct. L. Rev. (2d) 201.

that does not have some connection to moral duty.¹⁸³ For Moon, what may make religion special, and different from “mere” conscience, is that religious beliefs and practices connect individuals to cultural communities and are part of deeply-rooted cultural identities.¹⁸⁴

This is a useful distinction, but ultimately insufficient. The individual sincere belief test developed by the Court in *Amselem* has given religion a large degree of subjectivity, reflected largely in individual autonomy. As Benjamin Berger notes, the test makes it unlikely for Canadian constitutional law to render religion in an image anything other than individual and private:

There is, of course, a strong connection between law’s sense of religion as centrally a matter of individual autonomy and the translation of religious commitment into matters of preference... Religion is to be protected because it is the object of individual choice.... [R]eligion comes out in a shape easily assimilated into a distinction critical to the liberal political imagination: religion is quintessentially private.¹⁸⁵

Moreover, other cultural communities exist that have no connection to religion or religious practices. Strong communities are created over deeply-rooted identities in sports — avid hockey and soccer fans the world over (for that matter, many fans of many sports) are both connected to a community (and it would be easy to see that as a “cultural” community) that is deeply rooted in their identity. They are part of a tradition that is easily over a century old, and share in those common histories.¹⁸⁶ In Canada, the “national sport” of hockey is the subject of a number of university courses, most comparing it to a form of organized religion.¹⁸⁷ One could guess that the same would hold true for motorcycle gangs such as the Hell’s Angels, ballet companies, or more contemporary online communities such as “gamers.”¹⁸⁸

The introduction of the *Charter* has changed the socio-political structure and environment of Canada. The traditional and collectivist legal culture has ceded to a more individualist, American approach to rights. To some extent, this is what rights talk does (although s. 1 of the *Charter*, especially with the Supreme Court’s newfound appreciation in *Wilson Colony*

¹⁸³ *Ibid.* at 215.

¹⁸⁴ *Ibid.* at 216. This would also deal with the problem he sees in the majority decision in *Amselem* that the Supreme Court views religious commitment as completely linked to individual choice and subjective sincerity, making it difficult to distinguish from a non-religious person’s sincere and chosen belief (at 219).

¹⁸⁵ Benjamin L. Berger, “Law’s Religion: Rendering Culture” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 264 at 283. A version of this chapter is also contained in (2007) 45 Osgoode Hall L.J. 277.

¹⁸⁶ See also Jonathan Franklin, “Maradona the Messiah” *The Globe and Mail* (13 November 2008) A2. It is hard not to ignore the idolatry of Diego Maradona, a former superstar soccer player in Argentina who has inspired La Iglesia Maradoniana — the Church of Maradona — in Buenos Aires, where the faithful cite their own version of the Lord’s Prayer: “Our Diego, Who art on earth, Hallowed be thy left foot, Thy magic come, Thy goals be remembered.”

¹⁸⁷ Carly Weeks, “Holy hockey sticks! Our national sport is like an organized religion, according to a university course that will examine our fervour for the game” *The Globe and Mail* (24 October 2008) L3.

¹⁸⁸ See Josh Wingrove, “Couple says son’s disappearance has to do with video game” *The Globe and Mail* (21 October 2008), online: *The Globe and Mail* <<http://www.theglobeandmail.com/news/technology/article717428.ece>>. A sad case of recent occurrence is that of Brandon Crisp, a young boy from Barrie, Ontario, who died after running away from home, ostensibly because his parents refused to allow him to continue playing video games, fearing that he was addicted. In the initial days following his disappearance, speculation was that he had fallen prey to a “gaming community” who kidnapped him, luring him to play the game for money — a theory subsequently proven wrong.

of the final proportionality arm of *Oakes*, makes some attempt to bring collective goals into the debate). What is not so clear-cut, however, is how the communitarian aspects of religious practice can survive and flourish in an environment that denies, or at least reduces, connectedness. This fear has been well-expressed by Canadian psychoanalyst Charles Levin:

[The function of religion] has been taken over by legalistic liberalism, the rule of law, and the entrenched principles of ... due process, freedom of conscience ... equal opportunity, and so on. To a variable extent, liberal democracies both create and reflect this novel circumstance of social relativity. Under these conditions, religion like everything else must be satisfied to compete in a game which has no final winner. In functional terms, it is now just another commodity, another social or political trend, another "lifestyle choice" to be wondered about and polled and televised and marketed but never absolutely embraced because - thank God - we are now protected by Constitutional Law even from our own deepest wishes.¹⁸⁹

It would not be wise to presume that accentuating conscience at the expense of religion will transform us and take us to a time where we retain the best of both worlds — a strong sense of shared, but fully multicultural and pluralist, community, coupled with an idealized protection of individual rights and freedoms. Yet relying on conscience, as a freedom in its own right apart from religion, could smooth some of these rough edges identified by Levin. It may allow religion, using his metaphors, to turn away from its own commodification, leave the game, and be embraced again on its own terms. "Conscience," as an independent freedom, may help bring back the very point of having religion and religious freedom. By insinuating that the idea of conscience as an independent right remains alive, the Supreme Court has, in *Wilson Colony*, returned partway to Wilson J.'s calculation in the *Morgentaler* decision. In particular, if LeBel J.'s words can be taken to heart — if freedom of conscience is not sufficient to protect religion, even in combination with the other s. 2 freedoms — then the converse could also be true: freedom of religion is insufficient to cover conscientious freedom, which is why the framers of the *Charter* thought it necessary to include an express guarantee of conscience. It should be given its own proper meaning and effect.

V. CONCLUSION

We began with a hypothetical situation, difficult to imagine happening. We end with something much more real. Suaad Hagi Mohamud spent three months stuck in Kenya (including eight days in prison) because a KLM employee at Nairobi airport, on the day she was to fly home to Toronto, thought she did not properly resemble the picture in her Canadian passport. What followed was an ordeal for Mohamud that did not put Canada in a good light. All because of human error.¹⁹⁰

The digital photo licensing project in Alberta will not remove human error. Digitizing photographs and facial recognition software aids in narrowing down the pool of potential duplicate persons, but is currently not sophisticated enough to provide exact matches.

¹⁸⁹ Charles Levin, "The Religion Question Answered — Charles Levin" *Books in Canada* (February 1998), online: Books in Canada <http://www.booksincanada.com/article_view.asp?id=778>.

¹⁹⁰ See "Suaad Hagi Mohamud's detention in Kenya" *CBC News* (5 October 2009), online: CBC News <<http://www.cbc.ca/world/story/2009/08/12/f-haji-mohamud-timeline.html>>. See also Margaret Wente, "The strange case of Suaad Mohamud" *The Globe and Mail* (13 October 2009) A19, indicating that the story may be more complicated.

According to the Alberta government's own experts, there will always be a need for a human being to sift through by hand and compare photographs (possibly between ten to 20 faces). What if mistakes occur? The case of Mohamud shows the effects of false positives, particularly in an age of apparent digital certainty. If you were found, incorrectly, to have two driver's licences, who knows what Kafkaesque string of events would follow? Trying to sort out that problem and convince governmental authorities that you only have one licence will almost certainly become exponentially more difficult because of the certitude that goes with "infallible" technology.

The mohel we imagined at the beginning of this article carries out his role in a ritual designed to recall the traditional Jewish concept of the covenantal relationship between God and Abraham. The *Charter* is also a covenant of sorts; it is a set of promises about the basic parameters of the relationship between the governments and the governed in this country. The Supreme Court, as the final interpreters of that promise, must ensure that our governments are faithful to those promises. In our view the Court erred in *Wilson Colony* by putting too much faith in technology and the Alberta government's evidence. Although it engaged in a form of cost-benefit analysis that may be a more appropriate method for resolving religious conflicts occurring over generally applicable laws, it failed to truly take into account the costs of difference borne by the Colony.

Moreover, with the Court's pro-government ruling, there is now seemingly no chance that other Alberta residents will be able to claim that they should be allowed to drive without a driver's licence photo on the basis that it is against conscience because it "steals one's soul." Yet, with the Court's continued hints at a role for conscience under s. 2(a), there may come a time when someone with a fervent, irresistible belief (a nouveau Thoreauvian figure who needs to spend time communing with nature in a tent on his balcony for a few days per year?)¹⁹¹ is protected from generally applicable laws without having to ground the belief on a religious basis. We shall see.

The only certainty for now is that the Wilson Colony will never be the same again. They have been wronged. It is a measure of their fortitude that they will either accept the judgment and carry on, or make the almost impossible decision to leave the country that has provided them a large measure of religious freedom for many decades. Only they are able to calculate what lies ahead for their community.

¹⁹¹ Compare with the situation of Moise Amselem and others in *Amselem*, *supra* note 46.