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Lest Law Forget: Locke's Toleration and Religious Freedom

Stephen Holt
Dalhousie University Schulich School of Law

LEST LAW FORGET:

Locke's Toleration and Religious Freedom

by

Stephen Holt

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DEDICATION PAGE

None of this would have been possible without the love, devotion, and help of my beloved wife. That you stay by my side, Kita, is a constant witness to the grace and love of the One who is our Life and to whom we dedicate this thesis.

Those who cannot remember the past are condemned to repeat it.

George Santayana

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Abstract

The *Canadian Charter of Rights and Freedoms* guarantees every person in Canada freedom of conscience and religion. I contend that the concept of religious freedom was born out of a history of religious suffering and originally took the form of John Locke's toleration of religious differences. In *Big M*, the first Supreme Court of Canada case that interpreted s. 2(a), Chief Justice Dickson recognized the historical context of religious freedom but also tied it to human autonomy, equality, and dignity. An examination of the cases since *Big M* suggests that when courts think in terms of tolerance, they accord greater protection to religious freedom. When they lose sight of the historical justification and consider religious claims within the framework of equality, there is a tendency to fail to give freedom of religion its due weight and proper place in Canadian society.

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Lastly, I thank my family for accepting so much change and disruption of their lives so that I could be close to the law school.

Chapter 1 Introduction

Pursuant to the *Canadian Charter of Rights and Freedoms*, everyone in Canada enjoys the fundamental freedom of conscience and religion "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[1] Since the coming into effect of the *Charter* in 1982, Canadian courts have wrestled with the scope and application of this freedom, often being called on to determine wherein it should be subject to limitation. It is my contention that when courts lose sight of the historical nature of and justification for religious freedom, they have, on occasion, failed to understand and give the right to freedom of conscience and religion its due weight and proper place in Canadian society.[2]

I begin with two historical perspectives in search of understanding as to the roots of religious freedom, and propose first to examine John Locke's writing on religious tolerance (henceforth Locke). Locke has been credited with having first given voice to the call for religious freedom.[3] A fresh examination of his thinking and its underlying

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 1 and 2(a) [*Charter*].
[2] In this thesis, I focus on the guarantee of religious freedom. The relationship between freedom of conscience and freedom of religion would be an interesting topic for further examination. Perhaps conscience covers a broad range of beliefs or convictions of which religious beliefs or convictions are just a subset. Mary A. Waldron dedicates a whole chapter of her book, *infra* note 5 – Chapter 7 "Freedom of Conscience: The Forgotten Human Right" – to arguing for a separate status for a guarantee of freedom of conscience. Perhaps the intent of the framers of the *Charter* was that s. 2(a) would guarantee freedom related to *religious conscience*, meaning that s. 2(a) guarantees one single freedom.
[3] Benjamin L. Berger, "The Cultural Limits of Legal Tolerance", (2008) 21 Can JL & Jur 245 at 266, footnote 73 [Berger, "Cultural Limits"].

premises exposes the historical rationale for according religious freedom. Next, valuable lessons may be gleaned from the way Canadian courts protected the religious freedom of the Jehovah's Witnesses before the creation of the *Charter*. The religious beliefs of this sect deeply troubled some Canadians at a difficult time in the country's history and yet Canadian law upheld their freedom to believe and manifest their view of religious truth. The Witnesses also incarnated certain characteristics of religious believers that contribute to the need for religious freedom and serve to illustrate further its underlying historical justification.

I then move to a brief introduction to the modern right to freedom of conscience and religion contained in s. 2(a) of the *Charter*, and subsequently, I examine at length Chief Justice Dickson's masterful opening interpretation of the freedom found in *R. v. Big M Drug Mart*.[4] I contend that Dickson C.J. laid a broad and solid foundation for religious freedom. He looked to the past and also anticipated the future. He placed the guarantee of this freedom within its proper historical context and provided it with space to live and grow. The foundation that he laid had potential to sustain the interpretation of this freedom through the years. At the same time, however, Dickson C.J. also introduced into the understanding of religious freedom certain concepts drawn from liberal political theory that have come to dominate the way that law views religious belief in Canada.

Big M was the promise, and a review of what the Supreme Court of Canada has done with freedom of religion since *Big M* constitutes the next major part of my work. As I examine the jurisprudence of the highest court, I draw on the work of three legal scholars that have long studied the relationship between law and religion in Canada. On

[4] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, [1985] SCJ 17 [*Big M*].

many occasions, the Court has done well, very well, but I also contend that, on occasion, the Court has lost sight of the historically grounded reasons for religious freedom, has failed to understand why this freedom is so important, and has weakened and left it more vulnerable to limitation.[5] Thus, I begin with Locke's concept of tolerance, rooted in the history of Christian suffering.

[5] Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013) at 21.

Chapter 2 John Locke and Toleration

When the Supreme Court of Canada was first called on to define the nature of the guarantee of freedom of conscience and religion under the *Charter*, it took time to explore the historical context in which the concept arose.[6] In my contention, it did so because freedom of religion is a child of history. In turning to the past, though it did not say so expressly, the Court showed familiarity with the thinking of John Locke, the 17th century English philosopher, whose writing, "*A Letter about Toleration*"[7] is identified as the historical starting point of the call for religious freedom.[8] It is essential to return to the source and recall the lessons of history that Locke had learned, to remember the underlying historical rationale for this freedom. His arguments based on historical events assist in properly understanding what this freedom should be even in the present context.

As odd as this may now seem, Locke's inspiration to make a case for religious tolerance came from the bubbling caldron of "Christian brutality".[9] In the unfolding of

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[6] *Big M*, *supra* note 4 at paras 118 to 121.

[7] John Locke wrote his treatise in 1685. It was published, apparently without his knowledge, in 1689. Originally written in Latin, it was subsequently translated into other languages, including English: John Locke, "A Letter concerning Toleration and Other Writings", ed by Mark Goldie (Indianapolis: Liberty Fund, 2010), online: Liberty Fund < http://oll.libertyfund.org/title/2375 > [Goldie]. In what follows, I rely on Jonathan Bennett's translation, John Locke, "Toleration", online: <http://www.earlymoderntexts.com/assets/pdfs/locke1689b.pdf > [Bennett]. Bennett's translation is in scanned PDF format with two pages on each PDF page. I refer to a page as 2A, meaning the left side of PDF page 2. 3B is the right side of PDF page 3.

[8] Berger, "Cultural Limits", *supra* note 3 at 266, footnote 73; Richard Moon also references Locke's views on religious freedom: Richard Moon, "Freedom of Religion Under the Charter of Rights: The Limits of State Neutrality" (2012) 45:2 UBC L Rev 497 at 509 [Moon, "Limits of State Neutrality"]; ----- Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms", (2002-2003) 41 Brandeis LJ 563 at 568 (HeinOnline) [Moon, "Liberty"]; ----- Moon, "Accommodation Without Compromise: Comment on Alberta v. Hutterian Brethren of Wilson Colony", (2010) 51 SCLR (2d) 95 at 116 [Moon, "Hutterian Brethren"].

[9] Goldie, *supra* note 7 at 6.

the events following the division brought on by the Protestant Reformation, both Protestants and Catholics had shown a propensity to use their influence with the changing political powers of their day to persecute each other in the name of maintaining purity of Christian doctrine and practice, resulting in the suffering and death of many persons on both sides of this main Christian divide.[10] When a monarch rose to power that favoured the Catholics, Protestants suffered and when power changed hands, Catholics lived under oppression. Locke saw the futility and tragedy of the losses on both sides and out of weariness with suffering and death, gave voice to the call for freedom of religion.

As much as Christians were to blame for the horrors inflicted on each other and so have reason to approach the topic of religious freedom with a touch of humility and even shame, one should also note that the impetus for promoting freedom and tolerance in relation to religion emerged from within Christendom itself.[11] "[M]utual toleration of Christians", wrote Locke, is the "chief identifying mark of the true [Christian] Church".[12] The Christian message calls for love, meekness, and goodwill towards everyone, Christian and non-Christian.[13]

Toleration then, for Locke, was in keeping with the teaching of Christ and religion in general, the very purpose of which was to promote virtuous and pious living,[14] requiring that people live holy lives, exhibiting pure conduct and kind and gentle spirits.[15] To truly understand Christianity, thought Locke, is to adopt charity as one's highest goal

[10] *Ibid*.
[11] Bennett, *supra* note 6 at 1A.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid*.

and one's normative principle.[16] Relying on the New Testament Scriptures, Locke argued for faith that demonstrates itself through labours of love and not through the use of force or compulsion.[17] People cannot in good conscience "persecute, wound, torture, and kill other [people]" in a spirit of charity and benevolence.[18] It was inconceivable for Locke that one would end another person's life "in agony, still unconverted" in the name of seeking to save that [person's] soul.[19] Locke wrote graphically in saying that,

> It won't be easy to convince intelligent men that that someone who – dry-eyed and content with himself – delivers his brother to the executioner to be burned to death is acting purely from a strong desire to save that brother from the flames of hell in the world to come.[20]

In Locke's mind, persons that behave in this manner are not following the Prince of peace, who armed his servants with only the "Gospel of peace" and the purity of their lives.[21]

It is not charity and concern for people's souls that leads one to deprive them of their property and the goods of civil society.[22] What wrong have they committed? These persons may not go to the same church and perhaps they "conscientiously dissent from ecclesiastical decisions", decisions that the common folk often do not understand in any event, but they otherwise lead "innocent li[ves]" and do not cause harm to others. .[23] Toleration was, in the mind of Locke, "fitting to the Gospel and to reason".[24]

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[16] *Ibid* at 1B.
[17] *Ibid*.
[18] *Ibid*.
[19] *Ibid* at 2B.
[20] *Ibid* at 10A and 10B.
[21] *Ibid* at 2B.
[22] *Ibid* at 1B.
[23] *Ibid* at 1B and 2A.
[24] *Ibid* at 2B.

For Locke, to use violence against those that did not believe the same doctrine was the mark of one "striving for power and domination over" others rather than a sign of genuine concern for their spiritual wellbeing.[25] Such religious zealots pursued purity with violence, while masking "greed, theft and ambition" under the clothes of religion, all in a play for power and control.[26]

Against this historical background, Locke delineated separate roles or domains for government and religion, state and church.[27] It was the role of those who hold public or civil authority to use their state power solely for the "purpose of preserving and promoting the public good".[28] The state exists to protect persons in their enjoyment of what Locke called "public goods", by which he meant at a societal level, "the safety and security of the commonwealth"[29] and at the individual level, a person's "life, liberty, freedom from bodily illness and pain," and the possession of goods, such as money, land, houses, and so on.[30] The state's function was to watch over and protect the rightful obtaining and holding of such public goods, enacting laws to govern society and deal with breaches of the laws through the redistribution of those same public goods.[31]

In seeking to protect the wellbeing of its subjects, the state might need to resort to the use of force, which the people allow because the state acts on their behalf to protect the possession of the public goods of everyone.[32] The state's jurisdiction, however, was limited to this concern for the just holding of public goods and public authorities had no

[25] *Ibid* at 1A.
[26] *Ibid* at 16B.
[27] *Ibid* at 3B.
[28] *Ibid* at 3A.
[29] *Ibid* at 18A.
[30] *Ibid* at 3A.
[31] *Ibid*.
[32] *Ibid* at 3B.

business involving themselves in matters that went beyond this role. The state had no role in relation to the wellbeing of persons' souls.[33]

The concern for one's soul belonged to the individual alone.[34]. Each person was to look after their own spiritual wellbeing.[35] Locke contended that no person could have so little interest in the wellbeing of their own soul, one's eternal destiny, as to "blindly leave" its care to someone else or something else.[36] No one would be or should be so foolish. Each person was responsible for themselves and should inquire for themselves as carefully and diligently as they might.[37] Moreover, wrote Locke, "If someone strays from the right path, that is his misfortune, not yours; and your belief that he will be miserable in the after-life is not a reason for you to give him a bad time in his present life".[38]

God had not given authority to the state or its officials to compel any individual to do anything in relation to saving their soul. Nor can persons give to each other any power to so rule over the souls of other people. The state could not compel anyone to follow a particular religion. The state had no more certain knowledge of that which is good for the soul than did the individual. The state was in no better position to make decisions with respect to religion,[39] and could never be as concerned for the salvation of the individual as the individual is concerned for their own destiny.[40] If an individual followed the state down a wrong road, the state would not be there to undo the loss.[41]

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[33] *Ibid* at 3B.
[34] *Ibid* at 10A.
[35] *Ibid* at 3B.
[36] *Ibid*.
[37] *Ibid* at 11A.
[38] *Ibid* at 7B.
[39] *Ibid* at 11B.
[40] *Ibid* at 12A.
[41] *Ibid* at 11B.

Locke found support for his argument in the nature of faith.[42] The essence of true religion is faith. Religion is the expression of faith. One embraces a religion only because one believes in that faith to which the religion gives expression. Moreover, Locke understood that, even if one wanted to, it is impossible to believe something simply because someone else tells one to believe.[43] That would not be genuine belief. To offer true and acceptable worship to God, said Locke, one must be fully convinced in one's own mind that one is doing what is right. If one is not so convinced, one is a hypocrite and instead of offering acceptable worship to God, one is showing "contempt of God's majesty".[44] If one obeys the state in following the religion of the state and is not personally convinced of its truth, one does not have true faith and one would not reach salvation.[45] Even if the state were right, it would make no difference for the individual; the individual would be lost. Locke wrote that, "No road that I travel along against the dictates of my conscience will ever bring me to the home of the blessed".[46] Outward conformity to a religion that one inwardly rejects brings no salvation.[47] Without real faith, one does not please God. True religion then is the outward expression of the inward confession of the soul.

For this reason, Locke spoke at length of the futility of using force to compel people to profess something that they do not believe.[48] Moreover, expressions of belief made in the face of violence are of suspect value at best. State authority, in its use of

[42] *Ibid* at 4A.
[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid* at 12B.
[46] *Ibid*.
[47] *Ibid*.
[48] *Ibid* at 2B.

outward means of compulsion, has no ability to affect the inner movements of the heart.[49] It lies in the nature of the human mind and heart that faith cannot be compelled by external forces. Torturing people, locking them away, and depriving them of their belongings will not change their convictions.[50] Imposing doctrine or beliefs by law would be contrary to the nature of faith. Law cannot, by the use of force or command, cause truth to enter people's minds.[51] The state may employ information and argument, and seek by reason and persuasion to correct errors in support of some understanding as to what is good and acceptable, but the use of force is futile.[52] Though it is proper to seek to persuade men as to what is good and true, laws and court rulings have no impact on faith.[53]

Deriving from the nature of faith, and of some importance to the modern discussion surrounding religion, Locke contended that, "[W]hat we believe doesn't depend on our will".[54] It is not a matter of choice. One cannot choose to believe something that one does not believe. That would be absurd.[55] Moreover, even if law and its punishments could change minds, according to Locke, people should still refuse to give up their own reason and the voice of their own consciences to "blindly submit to the will" of the state.[56] For Locke, it would not be wise to follow a faith established by the state. Over the course of human history, states have espoused numerous different religions.[57] Some of them (or all of them) must have been wrong. Considering the wide

[49] *Ibid* at 4A.
[50] *Ibid*.
[51] *Ibid* at 18A and 4B.
[52] *Ibid* at 4A and 4B
[53] *Ibid*.
[54] *Ibid* at 17B.
[55] *Ibid*.
[56] *Ibid* at 4B.
[57] *Ibid* at 12B.

variety of religions spread around the world, why should one thoughtlessly adopt the religion promoted by one's own government? How can one be sure that one's state has the right faith? If faith were tied to geography, what one would believe would depend on mere accidents of history, where one happened to be born or who happened to hold power during one's lifetime. One's fate, one's "eternal happiness", would rest on one's birthplace. In Locke's mind, that defied reason.

One thing that must not be overlooked is that Locke wrote from a perspective of faith. He seemed to situate himself somewhere within a Protestant form of Christianity. He obviously did not agree with all religions, but it seems apparent that he accepted the possibility that there may be one way to the salvation of one's soul within religion. He allowed that in the sea of religious options, someone may be right. Unlike many persons of the present secularist age, he did not reject the possibility of religious truth. Indeed, based on the fact that Locke balked at extending toleration to atheists on the basis that for such persons, "promises, covenants, and oaths", the "bonds of human society", held no "suasion",[58] one might contend that Locke rejected outright the possibility that there was no truth.

Having defined the limited role of the state, Locke turned to describe the role of the church.[59] Locke believed in a legitimate, valuable, respected role for religion. He was not dismissive of the importance of faith and religion.

Locke defined a church (or any religious institution) as a "free society of [people] who voluntarily come together to worship God in a way that they think is acceptable to

[58] In Locke's mind, an atheist could make no claim on religious ground for toleration: *Ibid* at 22A.
[59] *Ibid* at 5A.

Him and effective in saving their souls".[60] There are several key concepts in this definition. Religious societies are free societies, free from government and free from each other. People freely choose to belong to them. No one is compelled to join. It follows that persons must be able to leave them voluntarily. No one is compelled to stay. People join a given free society because they are personally convinced that the way that this religion teaches them to serve God is acceptable to God and will positively impact the salvation of their souls. If they come to believe otherwise and cease to believe that following the teachings and worship of a given church is pleasing to God, they are free to leave. People are bound to their religions only by their hope of salvation.[61]

Religious institutions may need to impose some structure on their own activities and assembly, determining place and time of meetings, establishing criteria for membership and exclusion, and making rules to govern the society in general, but the sole tool for enforcing these regulations is inclusion in or exclusion from the church and its benefits. Turning again to the Scriptures, Locke argued that nowhere do they empower the church to persecute others, using violent means to compel anyone to "embrace… faith and doctrine".[62]

Of great importance and flowing from the delineation of its separate domain, religion had no right to use force to affect its own members' public goods or those of persons that did not belong to their religion. The church had no power over that which the state governed. The church was limited to the use of "exhortations, warnings, and

[60] *Ibid*.
[61] *Ibid*.
[62] *Ibid* at 5B.

advice".[63] If persons fail to respond to persuasive correction, the church can exclude them from its assembly or deprive them of access to the benefits of belonging to the organization,[64] participation in its services or membership in the association. Excluded persons, however, are not to be harmed in any way in relation to their holding of public goods. The source of power within a religious institution is solely ecclesiastical. Its power comes from and is restricted to the context of its voluntary religious society.[65] Locke wrote that, "[T]he Church is absolutely separate and distinct from the commonwealth. The boundaries of each are settled and immovable".[66]

Likewise, individuals had no power over other individuals to affect their worldly goods in the name of religion. For Locke, this applied to Christians and pagans or non-Christians. All persons are "kept safe from violence and injury" at the hand of the church.[67] All are equally secure in the possession of their civil goods. Even if persons that hold state power happened to belong to a particular church, they could not give their state powers to that church.[68] At no time does a church come to hold the "power of the sword". Nor can the church give the state the right to exercise jurisdiction over matters of faith for their own members or over persons that belong to other faiths.[69]

Locke advocated that churches should show "equity and friendship" to other churches and make "no claim of superiority or jurisdiction" over each other.[70] Every person and organization alike are convinced in their own minds that they are orthodox

[63] *Ibid*.
[64] *Ibid* at 6B.
[65] *Ibid* at 9A.
[66] *Ibid*.
[67] *Ibid* at 7B.
[68] *Ibid*.
[69] *Ibid*.
[70] *Ibid*.

and that everyone else lives in error and heresy.[71] The ultimate determination of such matters was to be left to the final court of the "Supreme Judge of all [people]".[72] To God alone "belongs the punishment of those who are in error".[73] For their part, clergy ought to promote within their churches that their parishioners show peace and goodwill towards all, both persons in agreement with their religion and otherwise, directing them to live lives of love, humility and toleration. They should do their part to promote cool heads and reduce "unreasonable hostility" towards persons that disagree with their beliefs.[74]

Persons who hold different opinions do not by so holding those opinions cause harm to anyone else, particularly in relation to the enjoyment of public goods. People of different faiths are simply "minding their own business".[75] They may not share the same religion, but they follow "rules of equity" and the "law of nature". They obey the laws of the society.[76] No one else is harmed by their false beliefs and "wrongheaded" worship.[77] Such persons only seek to serve God "in a way that they think is acceptable to Him and to cling to the religion that gives them their best chance of eternal salvation."[78] Locke appealed to the humanity that his readers shared with persons of other faiths. [79] Rather than using violence to punish those of different religious convictions, one would be better served by seeking to employ arguments to persuade others of their errors.

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[71] *Ibid* at 8A.
[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid* at 9A.
[75] *Ibid* at 9B.
[76] *Ibid* at 16B.
[77] *Ibid* at 18B.
[78] *Ibid* at 9B.
[79] *Ibid* at 16A.

Locke dealt with the situation in which the state crosses the line and commands something that the believer cannot accept.[80] He was convinced that if the state is well run, this should not happen frequently, but if it does, he advocated that the believer should refuse to do what his conscience forbids and "submit to the punishment for this if it isn't morally wrong for [them] to undergo it".[81] Moreover, that for reasons of conscience a person might determine that a law created for the public good is wrong would not give that person an excuse or a defence in relation to their disobedience of the law. The believer should obey or disobey and submit to the punishment. On the other hand, wrote Locke, "[I]f the law really does concern things that lie outside the magistrate's authority…, then [people] are not obliged to obey that law against their consciences".[82]

In discussing what the state might do in relation to a potentially false religion, Locke elaborated a principle of reciprocity. He wrote, "What power could the magistrate have to suppress an idolatrous church that couldn't somewhere somewhen be used to ruin an orthodox one?"[83] This is key. The foundation for one individual's own freedom implies or demands the recognition of the same freedom for others. The same power granted to the state to eliminate heretical or wrong beliefs could some day be used to eliminate one's own faith, perhaps an elegant and older variation on the current maxim of 'what goes around comes around'.

Locke even answered those that believe that the state should weigh in on all matters of morality. Not every sin need be punished by the state.[84] There are many sins

[80] *Ibid* at 19A.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid* at 15A.
[84] *Ibid* at 16B.

that the state leaves unpunished because such sins have no impact on other people's holding of their public goods. Even when certain sins, such as lying and perjury, do, in some circumstances, call for punishment by the state, it is not due to the fact that the behaviour offends God, but rather that there is harm done thereby to others and the state.[85] Locke did recognize that the state and religion shared some common jurisdiction in relation to some areas of life that are governed by concerns of morality.[86] Some immoral behaviour affects both one's civil duties and one's religion. Locke, accordingly, recognized the potential for conflict between the law and religion in relation to questions of morality. He opined that persons of faith must use "charitable warnings", attempting by teaching and persuasion to lead people away from error, but at no time would there be any place for the use of force or compulsion in matter of morality.[87]

Locke sounded a note of caution. There were things that the state should not tolerate. In some ways, however, the things that the state should not tolerate sound rather like the inverse of what Locke said should be tolerated. A church that does not recognize that toleration is the basis for its own freedom should not be tolerated.[88] Religions that teach compulsion by law or the use of force in matters of faith should not be tolerated. Religions that teach doctrines that "clearly undermine the foundations of society" or beliefs that are "condemned by the judgment of all mankind" should not be accepted. Those situations should be rare, thought Locke.[89]

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[85] *Ibid*.
[86] *Ibid* at 18A.
[87] *Ibid* at 18B.
[88] *Ibid* at 22A.
[89] *Ibid*.

In a matter that some might consider controversial, Locke exhibited his conviction that much of the violence characterized as religious, including war, was actually the result of the oppression of religion. Religious persons that suffer and languish under unfair treatment eventually reach a breaking point and react violently.[90] The solution is not to clamp down on religion, but to grant religion more freedom. Let all members of society enjoy "equality with their fellow-subjects under a just and moderate government".[91]

Finally, Locke extended his call for toleration to include non-Christians, Muslims, and Jews. None of these persons should be harmed in their possession of public goods because of their religion. Society should welcome all persons who are "honest, peaceable, and hard-working".[92] The state should control those that are ungovernable and that cause harm to others.[93] Once again, he rooted his appeal for interfaith tolerance in the Gospel. The Gospel does not command that believers persecute persons of other faiths. The Scriptures instruct that believers are not to judge those that are outside of the faith.[94]

Locke's arguments for tolerance are useful in the search for the underlying rationale for protecting freedom of religion in several respects. First and most importantly, Locke establishes that the concept of freedom of religion is a child of history, not the creation of abstract philosophical reasoning or the logical outcome of a given political theory. Freedom of religion is the common-sense conclusion of one that

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[90] *Ibid* at 23 and 24B.
[91] *Ibid* at 23B.
[92] *Ibid*.
[93] *Ibid* at 25B
[94] *Ibid* at 24A. Locke is perhaps referring to a passage in the Apostle Paul's First Letter to the Corinthians in chapter 5:12-13: "What business is it of mine to judge those outside the church? Are you not to judge those inside? God will judge those outside": *The Holy Bible, New International Version* (Grand Rapids, Michigan: Zondervan, 1984).

has seen what transpires when humans interact with one another without respect for that freedom. Locke lived in a time when there was no freedom of religion and he arrived at the conviction that religion must be free primarily because he saw what a lack of freedom produced in terms of suffering and death. His inspiration then for developing arguments in support of religious freedom was drawn from human experience itself. He had seen that of which humanity is capable. He understood the inevitability of conflict, even ongoing future conflict, and acceptance of this reality drove him to appeal for freedom. His appeal was foremost an appeal to Christians, with full knowledge of their own bloody past, to extend freedom to one another. He promoted the separation of church and state and the mutual respect of the state for the church's unique role and the church for the state's special, limited role, as a way in which different faiths might exist and live in peace, as a way that people might tolerate one another in their differences.

Yes, Locke elaborated a political position, but his freedom of religion was not something that was inspired by political theory, not even liberalism. Note that he did not root his argument for religious tolerance in concerns for human autonomy, equality and the need for individual self-expression. I contend that Locke's freedom of religion was more like a political compromise, a societal truce, arrived at by generations of people that saw the horror of inflicting harm on others in the name of right thinking and belief. It was as though people should say, "Okay, let's stop killing one another". As such, the right to freedom of religion had content or meaning and justification based on history, not based on the need to follow abstract political reasoning to consistent conclusions. Moreover, for Locke, religious freedom had to take the form of tolerance.

I would also contend that Locke was able to elucidate a clear and solid foundation for his right to freedom of religion, in part, because he spoke from the perspective of a believer, meaning that he believed in the existence of truth, religious truth.[95] One may perceive hints here and there as to wherein his loyalties lay, though he nowhere openly stated his position, but it is certain that he believed in *ultimate* truth.[96] He nowhere excluded the possibility that some one religion might be true, and that knowledge of the truth might also be attainable. He believed in the possibility that one religion may in fact be correct and others wrong. Locke respected religion. Though he recognized that some religions could be wrong in their beliefs, he still maintained the possibility that one of them might be true and based on this conviction, he saw the need for people to be free to seek and find that truth. For Locke, religious freedom was a necessary condition to allow individuals to come to their own knowledge of this truth.[97]

Nonetheless, that one religion may be correct, and others wrong did not in Locke's mind give any religion any special power or right to oppress and use violence against other religions in the advance of its own interests. His fear that persons of one religion might end up living under an unsympathetic state authority likely provided the catalyst for this argument. History abounded with examples of state oppression of religion often in the name of religion and Locke himself lived with the spectre that his own faith might not be the one accepted and promoted by the state.

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[95] Moon, "Liberty", *supra* note 8 at 568; ----- Moon, "Hutterian Brethren", *supra* note 8 at 116; ----- Moon, "Limits of State Neutrality", *supra* note 8 at 509.
[96] I am here referring to the conviction that objective truth exists in contrast to those that might deny the existence of objective reality, truth, morality, etc.
[97] ----- Moon, "Liberty", *supra* note 8 at 568.

Locke was well positioned to make a case for religious freedom. I contend that if present day courts reason from a position different than that of Locke, especially if they write from a position of disbelief in religion, they would likely struggle to understand and deal properly with issues of freedom of religion. They might fail to give religion proper weight in their considerations. I am not here referring to courts that merely hold different religious beliefs than the parties before them, but to a court that might believe that there is no such thing as an ultimate religious truth, a court that would consider that religion is a purely personal matter not concerned with truth at all. Richard Moon has raised the suggestion that the existence of religious truth is no longer the underlying premise of the debate in relation to religious freedom.[98] Moreover, atheism, agnosticism, deliberate apathy, and blissful ignorance are religious positions that would have been quite rare in Locke's day, at least among the "educated", but are now widespread among those so considered. If a judge analyzes from one of these underlying premises, might that not affect his or her legal reasoning?

I contend that a court that consciously or unconsciously excludes the legitimacy of positions of faith as truth would have some difficulty grasping the value of religion. As I turn to the case law, one should be vigilant for any sense of a trend to leave no room in legal discussions for the possibility that one religion may in fact be true to the exclusion of all others. Some courts seem to operate on the premise that all religions are acceptable. All are equally of worth. All are to be respected. Hence, courts emphasize equality and respect. This was not exactly Locke's position. Locke believed in truth. He called for

[98] *Ibid* at 569. Moon seems to cede the truth territory for religion by his acceptance that one must look elsewhere for the justification for religious freedom.

tolerance, not necessarily respect, if by respect means that a contradictory religious belief might be equally true or valid.

Unlike Locke, persons that lack faith or positively discount any value to faith would see no personal need for religious freedom other than a "freedom from religion" type of freedom. They might fail to see the need to accord freedom of religion to others, at least on the basis that religion should be tolerated because it is potentially true or has validity. Some might look at the history of religion and instead of seeing a basis for religious tolerance, might see a basis for the elimination of religion entirely.

Locke's treatment of the subject further adds to what I will argue because he understood something of the mystery of faith. Contrary to what will be seen as the modern legal mantra, faith is not based on choice. It is not a mere matter of will. Faith is something else; it is something other. Speaking from the perspective of a believer, at least in this treatise, and understanding the mysterious nature of faith, Locke was able to argue for tolerance based on the futility of the use of violence to compel religious belief. He understood that laws and punishment have no effect on real faith because faith is not a choice of the will. If it were, it could be subject to compulsion.

Locke's thinking is also refreshing in its affirmation of the desirability and propriety of argument and persuasion.[99] Toleration of other religious beliefs does not imply the loss of anyone's right to dispute religious error. Toleration does not mean that one cannot argue that some religions are false. Mark Goldie writes that, "Locke would… have been dismayed by a society such as ours in which the onus on respect frequently

[99] Goldie, *supra* note 6 at 12.

produces a timid unwillingness to challenge the beliefs of others"[100]. As mentioned, Locke's view of tolerance did not extend to an acceptance that all religious beliefs, no matter how contradictory, were equally deserving of respect and acceptance. He did not advocate that people stop discussing and debating their respective views in the interests of getting along together. He merely asked that persons stop inflicting grief and suffering on each other in the name of religious purity.

For Locke, the underlying rationale of freedom of religion was to put an end to inter-Christian persecution. His notion of religious freedom was that of a child born of history, the expression of a necessary principle of reciprocity, the logical consequence of the Christian message, and consistent with the essence of true faith, which was a personal matter and immune to the effects of compulsion. He saw the need to define and maintain separate roles for the state and the church. He wrote from a conviction that truth existed, and that freedom was a necessary condition to allow individuals to seek and find this truth. Association with religion was voluntary. He both recognized that the state had a limited role in relation to issues of morality and that by times, should the state go too far, a believer might have to disobey the law and submit to the consequences of one's faith, paying the cost of one's convictions.

I contend that courts would do well to go back to Locke and re-examine his arguments. His approach to toleration has largely been left behind in recent times. It is not enough to identify his writing as the origin of the call for the right to freedom of religion and then fail to see the rich historical foundation for what he argued. Locke's historically grounded common sense has much to say to the modern legal situation. A

[100] *Ibid*.

renewed interest in his thinking would uncover and strengthen the justificatory foundation for freedom of religion. One must grant that religion may in fact be true or one will fail to see its proper value.

That religious freedom is a child of history is evident in the manner in which Canadian courts rose to protect the Jehovah's Witnesses in their struggle to advance their religious beliefs around the time of the Second World War. I turn next to the lessons that may be learned from their story.

Chapter 3 Jehovah's Witnesses and Canadian Toleration

In the quest to understand more fully the justification for the right to freedom of conscience and religion in Canada, it is informative to look back in history to a period prior to the existence of the *Charter*[101], to a time when Canadian society found itself squarely put to the test by an unpopular manifestation of religious conscience and belief, the aggressive expression of which pushed the law to its outer limits of tolerance. Canada or at least a part of Canada has been down the road of attempting to suppress religion. The Jehovah's Witnesses proudly wear the badge of honour for having been the only religious group whose literature and even very existence had been made illegal in Canada since the mid-nineteenth century.[102] As difficult as it might be to believe now, for a period during the Second World War, it was unlawful in this country to be a Jehovah's Witness. The fierce determination of the Witnesses to hold and spread their religious views in the province of Quebec was met with vigorous resistance that created many bitter clashes and led to legal disputes that cast light on the Canadian concept of the right to religious freedom.[103] Their experiences illustrate the need for a historical understanding of the justification for religious freedom

[101] One might also say even prior to the *Canadian Bill of Rights*, SC 1960, c 44.
[102] M. James Penton, *Jehovah's Witnesses in Canada: Champions of Freedom of Speech and Worship* (Toronto: MacMillan Company of Canada, 1976) at 2, 4, 54, and 75. I acknowledge my indebtedness to Mr. Penton's fascinating and exhaustive historical work. The story he tells brings clear insights into the workings of Canadian law in relation to the protection of religious freedom.
[103] *Ibid* at 4.

Consonant with the principle of reciprocity detected in Locke's writing, the battle of one person of faith for recognition of their own religious freedom is the battle of every person of faith for their freedom. Believers of all stripes in Canada, no matter what they might think of the teachings and tactics of the Witnesses, should feel some gratitude for this group of militant believers. One need not agree with their interpretations of the Scriptures to acknowledge that no other religious group has done so much to bring legal religious-based complaints before the legislatures and courts of the country in order to insist that the law define and respect religious freedom[104]. M. James Penton quotes a Charles S. Braden who in commenting on the Jehovah Witnesses' legal battles in the United States, said that,

> Against every sort of opposition they press ahead. They fight by every legal means for their civil rights, the right of public assembly – sometimes denied them – the right to distribute their literature, the right to put God above every other loyalty. They have performed a signal service to democracy by their fight to preserve their civil rights, for in their struggle they have done much to secure those rights for every minority group in America. When the civil rights of any one group are invaded, the rights of no other group are safe.[105]

The Jehovah's Witnesses' battles produced some recognition of the rights of all believers.[106]

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[104] *Ibid* at 21.
[105] *Ibid* at 22.
[106] Several of the court cases initiated by the Jehovah's Witnesses came to form part of the Supreme Court of Canada decisions that gave rise to the concept of an *implied bill of rights*: Eric M Adams, "Building a Law of Human Rights: Roncarelli v Duplessis in Canadian Constitutional Culture" in "The Legacy of Roncarelli v Duplessis, 1959-2009", (September 2010 Special Issue) 55 McGill LJ 437 at 439 [Adams, "Building a Law of Human Rights"]; David J Mullan, "Underlying Constitutional Principles: The Legacy of Justice Rand", (2010) 34 Man LJ 73 at 74 and 75 [Mullan, "Underlying Constitutional Principles"]. Based primarily on the Preamble of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 19, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*] and the "expressed wish of the provinces" that formed the original union for "a constitution similar in principle to that of the United Kingdom", it was argued that one could discern certain "unwritten" constitutional principles that not even the legislative bodies could violate or undermine. The courts accessed principles that were "inherent in federalism and necessary for modern democracy". Freedom of speech, political expression and the press received the clearest support in the various judicial opinions. Religion was mentioned but did not receive a strong

The pertinent events related to the Jehovah's Witnesses' legal struggles began over a century ago, in a time prior to the widespread secularization of Canadian society and before the massive decline of the influence of religion in the province of Quebec. One must also acknowledge that the Witnesses' religious struggles occurred during a period of war. That Canada was in a state of war is relevant because the Witnesses' beliefs were perceived to be negatively affecting the war effort. Many persons in Canada, including politicians and members of the judiciary, were offended by the *religious* content of the Witnesses' religious message, opining that it crossed the bounds of religious decency,[107] but at the same time, the Witnesses' message and behaviour strayed close to another line in the minds of Canadians, the line that separated those that were considered loyal subjects and determined to give their lives in support of the war effort and those that opposed the war and so were not fighting against the evil of the age. The sect adopted a pacifist, conscientious objector posture, in relation to all war, and their members spoke loudly against the war effort. It was felt by many that their religion discouraged the country in a time when there was a great need for courage and sacrifice. More than just religious heretics and offensive unwanted evangelistic nuisances, the Witnesses were considered political traitors and their beliefs a liability in relation to the war.[108] When the government moved to outlaw the Witnesses, it was formally for being a subversive movement.[109]

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affirmation. In a later case, Justice Beetz, writing for a majority of the Supreme Court of Canada in *Canada (AG) v. Montreal (City)*, [1978] 2 SCR 770, 19 NR 478 [*Dupond*], ruled that, "None of the freedoms [referring to those in the *implied bill of rights*] is so enshrined in the Constitution as to be above the reach of competent legislation".

[107] Penton, *supra* note 102 at 86.

[108] *Ibid* at 43, 50, 52, and 78.

[109] *Ibid* at 131.

On the other hand, the example of the Witnesses is still of value in examining the historical justification of religious freedom. Often unpopular religious messages are made up of a mixture of questionably religious opinion, distortion of reality and history, and pure vitriol. It is sometimes difficult to characterize these extreme forms of belief as being truly related to religion. They may be racist and hateful, often the type of speech that could be captured by the *Criminal Code* provisions in relation to the promotion of hatred. [110] By contrast, though some likely found the Witnesses' message hateful, the content of their message was clearly religious in nature. Their writings were, at all times, religious.

The Witnesses' message tested Canadian society's capacity for tolerance. The Witnesses' aggressive proselytization was considered offensive.[111] They were dogged in their bitter religious attacks on almost every facet of society. All human governments were corrupt. The political and economic systems of the world were evil. They denounced all forms of organized religion in graphic terms and looked forward to an apocalyptic eradication of all human organizations that stood in the way of the Kingdom of God.[112]

Gleaning "from" the Witnesses' Supreme Court of Canada cases, it is possible to piece together some of what these believers were saying that so deeply offended the people of Quebec. The sect attacked the administration of justice in the province as biased, alleging that it was under the control of the Catholic clergy, that Quebec judges

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[110] *Criminal Code*, RSC 1985, c C-46.
[111] Geneviève Cartier, "L'héritage de L'affaire Roncarelli c. Duplessis 1959-2009" in "The Legacy of Roncarelli v. Duplessis, 1959-2009" (September 2010 Special Issue) 55 McGill LJ 375 at 376 [Cartier, "L'héritage"].
[112] Penton, *supra* note 102 at 86.

ignored their duties and oaths by engaging in tongue lashings of the accused persons that appeared before them, and that courts imposed scandalous sentences at the bidding of a corrupt and overreaching church.[113] Quebec hated God, Christ, and freedom.[114] Quebec should be ashamed.[115] Police forces and members of the clergy were criticized for standing by and watching mob violence perpetrated against the Witnesses.[116] It was suggested that politicians were using their powers to create laws to "'get' those not favoured by the ruling elements".[117] Police were accused of allowing religiously motivated violence against the Witnesses and then turning around and arresting the Witnesses, instead of the perpetrators of the violence.[118] Their heinous crimes were the distribution of Bibles or pamphlets with biblical passages.[119] The opponents of the Witnesses, so-called Catholic hoodlums, threw rocks, tomatoes, potatoes, cucumbers, eggs, and human excrement.[120] Quebec was accused of using "mob rule and gestapo tactics".[121] Quebec was an "obedient servant of religious priests".[122] Religion was an adulteress and a whore and committed "religious fornication with the political and commercial elements".[123] From the balcony of the Vatican, the Catholic Church, the Harlot of the Book of Revelation that was committing adultery with the political systems

[113] *Boucher v R*, [1950] 1 DLR 657, 96 CCC 48 at para 51[*Boucher 1*].
[114] *Ibid* at paras 4 and 15.
[115] *Ibid* at para 51.
[116] *Ibid*.
[117] *Ibid*.
[118] *Ibid*.
[119] *Ibid*.
[120] *Ibid*.
[121] *Ibid*.
[122] *Ibid*.
[123] *Saumur v Quebec (City)*, [1953] 2 SCR 299, [1953] 4 DLR 641 at para 59 [*Saumur*].

of the world, blessed her lovers, tracing her roots back to Babylon.[124] The Catholic Church or its Pope was the anti-Christ and the devil's seed.[125]

The Witnesses complained of assaults and beatings, the destruction of their materials, entry without warrant into their residences, the removal of property, daily lawless arrests, abusive tirades on the part of court officials, excessive bail, threats of higher bail if persons returned before the court, some 800 charges facing Witnesses,[126] and inconvenience and expense-causing delay due to adjournments.[127] A court official allegedly referred to the Witnesses as a "bunch of crazy nuts". One member charged had to appear 38 times in court to have their matter addressed.[128]

In response to the violence that they faced, the Witnesses published and distributed a pamphlet entitled "Quebec's Burning Hate for God and Christ and Freedom Is the Shame of All Canada".[129] Premier Duplessis himself labelled the Witnesses' writings as reprehensible and harmful to the people of Quebec, going as far as to say that their message was unhealthy, hateful,[130] libellous,[131] and seditious.[132] Others alleged that the obnoxious message of the Witnesses was "insulting and offensive to the religious beliefs and feelings of the Roman Catholic population" and caused the people of Quebec hurt.[133] The Witnesses were considered "disturbers of the public peace" and "constant

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[124] *Ibid* at 59; Cartier, "L'héritage", *supra* note 111 at 376; and *Saumur*, *supra* note 123 at 45.
[125] Penton, *supra* note 102 at 71.
[126] The Witnesses in their allegations in relation to the events of 1946 claimed that their members were facing some 800 charges: *R v Boucher*, [1951] 2 DLR 369, [1951] SCR 265 at para 63 [*Boucher 2*]; Rand J. speaks of hundreds of charges: *Boucher 1*, *supra* note 113 at 77.
[127] *Ibid*.
[128] *Boucher 2*, *supra* note 126 at para 63.
[129] Penton, *supra* note 102 at 186.
[130] Cartier, "L'héritage", *supra* note 111 at 379.
[131] *Roncarelli v Duplessis*, [1959] SCR 121, [1959] SCJ No 1 at para 36 as per Rand J [*Roncarelli*].
[132] Cartier, "L'héritage", *supra* note 111 at 378; *Roncarelli*, *supra* note 131 at para 136.
[133] *Ibid* as per Rand J at para 29.

sources of trouble and disorder".[134] Some thought their movement dangerous. They provoked "serious agitation" and faced accusations of seditious conspiracy.[135]

When brought to court, which occurred frequently, the Jehovah's Witnesses were quite successful in winning the day legally. Their victories before the Supreme Court of Canada, however, did not always produce clear affirmations of the religious freedom that they hoped to establish. Though the sect won their cases, the reasons for which they won were not always ringing endorsements of the right to freedom of religion. The decisions were often highly fractured, characterized by multiple, conflicting judicial opinions. Rulings were made by narrow majorities joining in the final result, but rarely together in the reasoning. If one includes all judges involved in the cases from the first instance to the highest court, the weight of judicial opinion was often against the recognition of the righteousness of the Witnesses' position. More than a few judges were willing to decide cases for and against the Witnesses on narrow procedural issues.[136] Many judges did not perceive the religious character of the disputes. Here and there, a few judges would say things that sounded like they recognized the importance and inviolability of religious freedom, but often even those judges spoke in guarded language and without much explanation as to the foundation for what they were saying.

R. v. Boucher is perhaps the most important of the Jehovah's Witnesses' cases.[137] Mr. Boucher, a farmer, living near the town of St. Joseph de Beauce, Quebec,[138] admitted to having knowingly distributed several copies of *Quebec's Burning Hate for God* and

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[134] *Ibid* as per Taschereau J at para 12.
[135] *Ibid*.
[136] *Ibid*.
[137] There were two decisions in *Boucher*. See notes 113 and 125.
[138] *Boucher 1*, *supra* note 113 at para 76.

was convicted of publishing a seditious libel. He was sentenced to a month in jail.[139] The case is full of interesting twists and turns, but it is of most value for its determination that the religious attacks of the Witnesses did not constitute seditious libel.[140] It was not enough that a publication "promote feelings of ill-will and hostility between different classes" of persons within society.[141] Rather to constitute seditious libel, the jury had to find that the accused intended to incite others to use physical violence or "create a public disturbance or disorder".[142] It was not enough that the accused used strong language that might be hurtful or harmful, that readers of their materials would be "annoyed or even angered" or that the words would result in discontent, ill-will, discord or even hostility.[143] The Court rejected the Crown's contention that it was enough that the publication was "calculated to disturb the tranquillity of the State, by creating ill-will between different classes of the King's subjects".[144] The Court recognized the importance of free expression to the democratic process within justified limits.[145] Mr. Boucher was eventually acquitted.

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[139] *Ibid* at paras 49 and 50.
[140] *Ibid* at para 35.
[141] *Ibid* at para 41. Important to the debate was an old English definition of *seditious libel* that had appeared in an edition of *Stephen's Digest of the Criminal Law*, providing that,

> A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

It was to this last phrase that the prosecution turned in support of their allegations against the Witnesses.
[142] *Boucher 1*, *supra* note 113 at paras 28 and 44.
[143] *Ibid* at paras 44, 54, 56, and 85.
[144] *Ibid* at para 52.
[145] *Ibid* at para 35.

Of all the judges, Mr. Justice Rand best cut through the fog surrounding the issues and neatly encapsulated what was going on as a "religious controversy".[146] Recognizing that the manifestation of religious belief can evoke wide-ranging emotional reactions, he characterized what the Witnesses were doing as activities that were "taken for granted to be the unchallengeable rights of Canadians".[147] He wrote that, "Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life".[148] Discussion on political, social and religious subjects is critical. That such views "clash" had "deeply become the stuff of daily experience". "Controversial fury is aroused constantly by differences in abstract conceptions". "[M]ere ill-will as a product of controversy" is not enough to render a religious message unlawful. Participants in discussions can exhibit "fanatical puritanism in ideas as well as in morals". Subjective reactions of rage and feelings of ill-will could not be the basis for a criminal charge.

Rand J. went on to say that, "[O]ur compact of free society accepts and absorbs these differences".[149] Note his use of the concept of a compact. Note the reference as well to absorbing differences. Our society, a mature and reasonable society, is strong enough to allow for passionate disagreement and still function. Ideas that create feelings of "discontent, disaffection and hostility" stimulate the "search for the constitution and truth of things generally". Rand J. saw the need to allow such debate as the necessary creation of the conditions that allow us to seek truth. Rand J. also defended "free criticism" as

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[146] *Ibid* at para 76.
[147] *Ibid* at para 77. The Witnesses handed out Bibles and tracts and held religious services publicly and privately teaching their interpretation of the Scriptures.
[148] *Ibid* at para 85.
[149] *Ibid*.

something that is essential for "modern democratic government". There is a need to allow for the widest possible range of public discussion and controversy.[150] In passing, he pointed out the irony that it was the Witnesses that were considered criminals for having provoked others to use violence against them.[151] If persons react violently to something that is said, they are the hoodlums, not those that engaged in the manifestation of belief.[152]

Rand J.'s thinking in *Boucher* echoes Locke's concept of the justification for religious freedom. He speaks of religious freedom forming part of a compact of a free society. It is received as part of a political compromise that allows people to live peacefully together. There is a need to accept that there is ample room within society for different views and that society is able to absorb differences and still function. He joins with Locke in seeking to preserve the conditions that allow persons to strive to find truth. His thinking and the outcome of the case accord well with the idea of tolerance in

[150] *Ibid* at para 90. Rand J. did qualify what he said to require that persons engage in debate or speech in "good faith" or for proper purposes. He wrote that, "[A] motive or ultimate purpose, whether good or believed to be good is unavailing if the means employed is bad; disturbance or corrosion may be ends in themselves, but whether means or ends, their character stamps them and the intention behind them as illegal".

[151] Rand J.'s examination of the crime of seditious libel illuminates the historical context of the crime. At one time, political leaders were considered "superior beings, exercising a divine mandate" and were simply to be obeyed without "criticism, reflection or censure". There was no concept of equality between the leaders and the common person. Leaders were not accountable to the people. In such circumstances, seditious libel was, "in essence, a contempt in words of political authority or the actions of authority". The time of unquestioning respect had passed, however, and under democratic government, leaders were servants, "bound to carry out their duties accountably to the public": *Ibid* at paras 79 and 80.

[152] *Ibid* at para 88. On the re-hearing, Kellock J. echoed this thinking in *Boucher 2*, *supra* note 125 at para 44 where he wrote that: "To say that the advocacy of any belief becomes a seditious libel, if the publisher has reason to believe that he will be set upon by those with whom his views are unpopular, bears, in my opinion, its own refutation upon its face and finds no support in principle or authority. Any such view would elevate mob violence to a place of supremacy". Those who resort to violence are the ones that should be criticized.

general. He recognized that freedom of religion is a necessary condition of a proper functioning democratic society. Canada was able to tolerate religious diversity.

The *Boucher* case is representative of an attempt to use criminal law to stop the dissemination of religious belief. *Saumur v. Quebec (City)*[153] centred on the challenge of a City of Quebec by-law, which prohibited the distribution of "any book, pamphlet, booklet, circular, tract whatever without having previously obtained for so doing the written permission of the Chief of Police".[154] It was apparent that the by-law was created with the Jehovah's Witnesses in mind and was aimed at preventing their evangelistic activities.[155] The main question in the case was whether the right to freedom of religion could be restrained by legislation; the case is about censorship.[156]

As in *Boucher*, a disturbing and relevant feature of the case that bears noticing is the reluctance of four dissenting judges to see the broader implications of the dispute, namely that what was at stake was religious freedom. They were firm in their view that the sole question to be decided was the validity of a municipal by-law, accepting that the City of Quebec was acting in its regulatory role, addressing matters of cleanliness, good order, peace and public security, and the prevention of unrest and riots.[157] People might throw the materials on the ground or become upset and cause scenes. Offended readers could turn violent and retaliate against the Witnesses. If the contents of the materials were provoking attacks on the Witnesses, the distribution of those materials should be

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[153] *Saumur*, *supra* note 123.
[154] *Ibid* at para 70.
[155] *Ibid* at para 7.
[156] *Ibid* at para 5. The *Saumur* decision contains discussions about the implications of the nature of the British constitution, the *British North America Act*, a pre-Confederation statute and Quebec legislation along with questions of the distribution of powers between the provinces and the federal government which are beyond the scope of this work: *Ibid* at para 71.
[157] *Ibid* at para 12.

made unlawful. The handing out of tracts would disrupt traffic. Streets were meant to provide unhindered passage from one place to another. Any other use of the streets is secondary and would be tolerated only if the authorities felt that the proposed use did not affect the public interest.[158] The city went further and characterized the writings as insulting and provocative, and their distribution as not religious, but anti-social acts,[159] acts that might disturb the public peace and the "tranquillity and security of the peaceful citizens" through the provocation of disorder.[160] The city disputed whether handing out the tracts was even a religious act and whether it was covered by the right to freedom of religion.[161] Religion could not become an excuse for "licence" or a reason to authorize practices that were incompatible with public peace and security.[162]

Happily, a majority of the Supreme Court saw the religious nature of the dispute and found that the Witnesses had a legal right to "attempt to spread their belief".[163] Their publications did not constitute "licence" and as vitriolic as their attacks were, they were not inconsistent with public peace.[164] The country's capacity for tolerance was on display. One judge noted that, "The peace and safety of the Province will not be endangered if [the] majority do not use the attacks as a foundation for breaches of the peace".[165] Another judge said that Mr. Saumur was exercising his right to religious

[158] *Ibid* at para 23.
[159] *Ibid* at para 13.
[160] *Ibid*.
[161] *Ibid* at para 51.
[162] *Ibid.*
[163] *Ibid* at para 74.
[164] *Ibid.*
[165] *Ibid.*

freedom and "if doing so provokes other people to commit crimes of violence he commits no offence".[166]

The most vocal defender of religious freedom, Rand J. found that the by-law constituted censorship of religious freedom and conscience.[167] In paragraph 89, he writes that,

> … religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.[168]

Rand J. also concluded that pursuant to the distribution of power under the *Confederation Act of 1867*,[169] the federal government received the authority to legislate in relation to religion as falling under its peace, order and good government power. Matters of "religious belief, duty and observances were never intended to be included" within the powers of the provinces; they were not local or private matters.[170] Religious matters were a national concern, pertaining "to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other, and there is nothing to which the "body politic of the Dominion" is more sensitive".[171]

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[166] *Ibid* at para 257. One judge felt that if the material annoyed or insulted readers such that it would provoke disorder, that would be justification enough for the by-law.
[167] *Ibid* at paras 86 and 87.
[168] *Ibid* at 89.
[169] *Constitution Act, 1867*, *supra* note 106.
[170] *Saumur*, *supra* note 123 at 95 and 97.
[171] *Ibid* at 97.

Rand J. made an interesting distinction between civil rights and more fundamental freedoms. He writes that, "[C]ivil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order".[172] In using the language of the "conditions of community life", Rand J. again sounds like Locke, but in his placing of the right to freedom of religion as a necessary attribute and mode of human self-expression, he foreshadows language later used by the courts in the post-*Charter* period.

Rand J. also acknowledged that the right to freedom of religion would be subject to limit. The exercise of these fundamental freedoms may injure others. The law may need to limit them through the creation of civil rights. He has in mind legislation against such things as defamation. One might also see an opening for criminal sanction for the promotion of hatred. Persons enjoy religious freedom within the societal space left by the limitations of civil rights and public law.[173]

Rand J. also developed further the argument based on the requirements of democracy.[174] Briefly, the intent of the original founding provinces upon union was the creation of a country "with a constitution similar in principle to that of the United Kingdom".[175] Government was to be by parliamentary institutions, democratically

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[172] *Ibid* at 96.
[173] *Ibid*.
[174] Arguments in support of freedom of religion are often grounded in the need for a free exchange of ideas as an essential condition of a healthy democracy. This is Waldron's main contention. I acknowledge the force of that argument but would also note that the argument from democracy provides support for freedom of expression of all ideas, not just religious beliefs. Religious beliefs are just one more set of beliefs among many. It is not apparent to me how the democratic argument justifies a special protection for freedom for religion: see Waldron, *supra* note 5 at 9, 10, 13, 24, and 73.
[175] *Saumur*, *supra* note 123 at para 99.

elected assemblies, institutions that drew their very legitimacy from the consensus of public opinion "reached by discussion and the interplay of ideas". To censure the free flow of such ideas, including religious ideas, would be to destroy an essential condition of the proper functioning of those institutions.[176] If government censures thought, it cuts itself off from the people. He writes that, "The only security is steadily advancing enlightenment, for which the widest range of controversy is the sine qua non".[177] Rand J. speaks of free speech carrying "incidental mischiefs", but being the "breath of life for parliamentary institutions",[178] "essential to enlighten public opinion in a democratic State".[179] He writes that, "[I]t cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest".[180] Writing of the by-law in question, he says that, "[A] more objectionable interference, short of complete suppression, with that dissemination which is the "breath of life" of the political institutions of this country than that made possible by the by-law can scarcely be imagined".[181] Unstructured and unfettered discretion was given to the Chief of Police to censure whomever he pleased.

Rand J. noted as well the importance of streets and highways to accessing the public,[182] describing them as the "only practical means available for any appeal to the community generally".[183] The by-law had nothing to do with street control, disruption of

[176] *Ibid* at para 99.
[177] *Ibid*.
[178] *Ibid* at para 100.
[179] *Ibid* at para 101.
[180] *Ibid*.
[181] *Ibid* at para 102. Another judge pointed out that if a right of censorship of religious writings was permitted, the same power would extend to political views: *Ibid* at para 241.
[182] *Ibid* at para 102.
[183] *Ibid*.

traffic, nuisance, cleanliness and so on.[184] Not all forms of distribution of materials were prohibited in a particular location on the streets; instead, the intent was to frustrate the Witnesses.[185]

On a historical note, Penton writes that the Supreme Court of Canada decision in *Saumur* affirming the right of the Witnesses to propagate their religious views had the effect of putting an end to more than 700 charges against members of the sect in the province of Quebec.[186]

Several other cases decided in this time also protected religion in Canada through reasoning that turned on the determination that legislation that affected religion was *ultra vires* the provinces, being a criminal law power belonging solely to the federal government. Though this finding sheltered religion to a degree from provincial legislative incursion, it still left it open to restriction at the federal level, leading to the need for constitutional protection.[187]

To similar effect as *Boucher* and *Saumur* is the case of *Chaput v. Romain*, in which Quebec police entered a private residence and put an end to a religious service, seized religious materials, including a Bible, and then drove a visiting Witness minister to the border.[188] Only at the Supreme Court of Canada did the right to freedom of religion

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[184] *Ibid* at para 103. Another judge agreed that the by-law was aimed at the "minds of the users of the streets": *Ibid* at para 126.
[185] *Ibid*. Mention was made of *re Cribbin and the City of Toronto*, (1891) 21 OR 325 in which the by-law in question provided that, "No person shall on the Sabbath Day, in any public park ... in the City of Toronto publicly preach, lecture or declaim".
[186] Penton, *supra* note 102 at 212.
[187] *Henry Birks & Sons (Montreal) Ltd. v. Montreal (City)*, [1955] SCR 799.
[188] *Chaput v Romain*, [1955] SCR 834 at paras 1, 2, 10, 13 and 29 [*Chaput*]. Along the same vein is the case of *Lamb v. Benoit*, [1959] SCR 321 in which a young woman was arrested and held in custody without a telephone call for three days in conditions "too repugnant" for one judge to describe for allegedly having in her possession a copy of the *Burning Hate* pamphlet. Her treatment was considered reprehensible and humiliating. The police officer even offered to release her if she waived her right to take action against the

find any traction. Using language reminiscent of Locke, one judge affirmed that there is no state religion in Canada. No one is obliged to hold any belief. All religions are on the same equal footing. All persons have complete liberty to think as they desire. Conscience is a personal matter. He even gave a nod to the concept of reciprocity. The majority in Quebec was denying to their minority within Quebec rights that they demanded in other parts of the country.[189] Society can absorb different religions.

Another example of public officials using their influence and authority to discourage the spread of religious beliefs is likely the most famous of the Jehovah's Witnesses cases, that of *Roncarelli v. Duplessis*.[190] This case is most well known for its contribution to the concept of the *rule of law*, but is also considered a victory for religious freedom.[191] Mr. Roncarelli was a Montreal restaurateur that used his financial means to provide bail for Jehovah's Witnesses facing charges related to their religious activities. His involvement came to the attention of the premier himself and in a series of unguarded exchanges of advice and a not subtle enough direction to refuse the renewal of Mr. Roncarelli's liquor licence, the premier was found to have overstepped his authority and caused financial harm to Mr. Roncarelli. The actions of the premier were intended to bring to "a halt the activities of the Witnesses".[192] The punitive action in cancelling the liquor licence was meant to dissuade others from "activity directly or indirectly related to

police, telling her if she did not sign the form giving up her right to sue, she would have to be charged. The Supreme Court upheld her right to religious freedom.

[189] *Chaput*, *supra* note 188 at para 11.

[190] *Roncarelli*, *supra* note 131.

[191] Adams, "Building a Law of Human Rights", *supra* note 106 at 459.

[192] *Roncarelli*, *supra* note 131 at para 36. Much of the court's several judgments were taken up with an examination as to the evidence of the conversations between the premier and the official that had to make the decision as to the renewal of liquor licence. The court was focused on the proper interpretation to be placed on and what was said by whom. There is actually little comment related directly to the question of religious freedom.

the Witnesses".[193] The religious freedom message generally taken from the case is that the Witnesses had a right to continue their activities and persons who came to their aide could do so without fear of government interference.

In actuality, the *Roncarelli* win for freedom of religion is narrower. Lawyers for Mr. Roncarelli chose deliberately to define the issue before the highest court as one involving the right of a citizen to provide bail. They rested their argument on the right of a citizen to be involved in the legal process by enabling a person to be released from custody pending further court proceedings. In this case, though Rand J. refers to Mr. Roncarelli's "unchallengeable right", he is likely not referring to the right of the Jehovah's Witnesses to proselytize, but more likely to the right of a citizen to provide bail.[194] Nonetheless, Rand J. situated certain "original freedoms" as part of a package of rights that were thought to belong to a person as a citizen of Canada.[195] By virtue of being a Canadian citizen, one enjoyed "equality before the law, freedom of movement, freedom of religion, and freedom of speech.[196] No provincial power could be used to deny a citizen these rights. Note that he included religious freedom in the package of rights belonging to a person as a citizen. Perhaps this argument runs along the same track as that of a societal compact.

Roncarelli is another example of the courts speaking with many voices. If one includes the judge of first instance and the judges of the court of appeal and the Supreme

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[193] *Ibid* 36.
[194] *Ibid* at para 42. Others took *Roncarelli* as a decision that addressed religious freedom. One writer points out that the Montreal Gazette took this approach, saying that the decision was about "the right not only of freedom of worship but freedom to attack and offend the religious feelings of others": Adams, "Building a Law of Human Rights", *supra* note 106 at 451-452.
[195] Adams, "Building a Law of Human Rights", *supra* note 106 at 446.
[196] *Ibid* at 446 and 447.

Court of Canada, in all 15 judges weighed in on the issues before the court. Twelve opinions were written. Six judges of the Supreme Court ruled in favour of Mr. Roncarelli. Only one judge agreed with Mr. Justice Rand's opinion and yet, the case has come to be associated almost entirely with what he wrote.[197] At no time did a majority of the highest court join in affirming the underlying principles from which it was said that the right to freedom of religion was drawn.[198] Moreover, even in so far as what Justice Rand was prepared to say in his written judgments, the constraints on religious freedom applied only to provincial legislative authority.[199]

It is somewhat difficult to draw general lessons as to what was motivating the Supreme Court of Canada in these cases. The opinions were highly fractured. There was no clear, strong consensus centred on reasoning grounded in freedom of religion though the cases themselves outgrew the divided nature of the opinions and came to stand for recognition of religious freedom. Statements from these cases were picked up by the Supreme Court in *Big M*.

As difficult as it is to determine what was motivating the judges in question, I contend that those who based their reasons on religious freedom were operating within concepts drawn from thinking like that of Locke. They considered the right as a necessary condition of society, as an uncontestable constitutional given whose indisputable existence allowed people of different faiths to live together. One also notes their reference to religious freedom as a necessary condition of a democratic society. I

[197] Cartier, "L'héritage", *supra* note 111 at 380.
[198] Mullan, "Underlying Constitutional Principles", *supra* note 106 at 75.
[199] *Ibid* at 75, 76, and 97.

also acknowledge the early appearance of language related to respect for religion based on the inherent value of the person.

There are additional reasons why it is instructive to consider the experience of the Jehovah Witnesses. Their experience strengthens the historical foundation for religious freedom. What they lived shows what happens when society does not tolerate certain religious activities. Moreover, a foray into their history provides rich lessons for any day and age. Their story, replete with many different types of players, brings to light a variety of threats to freedom of religion.

When their cases were finally brought before the Supreme Court of Canada, the Jehovah's Witnesses carried the day. The highest court cleared the air and affirmed freedom of religion, but the road to the final arbiter was long and difficult and characterized by an extended lack of religious freedom. Before they ever heard someone say that they were free, the Witnesses suffered years of persecution and denial of their freedom of religion at the hands of persons of many societal levels and positions, ranging from common citizens to police officers, prosecutors, judges, politicians, clergy, and so on. Even when it seemed that the courts were beginning to uphold their rights to religious freedom, lower level, local officials continued to abuse their authority in suppressing the unwanted religious message. The law ultimately upheld the right to freedom of religion, but the existence of that freedom was not apparent in what the Witnesses lived for years.

One might also understand from the Witnesses' example that freedom of religion may exist in a climate of opposition and in a state of struggle. The law may recognize one's right to speak the faith of one's heart and mind, but the law cannot dispel the climate of hostility, opposition, and repression in which one may be called upon to

speak[200]. The law may ultimately uphold one's right to religious freedom, but nothing can negate the fear that one may have in speaking one's mind in a hostile societal environment. The law cannot mandate goodness and compassion. The law is an important institution in the preservation of the right to freedom of religion, but it is not an omnipresent and omnipotent force that creates free and welcoming space on all occasions. One may be free, but one may never be welcome. Locke himself never promised that tolerance would equal a warm welcome. The Witnesses did not suddenly experience warm acceptance when they won their court cases.

In their fight against the Jehovah's Witnesses, Quebec authorities pulled out all available stops. The Witnesses faced frequent charges, often being accused of carrying out their solicitation or distribution and sale of their literature without proper licences.[201] They faced accusations for violating Lord's Day legislation for their door-to-door evangelism and in-house meetings, simply because they preached from house to house on Sundays.[202] As noted, police used municipal by-laws, nuisance legislation, and occasionally criminal charges, such as blasphemous and defamatory libel,[203] conspiracy to commit sedition,[204] and even indecent assault.[205] Government officials restricted their use of radio, alleging that the content of their programming was intolerable, unpatriotic, and abusive of other organized churches.[206] Government officials, without search warrants, entered residences and broke up meetings, and seized Bibles, Jehovah's

[200] Penton documents that the Jehovah Witnesses suffered from the actions taken by government officials, military officials, courts, clergy, violent mobs, and other social pressures: Penton, *supra* note 102 at 4 and 69.
[201] *Ibid* at 90 and 122.
[202] *Ibid* at 90.
[203] *Ibid* at 92 and 115.
[204] *Ibid* at 114.
[205] *Ibid* at 122.
[206] *Ibid* at 97.

Witnesses' published materials, and even the members' own private papers.[207] Property was damaged and individuals were ordered out of communities and "in one case out of the province".[208] There are many ways to frustrate the enjoyment of religious freedom.

It should be acknowledged that some of the forms of attack used by government officials against the Witnesses would be simply unlawful and readily recognized as such under the *Charter* today. Still, the experience of the Witnesses provides a picture of what can happen when the state forgets religious history, loses sight of the need to show tolerance and begins to narrow the available space to divergent religious views based on the content of those views.

There is something else to be seen in the story of the Jehovah's Witnesses and it relates to their nature and behaviour *as* believers. The Witnesses truly believed. No one questioned that. They may be right, or they may be wrong in their interpretations of Scripture, but regardless, the Witnesses believed those sacred writings and their interpretations of them. They believed that they were right. They believed that they alone were the custodians of the truth. In the past, they were so devoted to holding true to their faith that they were prepared to suffer for what they believed. No matter what the personal cost to them, they marched on, obeying the dictates of their consciences and faith. And the point is this: this is the nature of a believer. It is within the nature of a true believer to continue to believe and hold to a profession of faith in the face of hostility and opposition even if that hostility and opposition should come from the law. That one's faith is considered unlawful does not alter one's faith and conviction that one is right.

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[207] *Ibid* at 122.
[208] *Roncarelli*, *supra* note 131 as per Rand J at para 28.

In fact, opposition in whatever form it takes is to some believers, like the Witnesses, a breath of fresh air that though intended to extinguish a flame only provides a new supply of oxygen that fans smouldering wicks into open flame. The harder true faith is pushed, the more it pushes back. Truth, conviction that something is true, will not yield. This too resonates with Locke's thinking. Faith is not amenable to compulsion.

Penton writes that the Jehovah's Witnesses themselves believed that they were being "persecuted for righteousness' sake".[209] As such, their persecution was proof of their righteousness. The more they were persecuted, the more they believed that they were right and righteous. Penton records that when the Witnesses' second leader Judge Rutherford was sentenced to jail in the United States, he told the court that it was the "happiest day of his life" and that "to serve earthly punishment for the sake of one's religious belief is one of the greatest privileges a man could have".[210] The Calgary Herald penned that banning the Witnesses clothed them with the mantle of martyrs, a mantle which they bore proudly. The actions of government and organized religion against them only led them to redouble their efforts and made "their determination to disregard the law firmer than ever". They accepted religious persecution as "a sweet morsel under the tongue".[211]

I contend that part of the historical justification for religious freedom grows out of this age-old recognition that faith cannot be eradicated by adverse legislation, punishment, societal contempt, or even by the loss of or exclusion from societal, public goods. The attempt to legislate against faith only strengthens the faith and risks creating

[209] Penton, *supra* note 102 at 81.
[210] *Ibid* at 81.
[211] *Ibid* at 155.

an unending source of enforcement issues. Law recognizes that it had best find a way to allow religion a space within which it can live and breathe because religion is not going to yield. If law takes up too much room in society and pushes the religious believer beyond the point of acceptance of law's restraint, law oversteps a boundary and religion digs in and defies the law. Indeed, in some deeper ironic sense, it does not and should not matter to the person of faith whether he or she has religious freedom. Faith does not require freedom. That faith perseveres in the face of legal opposition only serves to prove the worth of that faith.

At the end of the day, after all due credit has been given to the Jehovah's Witnesses for what they accomplished on behalf of persons of faith and recognizing the noble language of judges like Rand J., one thing is clear. Canada left this chapter with a rather weak and vulnerable right to freedom of religion. It was never explicitly recognized by a majority of the highest court and was subject to limitation by parliament. Those that lived in that time were keenly aware of this and a push began for a more certain affirmation and protection of such rights in a formal bill of rights.[212] It is said that some credit belongs to the Witnesses for the eventual creation of the *Canadian Bill of Rights* and their labours may even have opened the way for the acceptance of the *Canadian Charter of Rights and Freedoms* itself.[213]

There is one further point to be made. In leaving the story of the Jehovah's Witnesses and turning to the *Charter*, one would like to have the confidence, and arguably should be entitled to have the confidence, that whatever protection the *Charter*

[212] *Ibid* at 194 and 200.
[213] *Canadian Bill of Rights*, *supra* note 101. Credit is also said to go to representatives of the Jewish people in their push for the adoption of human rights codes.

affords to freedom of religion, it should not be less than what was available in the day when the right was recognized for the Witnesses. Freedom under the *Charter* may not necessarily be broader and more robust, but surely, it should not be narrower, weaker, and lifeless.

Chapter 4 A Brief Introduction to the *Charter* Right to Freedom of Religion

Subsection 32(1) states that the *Canadian Charter of Rights and Freedom* applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament… and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.[214] Accordingly, the *Charter* applies to government legislation and activity. It does not apply directly to the relationship between individuals.

Section 2 of the *Charter* provides that everyone in Canada enjoys certain fundamental freedoms, including as provided by s. 2(a) that of "freedom of conscience and religion".[215] The guarantee of this fundamental freedom, however, is not absolute. Section 1 of the *Charter* provides that the rights and freedoms contained therein are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The language of s. 1 has led the Court to develop two approaches to analyzing whether limitations on *Charter* rights are reasonable and demonstrably justified. The first and most well established test has come to be known as the *Oakes* test and is used in situations in which that which offends the *Charter* right is

[214] … and including all matters relating to the Yukon Territory and Northwest Territories.
[215] Section 2 also created three other fundamental freedoms, the relevant words of which are (b) freedom of thought, belief, opinion and expression, (c) freedom of peaceful assembly; and (d) freedom of association. It is noted that religion in its various manifestations would involve matters covered by these three freedoms as well and vice versa.

state action that has broad application, essentially government legislation or policy.[216] Under *Oakes*, the court must determine whether the state action in question has an objective that is "of pressing and substantial concern in a free and democratic society".[217] The objective must be of sufficient importance to override a fundamental freedom or right. The second aspect of the *Oakes* test requires an examination of the proportionality between the objective of the legislation and the state action in question. This part of the *Oakes* analysis has been broken down into several questions related to whether there is a rational connection between the state objective and the provision in question, whether the provision is designed in such a way that it "impairs the right or freedom as little as possible" and finally, whether the importance of the state objective is not outweighed by the harm caused by the violation of the *Charter* freedom or right.[218]

In more recent times, the Supreme Court of Canada has fashioned a second approach to analyzing allegations of *Charter* violations to deal with the vast and ever increasing number of decisions that are being made by statutorily-enabled administrative bodies. The Court has been moving steadily toward adopting the *Doré* approach to the review of these matters. Essentially, where a *Charter* complaint is not against state legislation or broadly applicable policy, but rather relates to the manner in which a lower level adjudicator has interpreted its own powers or applied its legislation or policy, a court will ask whether the limitation imposed on the *Charter* right (if there is one) is a reasonable one.[219] The administrative body must work within its statutory parameters and

[216] *R v Oakes*, [1986] 1 SCR 103, 50 CR (3d) 1 [*Oakes*].
[217] *Ibid*.
[218] *Ibid*.
[219] *Doré c Québec (Tribunal des professions)*, [2012] 1 SCR 395, [2012] SCJ No 12 [*Doré*].

in the application of its legislative mandate, seek to ensure that its decision respects *Charter* rights as much as possible.

Whether one speaks of the *Oakes* or the *Doré* test, it is important to note the role that s. 1 of the *Charter* has played as the constitutional access point through which certain concepts and values have penetrated *Charter* analysis. One might have thought that the work of the courts would be to interpret the rights and freedoms contained with the *Charter* as though the *Charter* were an independent, complete, stand alone constitutional document. In the application of s. 1, however, and more specifically, in the interpretation of the concept of a free and democratic society, courts have found it necessary to define what it means to be a free and democratic society. Of course, such a society upholds the values entrenched in the *Charter* itself, but the courts have turned to other values as well in order to define the scope and application of the *Charter* rights and freedoms. These values are not "expressly set out in the Charter".[220] It was in *Oakes* that Chief Justice Dickson said the following with respect to his understanding of a "free and democratic society":

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[221]

[220] *R v Keegstra*, [1990] 3 SCR 697, [1990] SCJ No 131 at para 49.
[221] *Oakes*, *supra* note 216 at para 67.

The import of this type of statement cannot be overlooked. The *Charter* contains rights and freedoms, but it does not contain all the values required to give meaning and content to those rights and freedoms. Courts draw on other values for guidance, those deemed "essential to a free and democratic society".[222] In some sense, these values are taken to inform the underlying rationale of the *Charter* rights themselves and constitute points of reference used by the courts in balancing rights one against another. One notes the reference to the inherent dignity of the human person, equality, respect for cultural and group identity, and the enhancement of the participation of individuals and groups in society. The values referred to by Dickson C.J. both generate the Charter rights and freedoms and act as the "ultimate standard" used to evaluate a limitation and whether it is reasonably justified.

As much as one might agree with these underlying values, they are not themselves stated in the *Charter*. Nor is this an exclusive list: in fact, the opposite is made explicit. The significance of this reliance on values not defined in the *Charter* for understanding the relationship of law and religion is that these values may not be the values to which religion gives priority. At the very least, some religions may view the meaning of these values differently and might assign them varying degrees of importance. As a result and as an example, a person alleging a violation of their freedom of religion may find that the interpretation of that freedom, and even of their religion, may be filtered through a matrix of values that do not coincide with their own religious convictions, values that do not themselves come from the *Charter*.

[222] As will be seen, Berger believes that the values that Dickson C.J. offers are those of liberalism.

On another note, in leaving the chapter on the Jehovah's Witnesses, I observed the vulnerability of even fundamental rights like freedom of religion to legislative incursion. Pre-*Charter*, the federal Parliament had the power to enact legislation that could limit religious freedom and beyond answering politically to the electorate for their actions, the lawmakers needed give no legal justification for what they had done. The creation of the *Charter* as a constitutional document represents a move in the right direction as a means of providing a higher degree of protection for such freedoms. Under s. 1 of the *Charter*, the state must now justify any limitation of a *Charter* right. Under the *Oakes* test, the Court set the bar quite high for the state to establish that its actions were justified. It remains to be seen, however, whether through a narrowing of the definition of the right to freedom of religion or by too easily allowing the state to justify limitations of that right, the entrenchment of this right has accomplished all that much. Recent cases, in which the Court seems to have required rather little to justify state interference with religious rights might suggest that the situation has not greatly changed from the day of the Witnesses. For my part, I contend that when the Court has kept clearly before it the guarantee of religious freedom as an expression of a historical commitment to tolerance, the Court has done well in respecting and protecting religious freedom. However, when the Court moves away from the language of tolerance and emphasizes autonomy and personal choice as expressions of equality, the Court has been easily persuaded of the need to restrict the exercise of religious freedom.

With this brief introduction to s. 2(a), it is now time to examine *Big M*, a case that provides a wonderful view of how the Court moves between the historical justification for the guarantee of freedom of religion and the reliance on extra-*Charter*, essentially

liberal values to understand and define the freedom. Dickson C.J. looks back and draws on history. He then turns to the underlying values of a free and democratic society to set the freedom on its current track.

Chapter 5 *Big M* and a New Beginning

With the *Charter* newly in place, the sale on Sunday of a few grocery items, some plastic cups and a bicycle lock produced the first case in which the Supreme Court of Canada was called on to interpret the s. 2(a) *Charter* right to freedom of conscience and religion.[223] Big M Drug Mart was charged with violating the *Lord's Day Act*.[224] In its defence, the company challenged the constitutionality of the legislation alleging that the law was created for a religious purpose, namely to enforce observance of Sunday as a sacred day of rest in accordance with the beliefs of some Christians and that compelling the observance of a particular religious belief was a violation of the guarantee of freedom of religion. Factually, for Big M, freedom of religion meant freedom from religion, state-imposed religion. The Court agreed with Big M, finding that legislation originally created for a religious purpose could not satisfy the justification requirements of a s. 1 analysis.[225]

The court in *Big M* tackled the question of the justification and meaning of the guarantee of freedom of conscience and religion. No other case since *Big M* has gone as deeply into examining the foundation of this freedom. No other court has sought to infuse

[223] *Big M*, *supra* note 4 at para 4.
[224] *Lord's Day Act*, RSC 1970, c L-13.
[225] Dickson C.J. was joined in his majority judgment by Justices Beetz, McIntyre, Chouinard and Lamer. In her minority, concurring decision, Wilson J. opined that under the *Charter*, the issue was not the original religious purpose of the legislation but rather the religious effect upon those compelled to close their businesses on Sunday. She believed that it was necessary to conduct a s. 1 analysis but concluded that the limitation imposed was not justified. She did not otherwise disagree with Dickson C.J.'s reasoning.

it with so much meaning and breadth. At the same time, one sees how the court turns to the concepts and values of a free and democratic society to define what it means.

Chief Justice Dickson began his exploration of the meaning of religious freedom by looking back in history. He touched on how religious freedom in Canada enjoyed some protection in older legislation.[226] He referenced statements concerning religious freedom that were made in the cases related to the struggles of the Jehovah's Witnesses, acknowledging Rand J.'s opinion in *Saumur* recognizing religious freedom as a "principle of fundamental character" in the Canadian legal system and the high constitutional value of the "untrammelled affirmations of religious belief and its propagation".[227] Dickson C.J. echoed the opinion of Taschereau J. in *Chaput v. Romain*.[228] In so doing, the Court acknowledged that the notion of religious freedom existed in Canadian law before the advent of the *Charter*. That Canadians could affirm their religious belief and propagate their religious views was "of the greatest constitutional significance" – and that without the *Charter*.

On the other hand, prior to the *Charter*, fundamental as the freedom was, it was subject to limitations imposed upon it by legislation.[229] That, according to the Court in *Big M*, changed significantly with the advent of the *Charter*. Dickson C.J. affirmed that, "With the entrenchment of the Charter the definition of freedom of conscience and

[226] *Big M*, *supra* note 4 at para 127. Dickson C.J. is referring to *An Act to Repeal an Act as related to Rectories, 1851 (Can)*, c 175 that contained the following provision: That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of this Province be allowed to all Her Majesty's subjects within the same.
[227] *Big M*, *supra* note 4 at para 62; *Saumur*, *supra* note 123.
[228] *Big M*, *supra* note 4 at para 65, *Chaput*, *supra* note 188.
[229] *Big M*, *supra* note 4 at para 127.

religion is no longer vulnerable to legislative incursion".[230] For his part, Dickson C.J. believed that the *Charter* would protect religious freedom from state legislative authority.

Sounding like Locke's argument for tolerance, the Court opined that the state cannot compel individuals in matters of faith. The state favours no religion but must consider all on the same equal footing. Individual conscience or religious conviction is a personal matter. Dickson C.J. even made use of a form of the principle of reciprocity: today's majority will be at some time tomorrow's minority.

Undoubtedly, the most significant part of Dickson C.J.'s opinion was his elaboration of the meaning of the right to freedom of religion under the *Charter*. In many s. 2(a) cases after *Big M*, courts return to these words. I provide them at length and then examine them in detail. Dickson C.J. wrote that,

> 94 A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> 95 Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect within reason from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces

[230] *Ibid* at para 129.

> both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> 96 What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".[231]

Chief Justice Dickson's language bears careful examination.

Section 1 of the *Charter* states that Canada is a free and democratic society and Dickson C.J. said that such a free society is one that provides for freedom of religion, as a mark of a truly free society. Freedom of religion is part of the very fabric of a society such as the Canadian society that aspires to be free.

Dickson C.J. viewed religious freedom in Canada from its earliest beginnings, from the angle of accommodation. Accommodation as a concept suggests that religion will be given ample space to prosper on its own terms, as religion. To accommodate something is to give it permission to exist and thrive. The Court recognized that religion is something that requires elbow room, room to breathe, open territory in which to roam, a space of its own within society.

Dickson C.J. went on to say that, "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms".[232] Equality is the second angle from which Dickson C.J. viewed religious freedom. Locke too would have argued for

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[231] *Ibid* at paras 94, 95, and 96.

[232] In passing, one need not wonder why Dickson C.J. goes on to say that, "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter": *Ibid* at para 94. Section 15 was not in effect at the time that he penned his reasons in *Big M*.

equality, but Dickson C.J. made a different use of the concept of equality than did Locke. For Locke, equality would have implied that persons should stop killing each other. Dickson C.J. viewed equality as a condition for individual expression. If individuals are equal, they should be equally free to be who they are, including who they are religiously, even if that means having no religion.

Religious freedom is about accommodation, but it is also tied to equality. Perhaps this mention of equality in the defining of the right to freedom of religion foreshadowed Dickson C.J.'s view that religious freedom will not be without limit. The right to religious freedom will be given space to live, but it will have to exist within a shared space. Persons of different faiths will have to share the available space equally. One person's equality may limit another person's equality, including their equality expressed in religious forms.[233]

Dickson C.J. ultimately laid the foundation for freedom of religion on human dignity and the rights that belong to persons as human beings.[234] This is the bedrock for him and led him logically to place human choice at the core of what it means to be free in religion. The basic unit in society that enjoys religious freedom is the individual that makes personal choices. Respect for an individual's dignity leads to respect for the individual's choices. To be free as an individual in relation to religion is to be free to choose one's religious beliefs. To deny a person freedom of religion is to deny their right

[233] One might see herein a foreshadowing of the balancing exercise in which the Supreme Court of Canada engages in decisions like *TWU 2001*, *infra* note 333 and *TWU-LSBC*, *infra* note 457.
[234] Benjamin L. Berger, "Law's Religion: Rendering Culture" (2007) 45 Osgoode Hall LJ 277 at 291 [Berger, "Law's Religion"].

to choose their own religious beliefs and so treat them as less than human. Religious freedom protects one's freedom to believe what one chooses to believe.

Dickson C.J. went on to spread the protection of the guarantee of freedom of religion over the right to manifest one's religious beliefs publicly, meaning, in light of the Charter's application to government activity, without interference from the state. That freedom of religion protects the right to be open about and act upon one's beliefs implies that one can speak about and act on one's faith without fear of being hindered or harmed by the state. The state will not stand in one's way in the manifestation of one's beliefs subject to one remaining within the reasonable limits acceptable in a just and free democracy.

The government will not hinder or harm a religious person in the public expression of their faith. Persons not connected to the government, however, may oppose or contradict those religious beliefs. They may criticize one's religious views without affecting one's *Charter* freedom. *Charter* freedom only entails the right to speak without fear of the government and without being restricted or made less able to state one's views by the government. The right gives a person the freedom to raise one's voice in any number of different ways to declare one's religious views, but it does not mean that other persons must like or agree with those views. It does not mean that others will have to respect those views in the sense of accepting their value as truth or join in facilitating or amplifying the declaration of those views.[235]

[235] This discussion, of course, points toward the cases and literature surrounding the interpretation and application of s. 2(b) of the *Charter* and the right to freedom of expression. I recognize the pertinence of s. 2(b), but a discussion of the principles emerging from that case law would be beyond the scope of my thesis. I have chosen to focus on the special protection, if any, that is to be accorded to expression that is given special protection because that which is expressed is religious belief.

The *Charter* offers no protection from the efforts of non-governmental persons to hinder or harm the one who declares his religious views openly. In such circumstances, the protection, if there be any, would have to come from other areas of the law, criminal, civil or human rights. The existence of the right to freedom of religion gives the individual the confidence that they can speak openly. Should they encounter hindrance or be harmed, they can push forward knowing that the law protects their right to believe and speak or act.[236]

The right to religious freedom, says Dickson C.J., included the manifestation of religious belief in worship and practice and "teaching and dissemination". The right to manifest one's religion and the right to teach and disseminate one's beliefs in particular carry religious belief into the light of day and even out of the confines of a church building into the public domain. Any person can communicate and spread their religious beliefs to anyone else. In the Court's mind, the expression of religious beliefs in the public domain was not an improper insurgence of religion into the public domain.

Working out the implications of this view of freedom of religion to address the facts that were before him in *Big M*, Dickson C.J. turned in paragraph 95 to explain what freedom of religion meant for this drugstore. Sounding rather like Locke, the Court opined that freedom in this context was the absence of coercion or constraint whether such coercion or limitation comes from the state or someone else. A person that is made to do or refrain from doing something that he would not of his own will have chosen to do or not do is not free. Coercion, said the Court, can take different forms. Laws that command behaviour or restrain persons from engaging in behaviour coerce. Laws that indirectly

[236] This is always subject to s. 1 limitation.

"determine or limit alternative courses of conduct available to others" are coercive. Always within the bounds of what is reasonable, the *Charter* protects against government interference with a person's will. Freedom of religion involves the absence of compulsion.

With a brief nod towards what is reasonable, the Court cautioned that freedom of religion will not be without limit. Dickson C.J. acknowledged that there will be a need for some limitations. Recognizing the high value of religious freedom, the limitations will only be those that are "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". Subject only to necessary limitations flowing from these delineated grounds, persons must be free to act in accordance with their beliefs and conscience. That the limitations must be *necessary* suggests that the justification for the limitation will have to meet a certain threshold, a high one even.

The reference to public safety, order, health and morals, suggests Benjamin Berger, seems like an allusion to restraints on freedom of religion that would come from the federal government's use of its criminal law power.[237] Religious freedom, however, may also be subject to limitation due to the fundamental rights and freedoms of others, language which foreshadows that there might be potential conflicts between individuals and groups of individuals within Canadian society that will involve the application of *Charter* rights.[238]

Though Dickson C.J. planted his concept of freedom of religion firmly in the liberal soil of respect for human choice and respect for the inherent dignity of persons, his thinking is not without trace of some reference to a higher, supra-rational value in

[237] Benjamin J. Berger, "Moral Judgment, Criminal Law and the Constitutional Protection of Religion", (2008) 41 SCLR (2d) 1 at 6.
[238] In *Big M*, the Court did not engage in much s. 1 analysis. The determination that the legislation was enacted for a religious purpose seemed to truncate the need for further analysis. Later cases affirm the need to conduct any balancing of state interest and rights under a s. 1 analysis: *Big M*, *supra* note 4.

religion. Dickson C.J. did not exclude considerations of truth entirely. He spoke in paragraph 96 of "what may appear good and *true* to a majoritarian religious group" (italics added). Dickson C.J. was aware that religions make rival truth claims. He was cognizant that some religious persons have different conceptions as to what is good. Both the concept of truth and even goodness arguably leave the door open to the legitimacy or permissibility of some appeal to a higher ontological order, higher than reason. Non-religious persons may have beliefs as to what is good and true, but I would contend that the concepts of true and good require some grounding in objective reality. The Court left room for this possibility. Dickson C.J. showed that he understood something about religion and its claims.

It was a quirk of history that *Big M*, the first *Charter* case on religious freedom, was an example of an institution fighting for its right not to have to observe a religiously inspired law. The right to freedom of religion for Big M was the right not to have to act in accordance with a law that was created for a religious purpose. *Big M* is about the right to be free from religion.

Dickson C.J. wrote that the state may not, acting on the wishes of a religious group, "for religious reasons", impose a law requiring certain behaviour on persons that do not share the underlying religious belief.[239] The right to freedom of religion under the *Charter* "safeguards religious minorities from the threat of 'the tyranny of the

[239] Indeed, *Big M* would say that government could not impose a religious law even on persons that shared the underlying religious belief: *Ibid*.

majority'".[240] One would surmise that it would follow that the majority that cannot tyrannize should include the non-religious or anti-religious majority as well.

Dickson C.J. found that the *Lord's Day Act* coerced persons to behave in accordance with a teaching held by some Christians,[241] thereby violating the *Charter* right to freedom of religion and offending the dignity of "all non-Christians". By legislatively incarnating the belief of one religion, the law created a "climate hostile" to those of other faiths or of no faith. He wrote that the law "gives the appearance of discrimination" against non-Christians.[242] Persons and institutions that did not share the Christian faith were being compelled to observe a rest day that was mandated, in the view of some Christians, by the Christian religion. He wrote that, "The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture". The *Lord's Day Act* was not subtle. It was apparent how this law was the arm of the state acting in favour of Christianity and thereby restricting the otherwise lawful behaviour of persons not belonging to that religion.

One should understand what *Big M* did not say. As much as some Christians might have considered this first Supreme Court of Canada case a loss for Christianity, it should be noted that no one, including the Court, was attacking in any way the right of Christians to believe in the sanctity of Sunday as the Lord's Day. No one contested their right to teach and disseminate that belief and act on that belief. *Big M* did not result in a

[240] *Ibid* at para 96.
[241] *Ibid* at para 97.
[242] I am unsure why the judge saw only an appearance of discrimination in this legislation. There was more than an appearance of discrimination.

loss of religious freedom for Christians. If any Christian wanted to refrain from the activities prohibited by the legislation on Sunday for religious reasons, that was still fully within their right.

In my view, Dickson C.J.'s language that the protecting of one religion through the provision of a day of rest from some forms of business activity was "destructive of the religious freedom of the collectivity"[243] seems a little strong and overstated, but the law did have a coercive effect. Though no one would have been compelled to consider the day as sacred, they would have had to adjust their business practices to reflect a religious law. The business effect was more than slight and inconsequential. The effect on persons of other faiths was not negligible. Persons of many different faith and non-faith backgrounds would have found the restriction on business activities did not align with their desired organization of their work week. Law cannot compel individuals to consider a day as holy. Law cannot compel religious sentiment or belief. Law cannot compel the movements of the heart or mind. Locke discussed this, but it did bind their behavior.

Dickson C.J. placed one matter to rest. Rights under the *Charter* would not necessarily have the same meaning as similar rights found in the *Canadian Bill of Rights*.[244] Jurisprudence under the older legislation would henceforth be of limited value going forward. The right to freedom of religion under the *Charter* was to be more than just "'liberty of religious thought' and untrammelled affirmation of religious belief and its propagation".[245] The *Canadian Bill of Rights* was a document of a different nature and

[243] *Ibid* at para 98.
[244] *Canadian Bill of Rights*, *supra*, note 101.
[245] *Ibid* at para 112.

status. It was not a constitutional document.[246] It assisted courts in the interpretation of legislation and recognized certain rights as they existed prior to its creation. It was declaratory only.[247] It protected religious freedom as it existed in the country prior to its coming into effect. The *Charter*, on the other hand, was to speak in imperative terms.[248] The *Charter* was meant to provide more protection. It did not contain "any reference to existing or continuing rights but rather proclaim[ed]" those rights in "ringing terms".[249] The *Charter* set the benchmark for then existing legislation and all future legislation.[250]

Rather than looking to the past meaning of the right under the *Canadian Bill of Rights*, Dickson C.J. declared that one had to use the purposive approach of interpretation that he had set out in *Hunter v. Southam*.[251] The right to freedom was to be understood in light of the "interests it was meant to protect". To elucidate the purpose of the right in question, one had to examine the "character and the larger objects of the *Charter* itself,… the language chosen to articulate the specific right or freedom,… the historical origins of the concepts enshrined, and where applicable,… the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*".[252] Note the reference to the "historical origins of the concepts enshrined". Without overextending the purpose, the interpretation was to be a generous one, not a narrow, technical one. It should aim to give persons the full protection intended. It was important

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[246] *Ibid* at para 113.
[247] *Ibid* at para 114.
[248] *Ibid* at para 115.
[249] *Ibid.*
[250] *Ibid* at para 116.
[251] *Big M*, *supra* note 4 at para 117. *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc,* [1984] 2 SCR 145, [1984] SCJ No 36 [*Hunter v Southam*], in which Dickson C.J. began to elaborate an approach to interpreting *Charter* rights, involved a s. 8 *Charter* challenge to legislative search and seizure powers.
[252] *Big M*, *supra* note 4 at para 118.

to place the right in its "proper linguistic, philosophic and historical contexts".[253] Note the reference to a *proper* historical context.

Having started earlier in the decision with a look to past protection of the right, Dickson C.J. made the link to the historical context of the right to freedom of religion. He identified the *proper* historical context.[254] The need for the right to freedom of religion grew out of the "religious struggles in post-Reformation Europe".[255] With the emergence and rapid development of religious dissent in Europe as persons and groups broke with the Catholic Church and the conflicts that such disagreement created, it came to be seen why persons should be free in religion and conscience. Dickson C.J. said it well in paragraphs 119 through 121, echoing Locke's writing,

> 119 The spread of new beliefs, the changing religious allegiance of kings and princes, the shifting military fortunes of their armies and the consequent repeated redrawing of national and imperial frontiers led to situations in which large numbers of people — sometimes even the majority in a given territory — found themselves living under rulers who professed faiths different from, and often hostile to, their own and subject to laws aimed at enforcing conformity to religious beliefs and practices they did not share.
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> 120… As a consequence, when history or geography put power into the hands of these erstwhile victims of religious oppression, the persecuted all too often became the persecutors.
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> 121 Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendant religion, came to voice opposition to the use of the state's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was no longer simply a conviction that the state was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of

[253] *Ibid.*
[254] *Ibid* at para 119.
[255] *Ibid*.

> freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our Charter, the single integrated concept of "freedom of conscience and religion".[256]

Dickson C.J. did not name John Locke in this passage, but what he wrote resonates well with what Locke argued. Locke too wrote in a context of diverging beliefs, changes in governments sympathetic to one or other of the sides in the Protestant and Catholic divide, and people finding themselves living under a government that did not share their faith or that positively wished to eradicate their faith. Locke decried the transformation of victims of religious persecution into religious oppressors. Locke spoke strongly of the use of state power to compel religious belief and put into words and argument the conviction that one cannot compel faith. Locke too appealed for freedom for conscience.

Dickson C.J. brought to the fore the historical development of the conviction that it was improper to use the "state's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs".[257] Beyond the conviction that the state was potentially siding with erroneous views, there was a growing appreciation that it was not possible to compel faith. It is within the nature of belief that it cannot be formed or changed by external force.

I note as well that from this very first *Charter* case, Dickson C.J., for his part, viewed the s. 2(a) freedom of conscience and religion as a "single integrated concept of 'freedom of conscience and religion'". They are not, in his understanding, separate rights. He saw this unification as being a product of its historical development. One might question whether one could separate the two concepts and expand on the use of freedom

[256] Note that Dickson C.J. views the s. 2(a) guarantee of freedom of conscience and religion as "one single integrated concept".
[257] *Ibid* at para 121.

of conscience as a broader protection with a life apart from any connection to religion. Religion is the lived-out form of the dictates or conclusions of conscience. Though it would seem possible to think of conscience in the absence of a defined connection to religion. Persons may have convictions that they do not link to any form of religion, but it is hard to imagine a true religious claim that is not a matter of conscience. In my mind, the two concepts are related.[258]

Dickson C.J. also saw that respect for the freedom of the individual in the formation of his own judgments and the expression of the dictates of his own conscience "lies at the heart of our democratic political tradition", which is Mary J. Waldron's main contention.[259] He wrote that, "The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government".[260] The importance of these rights to the legitimacy of a democratic society is the reason that these rights are termed "fundamental".[261] They are warp and woof of the "political tradition underlying the Charter".[262] Dickson C.J. saw the usefulness for the justification of the right to freedom of religion of an argument based on the nature of a democracy.

From these considerations, Dickson C.J. discerned the purpose of religious freedom. The very values that infuse and give legitimacy to the democratic system require that persons be

> free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, inter alia, only that such manifestations do not

[258] See note 2.
[259] *Big M*, *supra* note 4 at para 123.
[260] *Ibid*.
[261] *Ibid*.
[262] *Ibid*.

> injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[263]

The right to religious freedom inheres within the nature of a democratic system. In the formulation of the reasons for freedom, however, one finds the basis on which that right will also be limited. There will be questions as to how far the right to religious freedom extends, but a central question in the cases to follow will be in what manner or at what point the exercise of one's religious freedom affects someone else's right to hold and manifest their own religious views and so should be limited.

Applying his reasoning to the case of *Big M*, Dickson C.J. interpreted the *Charter* protection as covering, "for the same reasons", similar views and their "expressions and manifestations of religious non-belief and refusals to participate in religious practice". Religious freedom protects the right not to believe. As noted, religious freedom cases under the *Charter* started off with freedom from religion. In a number of cases that follow after *Big M*, religious freedom was invoked to remove the imprints of Christianity from the public face of Canadian society. Anticipating the perception that the application of the *Charter* has had the effect of removing the Christian religion from the public square, Dickson C.J. himself provided some explanation. He wrote of the difficulty those whose faith is the dominant faith have in seeing how others are being compelled against their will even to non-action for religious reasons.[264] *Big M* was one good example of the challenge of seeing and understanding the perspective of persons that do not share one's religious beliefs, and of the need to hear and appreciate their complaints that their freedom of religion is being infringed. It is important to keep in mind that *Big M* related

[263] *Ibid* at para 124.
[264] *Ibid* at para 134.

to "governmental involvement in matters having to do with religion".[265] In so far as the government had a role in the enforcing or promotion of religion, historically the Christian religion, the *Charter* has been used to put an end to that involvement. That seems logical and appropriate in a society that must accommodate a diversity of religious views. Further, it must be understood that the removal of the government imprimatur on the vestiges of religious influence in the public square is not to be taken as a governmental rejection of the truth or value that underlay the original belief or practice. While the courts, starting with *Big M*, have stripped state-supported religion from the public square in order to remove the kind of coercion recognized in Big M, this should not be taken as diminishing the importance of religion to some individuals or communities or diminishing the freedom to hold and manifest their faith.[266] Persons are free to believe and say so, publicly.

In my opinion, Dickson C.J. provided a masterful opening analysis and explanation of the right to freedom of religion in Canada. He made an effort to set out a rich and broad foundation for the right to freedom of religion. There is much that is positive in his analysis. It is my contention that it was proper to begin the analysis by looking to the past. The concept of religious freedom existed prior to the *Charter*, dating back at least to the time of Locke. The *Charter* did not create the concept of religious freedom. Locke and Dickson C.J. had many themes in common, the personal nature of religious belief, the futility of compulsion in religion, the need to restrain the state in

[265] *Ibid* at para 124.
[266] *Ibid* at para 134.

religious activity, and even the idea of reciprocity. The majority should not tyrannize the minority.

Dickson C.J. not only considered the historical context in which the concept arose; he included the historical rationale in the formation of his definition of the right under the *Charter*. He did not consider the past and then reject it. He drew no distinction with the past as though he disapproved of what was understood in ages past. He allowed history to inform his understanding of the right under the *Charter*. I contend that an understanding of the historical rationale for the right is key to understanding the importance of the right in modern contexts.

For Dickson C.J., religious freedom demanded accommodation. He mentioned accommodation first, indicating that the dominant forces in society may have to accept some level of disunity or discomfort. It may be stating the obvious, but if religion is to be accommodated, it is because there is and will be a need to accommodate religion. There is something about religion that requires accommodation. When society is marked by perfect tranquillity, unity and uniformity, everyone marching to the same drum in the same direction, there is no need for accommodation. The recognition that there would be a need for accommodation suggests that there will be differences and conflicts, perhaps deeply challenging differences and intractable conflicts. Dickson C.J. knew and acknowledged that religion and religious views sometimes grate against what some members of society may wish to hear and allow. Religious belief by times does not accord with majority sentiments. Some individuals may feel that society would be better off without certain beliefs; they may desire to crowd certain views out of the public space entirely and never have to contend with their existence, but that is why religious freedom

is first of all accommodation. Accommodation speaks to the need to create space for differences, some serious differences. I contend that Dickson C.J.'s concept of accommodation is just another form of Locke's tolerance.[267]

I acknowledge that subsequent courts have "cautioned against undue attention to the historical meaning of rights and freedoms as understood when the *Charter* was enacted". [268] The Charter had to be free to adjust to changes in society. Its protections were not to be "frozen in time".[269] I am not seeking to freeze the *Charter* right to freedom of religion in time. I contend nonetheless that Dickson C.J. himself drew on history to define the freedom and that due attention to what it meant and from where it came gives one a better appreciation of its present day value.

Locke's "A Letter about Toleration" contains several references to ideas of equality.[270] Beyond the few explicit uses of the concept of equality, his general thinking in the treatise evidences that he saw that concerns of equality formed some part of the underlying rationale for religious freedom. He would, undoubtedly, have argued that

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[267] Berger writes that, "This kind of tolerance ends at the point at which the religious culture genuinely begins to grate on the values, practices, and ways of knowing of Canadian constitutionalism. When religious practice actually starts to matter to the law by challenging something central to the culture of law's rule, we begin to see the depth and force of law's commitments: Berger, "Cultural Limits", *supra* note 3 at 264.

[268] *TWU-LSBC*, *infra* note 457 at para 179; *Re BC Motor Vehicle Act*, [1985] 2 SCR 486; *R v Tessling*, 2004 SCC 67, [2004] 3 SCR 432 at paras 61-62 and *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, [2004] SCJ 75.

[269] *TWU-LSBC*, *infra* note 457 at para 179.

[270] At page 11B, Locke writes that though "[m]onarchs are born with more power than other men… in nature they are *equal*". His point in this passage is that political leaders do not have any superior knowledge than any other persons in relation to spiritual truths. At page 16A, he refers to *equal* justice, the type of justice that certain religious factions, that might wish to impose their particular beliefs on others, allow to prevail for all persons as long as they remain a minority in the land. When their power grows, however, they begin to deny that equality to others and seek to impose their beliefs. A pertinent reference to equality occurs at page 23B where Locke speaks of that for which citizens should hope, meaning "*equality* with their fellow-subjects under a just and moderate government". Again, at page 24A, he refers to "those whose doctrine is peaceable and whose manners are pure and blameless", saying that they "ought to be on *equal* terms with their fellow-subject": Bennett, *supra* note 6.

everyone has an equal right not to suffer and die for their religious convictions based largely on reciprocity. If one set of believers allows those of another conviction to live in freedom and peace while the first set controls the state powers, then when the situation changes and power falls into the hands of the other group, they should likewise extend the same freedom. In *Big M*, religious freedom was tied at *Charter* birth to concerns for equality and that is understandable.

There is value in seeing where Dickson C.J. believed that Canadian law was in relation to religious freedom before the *Charter* took effect. *Big M* could be read as having taken the nature or content of the right to freedom of religion prior to the *Charter* as a reference point. History should set the low water mark for an understanding of the meaning and extent of the right, not the high water mark. Armed with the *Charter*, the courts should take the right higher and extend its protection wider, but the law should not sink below the historical protection. With the advent of this constitutional protection, religious freedom should grow stronger. Religious voices should find their place in the multi-part harmony of Canadian society. Unfortunately, the voice of religion is occasionally, and indeed, increasingly, muted by majority voices. I contend that as courts turn from religious freedom as tolerance to religious freedom based on concerns of equality, courts are showing a tendency to allow state objectives to prevail over religious freedom, placing freedom of religion under stress. It is necessary to examine what the Supreme Court of Canada has done with *Big M* and s. 2(a) of the *Charter* since Dickson C.J. penned his vast views.

Chapter 6 Supreme Court of Canada Cases Since *Big M*

Dickson C.J.'s view of s. 2(a) of the *Charter* in *Big M* suggests images of vast, open spaces for religion within society. The state cannot impose religion, but religion is free to exist and manifest itself. There was much potential and promise. Having examined this foundational case, however, the question is how subsequent courts have applied what Dickson C.J. said. What has the Supreme Court done with the foundation that he laid? What have they added? What, if anything, have they forgotten or left behind?

An online search in WestlawNext Canada for Supreme Court of Canada cases that contained the word "freedom" within the same paragraph as the word "religion", intended to capture every case in which the highest court might have had occasion to address the concept of freedom of religion since the inception of the *Charter*, produced some 140 cases. On closer examination, in less than thirty of those cases was the Court called on to address the s. 2(a) guarantee of freedom of conscience and religion.[271] Moreover, in most of those cases, the Court neither discussed the right to religious freedom at length nor expanded upon the meaning of the right as defined in *Big M*. The main questions raised were whether the right to freedom of religion was engaged on the facts and if so, whether a limitation imposed upon it was reasonable under s. 1.

[271] A few of the cases considered a parallel provision in the Quebec *Charte des droits et libertés de la personne* (*Charter of Human Rights and Freedoms*), CLRQ c C-12 [Quebec *Charter*]. The Supreme Court has stated that interpretations given to the provisions of the Quebec *Charter* in relation to religious freedom apply also to religious freedom under the *Charter*: see *Marcovitz v. Bruker*, *infra* note 377.

In what follows, I focus on those Supreme Court of Canada cases that say something about the nature and scope of freedom of religion and its underlying rationale, paying special attention to whether the thinking of the courts aligns with or deviates from the historical rationale that Locke set forth as the justification for religious freedom. I examine 14 cases, asking in what manner they reflect or do not reflect Locke's understanding of tolerance on religious matters.

In what follows, I do not examine every fact and point of law raised by the various decisions. The cases are often lengthy and highly complex and involve many issues not related to religious freedom. As well, not unlike the Jehovah Witnesses' cases, they often contain multiple concurring and dissenting opinions. It is sufficient for my purposes to give enough of the factual and legal context of a case to cast light on the foundational questions and themes that I wish to pursue. I contend that the Court thinking continues to reflect Locke's influence, but to varying degrees.

In my analysis of the cases after *Big M*, I have drawn extensively on the work of three Canadian legal scholars Benjamin Berger, Richard Moon, and Mary A. Waldron, [272]

[272] I acknowledge my indebtedness to these three Canadian legal scholars that have each thought long and hard about the guarantee of freedom of conscience and religion. I have studied their writings with the hope that by standing on their shoulders, I might have a better view of how courts have handled s. 2(a). Learning the vocabulary with which they analyze judicial reasoning has been helpful to understand what may be going on in the cases.

Professor Benjamin Berger [Berger] is a full professor at Osgoode Hall Law School and his thirty-three page curriculum vitae attests to over twenty years of dedicated study of the topic of law and religion in Canada. He is a long-time, careful observer of the evolution of the interpretation that Canadian courts have placed on the right to freedom of conscience and religion. He has been cited as an authority on the topic by the Supreme Court of Canada.

Professor Richard Moon, a University of Windsor Distinguished University Professor and Professor of Law [Moon], has also proven himself to be a long-time, consistent and careful observer of the courts on this topic. His curriculum vitae and the frequency with which his name appears in cases and commentary alike attest to the fact that he has thought intensely about topics related to both freedom of expression and freedom of conscience and religion in Canada.

In her 2013 publication, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada*, Professor Mary Anne Waldron provided a wide-ranging, common-sense examination of how Canadian

who have each studied law and religion in Canada over many years. Their extensive analysis of and writing on the topic provides insight and guidance and a conceptual vocabulary that assists in understanding religious freedom cases. In what may be a reincarnation of Locke's state/church divide, Berger sees a public/private divide at work in the decisions with the courts frequently reflecting that religion belongs to the private realm. Berger sees this divide as an expression of liberalism's influence in Canadian legal thought. Moon sees it as a reflection of how religious beliefs have come to be considered as part of a person's core identity. For her part, Waldron highlights the deep, underlying, and contradictory worldviews of the various players, courts and litigants, that make certain that the conflicts that religion produces in Canadian society will continue into the future and will be, at times, irresolvable, a premise that I contend justifies Locke's call for tolerance. There will always be a reason for which some individuals will be called upon to show tolerance to others in relation to religion. There will always be a need to accommodate different religious beliefs within society if Canada is to attain its ideal as a free and democratic country.

Finally, in the interests of remaining on topic as I move from case to case, I provide a brief analysis of the essential court reasoning in each case immediately after I discuss the case. Based on my reading of the post-*Big M* cases, I contend that courts show a higher degree of respect for religious freedom when they remain close to Locke's thinking as rooted in history and speak of religious freedom as tolerance. Courts appear

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courts have grappled with s. 2(a) [Waldron]. Her thinking comes closest to mine when she speaks of the impossibility that there will ever be complete agreement within society in relation to certain important values and beliefs and of the consequential great need for a genuine right to freedom of religion that permits persons of different convictions to live and participate in society and still disagree. She justifies religious freedom on the basis that it is a required condition of a healthy democracy.

to diminish the importance of religious freedom when they ignore history and emphasize human autonomy and equality as the values at stake in religious freedom.[273]

As one will recall, rooted in weariness brought on by the suffering that religious intolerance had produced in history, Locke posited separate roles for the church and state. The state was limited to protecting individuals in their holding of public goods and had no role in compelling religious belief or observance. The church, a voluntary association based on personal faith, employed tools of teaching and persuasion, but never the powers of the state, to seek to convince people of religious truth. Holding to a conviction that there was ultimate truth in religion and faced with a divergence of opinions on religious matters, Locke believed that it was best that individuals be free to seek out for themselves and hopefully, find that truth.

The first case relevant to my topic after *Big M* was that of *R. v. Jones*.[274] Mr. Jones believed that his responsibility to educate his own and some 20 other children came directly from God and that it would be a sin for him to submit to a government requirement that he register and provide information about his educational program as that would amount to recognizing the state as a higher authority than the divine. Taking a different view of the matter than Mr. Jones, the majority of the court thought that the

[273] In the interests of being thorough, I have included the s. 2(a) cases in which the court did not significantly alter the meaning or application of the concept in footnotes inserted chronologically throughout this chapter:

Alberta (AG) v Plantation Indoor Plants Ltd, [1985] 1 SCR 366 was released as a companion case to *Big M*. An injunction based on Lord's Day legislation was vacated in accordance with the right to be free from religion under s. 2(a).

An indigenous man who killed and burned deer meat for religious purposes received no protection from s. 2(a) against charges under provincial wildlife legislation. Even if the burning of deer meat might have carried religious significance for the man, the court determined that he could have used frozen deer meat that had been killed lawfully in accordance with the legislation: *R v Jack*, [1985] 2 SCR 332.

[274] *R v Jones*, [1986] 2 SCR 284, [1986] SCJ 56.

provincial legislation actually accorded Mr. Jones freedom to obey God and that the legitimate and parallel state interest of ensuring that his program met acceptable standards did not interfere significantly with his freedom of religion. Laforest J. spoke of the legislation allowing for a reasonable accommodation of Mr. Jones' religious convictions. He mentioned the need to "delicately and sensitively weigh the competing interests so as to respect, as much as possible" the "right of parents to teach their children in accordance with their religious convictions".[275] The right to freedom of religion had to yield to only a small degree to allow the state to achieve its legitimate objective.[276]

The *Jones* case fits within Locke's concept of religious freedom as based on the recognition of separate roles for the state and the church. Laforest J. showed genuine respect for Mr. Jones' religious convictions, accepting the legitimacy of his religious belief that he was responsible to educate his children. His majority opinion evidences no hint of rejection of Mr. Jones' faith in any way. The Court stayed out of the religious domain. At the same time, the Court found that the state also had a parallel interest in ensuring that the children of the province were properly educated to ensure that they were able to function well as citizens in the public domain. This was part of the state role in society. The government requirement of registration was a minimal and justified intrusion into Mr. Jones' freedom of religion. Mr. Jones was free to hold and act on his religious views but as his actions also entered into the public domain, he had to comply with some state involvement. The language of accommodation used by the Court evidenced Laforest J.'s concern to respect and uphold religious freedom as much as possible, allowing it to

[275] *Ibid* at para 63.
[276] Wilson J., in a concurring opinion, maintained that Mr. Jones' s. 2(a) freedom was not even engaged.

thrive in its own created space. Beyond this application of s. 2(a) to the facts, the decision does not expressly advance the discussion with respect to the justification for the right to freedom of religion. Unlike *Big M*, *Jones* recognizes freedom *for* religion as opposed to freedom *from* religion.

I perceive that *Jones* can be analyzed in light of Locke's state/church separation, but it also reflects the public/private divide referenced in the writings of Berger and Moon and mentioned above. The division between the public and private is useful in accounting for what later courts say and do in law and religion cases.

As noted above, Benjamin Berger suggests that courts seem to dissect reality into two domains, public and private. As expected, to the public domain are assigned matters of the state, including such things as the formation of public policy, legal adjudication, and the regulation and provision of commercial services. The private domain takes in all that is personal, matters which belongs to the individual, such as questions of taste, preference, and so on.

Important to Berger's view of how the public/private concept works is his understanding that the public domain is governed by principles drawn from liberal political theory which gives primacy to reason in public discourse.[277] Moral and religious claims, explains Berger, do not rely solely on reason for their foundation and are considered part of the "realm of the private."[278] The deeper questions of what life

[277] Waldron questions whether liberalism's public discourse is solely based on reason. She contends that everyone operates within a given belief system, whether that belief system is made explicit or not. Opinions are not just compilations of raw, unfiltered data. Opinions take moral references from beliefs that are themselves ultimately anchored in some "organizing system" or worldview. Waldron calls these worldviews "comprehensive belief systems": See Waldron at 11 and 20.
[278] Benjamin L. Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State", (2002) 17 Can JL & Soc 39 at 43 [Berger, "Limits of Belief"]. See also ----- Berger, "Cultural Limits",

ultimately means, one of the concerns of religion, fall within the private realm. Ascribing significance to life is a matter not "governed by reason", at least not entirely. Instead, says Berger, meaning is a manifestation of "love, preference, and belief", involving an element of personal choice.[279] The public sphere "remain[s] agnostic as to the good – as to meaning".[280] In highlighting this public/private distinction and identifying religion as a private concern, Berger is not saying that courts that use the distinction are concluding thereby that religion is false. The distinction simply implies that religion is "essentially individual".[281]

One might immediately note that this public/private divide may not sit well with religious persons. Berger notes that religious persons may believe that the public/private divide represents a misunderstanding of the nature of their faith and its implications for their lives. Society and law may wish to see the world as either private or public, but a religious person does not and cannot view his world in such a manner.[282] Berger quotes an Abraham Joshua Heschel, who wrote from a Jewish perspective, in stating that,

> To the modern mind, religion is a state of the soul, inwardness; feeling rather than obedience, faith rather than action, spiritual rather than concrete. To Judaism, religion is not a feeling for something that is, but an answer to Him who is asking us to live in a certain way. It is in its very origin a consciousness of total commitment; a realization that all of life is not only man's but also God's sphere of interest.[283]

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supra note 3, ------ Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of Alberta v. Hutterian Brethren of Wilson Colony", (2010) 51 SCLR (2d) 25 [Berger, "Hutterian Brethren"], and ------ Berger, "Belonging to Law: Religious Difference, Secularism, and the Conditions of Civic Inclusion", (2015) 24(1) Soc & Leg Studies 47–63.

[279] Berger, "Law's Religion", *supra* note 231 at 301.

[280] *Ibid*.

[281] *Ibid* at 283.

[282] Berger, "Limits of Belief", *supra* note 278 at 43.

[283] *Ibid* at 46.

Faith is not just inwardness. It encompasses everything for the believer including the public domain. It does not live isolated in the realm of the private. Faith exists as fully engaged in the world and speaks to all aspects of life. For the religious person, faith defines the public and religion is most genuine when it speaks to all of life, private and public.

In relation to this public/private distinction, Moon agrees that religion has been assigned to the realm of the private but maintains that this is due to the "contemporary understanding of religion" as a part of a person's core identity.[284] Matters of such a personal nature as one's identity belong in the private realm. Religion is important, but ultimately, it is most important to the individual himself. Questions related to who one is in one's essence, reasons Moon, do not lend themselves well to public discourse.[285] Moreover, religious beliefs are not based solely on reason and so belong outside of the realm of politics and public debate.[286]

Moon contends that it is the requirement that all persons be treated as equal in their essential identities that confines religion to the private domain.[287] If religious views enter public debate, persons that do not share the underlying religious viewpoint would feel left out. Aggrieved persons would complain that they were not being treated equally. Incorporating the religious views of one group in public policy over the views of another group would be to impose religion and would amount to a form of religious

[284] Moon, "Liberty", *supra* note 8 at 570.
[285] The case of *Chamberlain*, *infra* note 336, provides an insightful analysis of the place of religious views in the public domain.
[286] Moon, "Liberty", *supra* note 8 at 570.
[287] *Ibid*.

discrimination, like in *Big M*.[288] The implicit rejection of one group's religious views by the state would communicate the message that that group is less important and that their beliefs are not considered true, thereby diminishing the value of the involvement of the group in society and leading the members of the group to feel devalued. In the face of this unequal treatment, persons would feel affected in their dignity.[289] For this reason, says Moon, "the state should remain neutral on the issue of what is the true faith"[290] and "neither affirm nor repudiate the values or practices of a particular religious group".[291]

The private/public dichotomy evidenced in the Supreme Court of Canada s. 2(a) jurisprudence resonates with Locke's separation of the roles of church and state. The state operates in the realm of the public and the church governs religious, private matters. The division into private and public, however, might be a cause for concern. Taken further, one might contend that matters of faith should be kept entirely out of the public domain and strictly confined to the realm of the private, jeopardizing freedom of religion in its public expression. That did not happen in *Jones*. Mr. Jones was free to follow the dictates of his conscience and religious belief with respect to educating his children and those religious beliefs became the basis for his public actions. His actions flowed from his inner religious convictions, but also operated outside of the private domain and touched

[288] Richard Moon, "The Supreme Court of Canada's Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in the Public Schools" in *Faith, Politics and Sexual Diversity*, eds D Rayside & C Wilcox (UBC Press, 2011), online: <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=390771> at 321 to 338 [Moon, "Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality"].
[289] *Ibid*.
[290] Moon, "Liberty", *supra* note 8 at 573.
[291] Moon, "Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality", *supra* note 288 at 324.

on public concerns and that led to the state requirement that he comply with the public requirement of registration.[292]

The desire to follow the dictates of one's religious beliefs is something that becomes a matter of passion when it relates to raising one's children. Two matters close to the heart come together. Mr. Jones was prepared to insist on his freedom before God all the way to the highest court likely, in part, because the well-being of his children was involved. The next two cases which also relate to how a parent's religious faith may affect their children reveal ways in which adherence to a public/private divide may go beyond Locke's recognition of two spheres and may limit the courts' ability to uphold religious freedom. The Supreme Court has determined that religious freedom does not extend to protect the religious expression or conduct of parents that a court deems would not be in the best interest of children. In the context of custody and access matters[293] and the medical treatment of children[294], the strong public interest in protecting children trumps a parent's religious views where the state establishes that acting on those views could result in harm to children.

In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Jehovah's Witnesses parents, for religious reasons, objected to their child receiving blood transfusions. When the child was one month old, physicians came to believe that she might at some point require a transfusion. The state intervened, and a lower court gave the Children's Aid

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[292] Non-religiously motivated rest day legislation created to replace the religiously motivated Lord's Day legislation survived challenge under s. 2(a): *R v Videoflicks Ltd*, [1986] 2 SCR 713 [*Videoflicks*].
Arguments based on s. 2(a) were unsuccessful in challenging public funding of denominational schools. The funding of these special schools is covered by supra-constitutional provisions and are not subject to *Charter* attack: *Reference re Bill 30, An Act to amend the Education Act (Ont)*, [1987] 1 SCR 1148.
[293] *Young c Young*, [1993] 4 SCR 3, [1993] SCJ 112.
[294] *B (R) v Children's Aid Society of Metropolitan Toronto*, [1994] SCJ 24, [1995] 1 SCR 315 [*RB*].

Society authority in relation to decisions with respect to medical treatment. The child eventually received a transfusion. The parents went to court to challenge the provisions of the legislation that allowed the state to do this, alleging that the provisions violated their freedom of religion. The major part of the reasons focused on arguments related to s. 7 of the *Charter* and the interpretation of liberty as it relates to parental liberty. The judges did, however, consider the application of s. 2(a) to the situation. Writing for the majority, Laforest J. stated that, "It seems to me that the right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is a… fundamental aspect of freedom of religion".[295] Though the purpose of the legislation, namely the protection of children, did not offend the parent's freedom of religion, the effect of the legislation, in denying them the right to make decisions as to the child's medical treatment, did. The right to freedom of religion, however, is not absolute and must yield to reasonable limitation. In this case, it was limited by the rights and freedoms of the child herself. The religious beliefs of the parents would have to yield under s. 1 in the best interests of the child.

There is a problem that one might see in this analysis from the perspective of the believer and it relates to how one determines what is in the child's best interest and what that reveals about the thinking of courts in relation to religion. What considerations go into the mix in arriving at an assessment of what is good for a child? Evident in these types of cases and illustrative of the public/private divide is the courts' reliance on and preference for its own reason-based understanding of what is in the children's interest to the exclusion of the parents' religious beliefs. These cases bring to light how law

[295] *Ibid* at para 105.

implicitly trusts its own rational instincts and relies on its own values and non-religious sources in the assessment of what is good for children.

In keeping with the public/private divide, normative claims, that is, claims as to what ought to be, must be grounded in reason. Courts in this context give no weight to appeals to non-rational worldviews, systems of belief, whether philosophical or religious, that rely on more than just reason for their foundation. Religion makes claims based on an authority other than and even beyond reason. Religious claims may be based on sacred texts, received traditions, ancient practices, established institutions or recognized leaders. Religious claims are rooted in beliefs.[296] An individual is free to rely on religious principles within their private life and a liberal society would even seek to protect the individual within that private domain, but reason governs life in the public domain.[297]

As understandable as this distinction is legally, in the context of making decisions that affect a person's own child, a believing parent would find it deeply wrong and offensive that a court would overrule their decisions as a parent on this basis. It is not that courts must merely do a better job of being sensitive to how parents feel about the rejection of their opinions.[298] The point is that most parents believe firmly that they truly are acting in the best interests of their children. Parents that believe that blood transfusions violate the biblical command that one not consume blood are referencing a higher authority than reason. It is not good to violate divine law. They believe that the

[296] Berger, "Limits of Belief", *supra* note 278 at 41 and 43. Arguably, all normative claims, even those that find no grounding in religion, are, at some level, based on belief. It seems that what is excluded from public discourse is not discourse that is not grounded in reason as much as discourse that is grounded in religious belief. See the discussion below of Waldron's concept of "incommensurate value systems" at note 299.
[297] Berger, "Limits of Belief", *supra* note 278 at 41 and 43.
[298] Though in many circumstances, a good decision-maker would strive to be sensitive to the feelings of a losing party.

state assessment of what is in their child's best interest fails to recognize a deeper, spiritual component, spiritual, but still real, that would lead them to believe that what the state wants is not truly good for the child. The parent draws on religious truth in determining what is best for their child, but the state truncates the discussion, leaves the religious information component out, and imposes its own non-religious view as to what is best for the child.

In these troubling and difficult situations, one cannot help but detect an underlying, not always subtle, current of disbelief on the part of the court in relation to the trustworthiness of the parents' religious beliefs. The court excludes the parents' faith from the calculus and prefers secular, scientific sources, relying on medical and psychiatric professionals to determine the best interests of the child. This situation exposes the fundamental nature of a worldview level disagreement between religion and law. In some situations, parents may not dispute a physician's expertise with respect to what is needed to save the physical body – but they would say that's not the only or even the most important aspect of the child's best interests. If one allows for a moment Locke's contention that there is truth in religion, one must grant that courts may ultimately prove to be wrong.

This is where Waldron's concept of "incommensurate value systems" enters the picture.[299] Religion and law often speak from contradictory worldviews. It is a fact of life that sincere and reasonable people and even individuals and courts, disagree fundamentally with each other as to important concepts, what is true or false, right or

[299] Waldron at 98.

wrong, and good or bad and this is often due to their underlying worldviews.[300] Worldviews clash and are often irreconcilable.[301] Individuals, thinking consistently within their own belief system, follow reasoned paths to different results and the real source of the conflict lies as a seed deep within the underlying belief systems. Unfortunately, contends Waldron, these underlying belief systems often remain hidden and unarticulated. With limited understanding as to why, the participants in an argument reason, use language, and weigh values in ways that the other side finds incomprehensible and even reprehensible.[302] Courts and religion, relying on their own underlying and unarticulated beliefs illustrate this dynamic. Waldron contends that judges are "ill-equipped" to handle cases involving the conflict of such incommensurate value systems.[303] Courts end up processing cases involving moral conflict through the filter of unarticulated belief systems. Waldron writes that,

> Despite genuine efforts to judge the parties impartially, the judge will hear the language of the argument and use the language of the judgment informed by one or other of the underlying belief structures. This will make the decision at least rationally impenetrable to the losing side and, in some cases, may lead them to suspect overt bias on the judge's part.[304]

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[300] *Ibid* at 36.
[301] *Ibid* at 99.
[302] *Ibid*. Waldron notes that communication between persons holding incommensurate value systems is often quickly marred by frustration and anger. Few resolutions emerge and no one advances in understanding. Parties become entrenched in their previously held convictions and dismiss the other side as unworthy. She writes that, "Compromise becomes not only impossible but unthinkable and the issues themselves frequently cannot be discussed in any way that can contribute to a solution": *Ibid* at 99. She argues that the best that can be hoped is that this flaw of the modern debate be recognized and that through free exchange and sincere discussion, the foundations for each person's convictions can be made express or laid bare. Persons should seek to reach back in their thinking to find where the disagreement begins, as "unpleasant… unpalatable" or uncomfortable as that process may be. Such conversations are essential if parties are to avoid a breakdown of understanding and communication. Waldron encourages individuals to seek "broader principles" on which there might be agreement, ideas that will allow for "honest debate and peaceful co-existence": *Ibid* at 20, 52, 99, 100, and 116.
[303] *Ibid* at 100.
[304] *Ibid*.

It is preferable, contends Waldron, to make underlying belief systems explicit.[305] When the moral foundations of the parties' beliefs are laid bare before the court, care can be taken to understand their positions accurately and on their own terms to arrive at a proper result. The court itself should be aware of its own belief system. In the end, courts may not succeed in resolving issues, but with deeper understanding will come better outcomes.[306]

Berger asks on what basis courts adjudicate if not on some form of belief about what is good or right.[307] Even "liberal justice must operate on some notion of the good".[308] Courts draw on concepts of what is good within society.[309] Liberal "virtues of civility, tolerance, reasonableness, and fairness",[310] freedom, equality, and human dignity are the subject of belief at some level. Berger writes that, "[L]iberalism necessarily reflects a set of normative judgments about what principles must be protected within a given society".[311] In the cases involving children, courts place their faith in science to the exclusion of other sources of knowledge or information. Law speaks a vocabulary dependent for its value and acceptance upon a worldview. Law may not make a claim to a religious foundation for its beliefs, but its view is built on belief nonetheless.[312]

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[305] *Ibid* at 12.
[306] *Ibid* at 100.
[307] Berger, "Limits of Belief", *supra* note 278 at 44.
[308] *Ibid*.
[309] *Ibid*.
[310] *Ibid*.
[311] *Ibid* at 45.
[312] Moon agrees that all values have "a religious pedigree, and a transcendent or faith-based character": Moon, "Liberty", *supra* note 8 at 573; see also ----- Moon, "Introduction: Law and Religious Pluralism in Canada", *Law and Religious Pluralism in Canada*, ed Richard Moon (UBC Press, 2008), online: <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=390771> at 5 [Moon, "Introduction"].

In managing this worldview divide, there seems to be an underlying element of risk assessment at play in the courts' reasoning in relation to faith and children. Perhaps there is truth in religion and the court recognizes the freedom of an adult to follow the dictates of their religious beliefs even if obeying those beliefs involves a scientifically identified medical or psychological risk. The problem is that a child is not of age to understand and choose to embrace the religious beliefs of the parent and so the court steps in to protect the child in its vulnerability. The court is not prepared to allow the health or wellbeing of vulnerable individuals, such as children, to ride on the faith of another person, even a parent. If an adult is prepared to risk his health for reasons of faith, that is a matter for the autonomy of the adult, but a child's life should not depend on a parent's faith.

Finally, note that there is no talk of accommodation of the parents' religious views in relation to the medical treatment issue. Instead, the Court is driven by a concern for equality, the child's equality interest in surviving long enough to make her own religious decisions.[313]

The next decision of the Supreme Court of Canada relevant to both Locke's thinking with respect to religious freedom dependent on a separation of church and state and the public/private divide is that of Malcolm Ross whose highly public anti-Semitic writings and pronouncements led to his removal as a teacher from a Moncton elementary

[313] *Droit de la famille — 1150*, [1993] 4 SCR 141, [1993] SCJ 111, should be read with *Young c Young*, *supra* note 286.
Hy & Zel's Inc v Ontario (AG), [1993] 3 SCR 675, [1993] SCJ 113 deals with the same issues as *Videoflicks*, *supra* note 285. The case is of limited value as the Court determined that the evidential record was insufficient to allow it to examine the application of s. 2(a).

school.[314] The case is also relevant to Locke's contention that individuals should not be deprived of their public goods because of their religious beliefs. The facts of the case stray close to situations that have given rise to hate promotion charges. One wonders if Mr. Ross' behavior could have been dealt with under the *Criminal Code*. That the matter was dealt with under provincial human rights legislation led to the appearance in the jurisprudence of an argument that may contribute to the exclusion of some persons of faith from public employment, especially in the public educational system, one of the most significant public goods of Canadian society.

Mr. Ross expressed his personal, anti-Semitic views outside of the school setting and the Court acknowledged that school officials had found no evidence that he manifested those views in the way he treated his students. His classes were subject to monitoring and there was no sign that he was discriminating against anyone, including Jewish children. The Court concluded, however, that Mr. Ross' highly public association with racist views compromised his ability to fulfill the state objective of providing a discrimination free educational environment for young children. By the exercise of his freedom of expression, Mr. Ross had rendered himself unfit to teach young children.

In his reasons, Laforest J. used both the language of tolerance and equality. Of importance, he identified schools as "arena[s] for the exchange of ideas" used by Canadian society to inculcate in students "those fundamental values" upon which society rests.[315] Teachers within those public schools must be able to communicate and model those fundamental values.

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[314] *Attis v New Brunswick School District No 15*, [1996] 1 SCR 825, [1996] SCJ 40 [*Ross*].
[315] *Ibid* at 80.

Though Mr. Ross primarily fought his exclusion on the basis of his right to freedom of expression, he also contended that his views reflected his religious beliefs and that the human rights legislation was being used as a "sword to punish [him] for expressing [his] discriminating religious beliefs".[316] He claimed that the charge of anti-Semitism was a "smoke screen for imposing an officially sanctioned religious belief on society as a whole" which was not the role of the courts or the human rights commissions.[317]

Relying on *Jones* and *Big M*, Laforest J. reaffirmed that everyone, even Mr. Ross, was "free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience", but such freedom was not absolute or, one might say, not without certain consequences. Echoing Locke's concept of reciprocity and the words of *Big M*, he repeated that religious freedom is subject to the limitations required by the "right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others". [318] The exercise of one's freedom of religion cannot harm the "fundamental rights and freedoms of others".[319] Laforest J. believed that Mr. Ross' views "denigrate[d] and defame[d]" the beliefs of Jews thereby undermining the "very basis of the guarantee in s. 2(a)" of the *Charter*. The public manifestation of his religious views deprived Jewish people of their dignity and right to equality. Using language typical of hate crime cases, the Court opined that the "manifestations of [Mr. Ross'] right or freedom are incompatible with the very

[316] *Ibid* at 70.
[317] *Ibid*.
[318] *Ibid* at 72.
[319] *Ibid*.

values sought to be upheld in the process of undertaking a s. 1 analysis".[320] The Court reaffirmed his right to hold and manifest his religious views, stating that,

> [Mr. Ross] is free to exercise his fundamental freedoms in a manner unrestricted by this Order, upon leaving his teaching position. These clauses only restrict the respondent's freedoms to the extent that they prohibit the respondent from teaching, based upon the exercise of his freedom of expression and freedom of religion.[321]

The exercise of his freedom of expression and religion led to Mr. Ross' disqualification as a public school teacher.

The Court in *Ross* did not advance the discussion as to the foundation or definition of religious freedom. Like many cases, however, it showed a limitation of its protection. Mr. Ross had unpleasant, and most would say, false religious views related to Jewish people and though he was entitled to speak publicly of those beliefs, the guarantee of his religious freedom did not protect his public employment as a teacher.

The *Ross* case is important for several reasons. Though the case revolved around his qualifications as a teacher, the case essentially pitted Mr. Ross' right to freedom of religious expression against the right of young Jewish students to enjoy a school environment that was free of any form of discrimination. As such, the case falls into a category of cases in which religious freedom is balanced against the right to equality. In this case, the right to equality prevailed over the right to religious freedom.

The outcome of the case seems correct. Mr. Ross' views were extreme and marked by distortion and traces of hatred. The negative effect that his public association

[320] *Ibid* at 94.
[321] *Ibid* at 107 and 108.

with those anti-Semitic views would have on any Jewish students who knew what he was saying outside the classroom seems evident. The *Ross* case, however, helped to bring to the fore the nature of the public school system as a communicator of society's approved values. It also revealed the negative effect that a manifestation of disagreement with those values may have on one's ability to participate in certain roles within the educational system. If one is associated publicly with a position that conflicts with certain societal values, even for religious reasons, one is potentially at risk of being excluded from employment as a teacher.

It would be an easy and logical step should someone argue that persons, who for reasons of religious conviction disagree with the societally approved value system and say so publicly, should be excluded from other types of public employment as well, whether judicial or quasi-judicial office, law enforcement, or the provision of publicly funded medical services.[322] Perhaps such persons would be rendered unfit to serve in any government capacity that requires the communication or modeling of those approved societal values. Perhaps church groups that do not agree with the moral views of the federal governing party on certain issues should not receive government funding for their charitable summer works projects.[323]

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[322] Richard Moon has said that,

> a teacher should be excluded from the schools if she/he has indicated by her/his public statements or actions that she/he regards homosexuality as sinful or objectionable, even though there is no evidence that she/he has directly discriminated against gays and lesbians in the classroom. She/he should be excluded not only because discrimination is sometimes subtle and difficult to prove but also because a teacher should do more than simply tolerate gays and lesbians. She/he should affirm their equal value.

See Moon, "Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality", *supra* note 288.

[323] Perhaps someone will consider whether individuals and groups that espouse views contrary to the ascendant societal values should qualify for charitable tax status.

One might recall Locke's views with respect to harming a person in the possession of public goods for religious reasons. Public employment is a significant public good. Canadian society may affirm the right to religious freedom, but if it narrows the access of religious people to the public goods of society because of their religious beliefs, that would constitute a serious restriction of their religious freedom. The threat of unemployability would act as a strong compulsive force restraining the free expression of religious views.

In such situations where the state excludes religious persons for religious views, has not the state become the approver and prescriber of views that contradict religious belief? Locke spoke of the separation and delineation of the role of the state and the church. Is the state straying into the realm of faith, the realm of the church? An answer might be that, in *Ross*, the state only strays into the domain of faith in so far as necessary to ensure that the public school environment is welcoming for all potential students.[324] However, there should be room to at least consider whether it is the hallmark of a diverse, pluralist society that students will sometimes encounter teachers who do not prescribe to dominant moral views. The counter argument with Ross is that his views were not simply divergent but had the potential to poison the learning environment for some young students. It is important that *Ross* not be read broadly to apply to every religious belief that runs counter to prevailing norms.[325] Accepting that the *Ross* matter was decided

[324] The concern as to whether Mr. Ross would actually discriminate against his students was not the main one in the case. The concern was the effect that his public behavior had on the learning environment of the children in his class who might become aware of what he was saying publicly. Accepting at face value that Mr. Ross did not discriminate against his students in the classroom does not help the child that lives in fear that he will do so because of what the child has seen or heard. Incidentally, the school officials in *Ross* had tried to handle the matter without taking away Mr. Ross' teaching position. They monitored his classroom, placed letters of reprimand on his file, and attempted to address the concerns of the parents and students.
[325] This thinking arises in *SL* and *Loyola*, both *infra* notes 405 and 441.

correctly, I contend that an overly broad reading of the case has given rise to an argument that has weakened the protection that the right to religious freedom in Canada affords religious persons in public employment. placing pressure on persons of faith through the reduction of their ability to earn a living and seek personal fulfillment in public service.[326]

The *Ross* matter provides an opportune moment to refer again to Locke's thinking on tolerance. For Locke, the arguments in support of religious freedom led to his call for tolerance. The way to allow religion freedom was to tolerate religion. Berger identifies tolerance as a concept that Canadian law uses to manage disputes involving claims of religious freedom.[327] Society allows for religious difference in belief and conduct. Beyond tolerance, society may even respect certain religious differences when those differences are relatively small and considered innocuous. At some point, however, one's respect for a religious belief or conduct may run out. When one reaches this stage, to continue to allow freedom to the religious expression, one might simply have to put up with the belief or conduct. In these situations, one passes from respect or perhaps indifference to toleration. Courts sometimes speak of law's posture toward religion in terms of the "language of tolerance".[328] In my opinion, that is when law's protection of religious freedom is strongest. This is when society must work to be a free society. Before this point, it presents no challenge to society to accept religious difference. Before this point, society does not really care. There is, of course, a point beyond which even society's ability to tolerate the expression of certain beliefs is exhausted. Religious

[326] *Adler v Ontario*, [1996] 3 SCR 609, [1996] SCJ 110 deals with funding of denominational schools. See *Reference re Bill 30*, *supra* note 292.
[327] Berger, "Cultural Limits", *supra* note 3 at 254.
[328] *Ibid*.

freedom is not absolute, but between the point of respect or indifference until one arrives at the point of the intolerable, one finds a zone in which the according of freedom implies tolerance. Within this zone, the mettle of a society as a free society is tested. The extent to which a society is free is reflected in where the outer line of tolerance is drawn.

Tolerance is essential in a multicultural context, says Berger, "giving a margin of freedom for a broad diversity of pursuits, tastes, beliefs, and practices".[329] Law demonstrates the depth of its commitment to religious freedom and tolerance precisely "at those points at which the tolerating group 'thinks that the other is blasphemously, disastrously, obscenely wrong'".[330] Society shows itself to be most tolerant when being tolerant is most challenging

Reminiscent of Waldron's views, Berger contends that law's use of the concept of toleration implies that law is working from a normative position, a worldview. He writes that,

> [L]egal toleration admits that the legal system embodies and expresses a set of commitments and judgments about a good life—concedes its non-neutrality —but counsels acceptance of certain departures from the norm in the name of political peace, mutual respect, or other strategic or moral ends.[331]

Moon sees tolerance as a way to "blunt the conflict between belief systems (religious and secular) by seeking to accommodate minority belief systems within the dominant culture – by attempting to create space for minority religious communities".[332]

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[329] *Ibid* at 255.
[330] *Ibid* at 257.
[331] Benjamin L. Berger, "Religious Diversity, Education, and the "Crisis" in State Neutrality", (2013) 29:1 Can J Law & Soc 103 at 118 [Berger, "Religious Diversity"].
[332] Moon, "Liberty", *supra* note 8 at 573. Tolerance is not an entirely acceptable notion for some thinkers. Toleration implies a tolerator and a tolerated, suggesting to some a hierarchy or superiority on the part of

In my mind, one of the clearest examples of both Locke's church/state separation and the public/private divide at work in the analysis of the application of s. 2(a) is the case of *Trinity Western University v. College of Teachers*.[333] *Ross* pitted religious freedom against the equality rights of young Jewish students; *TWU* marks the beginning of a perceived clash between the public manifestation of religious moral belief and the right to equality of persons of same-sex orientation, a conflict that has become a significant source of concern in relation to the right to freedom of religion and the right of believers to participate fully in society. The manner in which the case was argued reflects the potential for reading *Ross* too broadly, as noted earlier.

The relevant facts in *TWU* are well known. TWU was a private, Christian university that, for reasons of religious conviction, required the students that chose to attend their institution to comply with a mandatory community covenant that prohibited sexual behavior outside of the confines of a married relationship between a man and a woman. When TWU applied to expand the accreditation of its teaching program, the provincial body that governed accreditation denied their application on the basis that the university discriminated against same-sex persons. In the Supreme Court of Canada, the majority decision framed the issue as one of equality asking in what way one could resolve the perceived conflict between the religious freedom of the students of TWU (and their equality rights) and the equality interests of homosexual students in the public

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the one that deigns to put up with the distasteful views of another: Berger, "Cultural Limits", *supra* note 3 at 256 and 257. That the failure to tolerate might carry consequences for the one tolerated also suggests a power imbalance. Berger notes that the idea of tolerance is perceived as solidifying power structures, creating an "us and them" mentality: Berger, "Religious Diversity", *supra* note 331 at 118. The writer senses no trace of a condescending attitude or power imbalance in Locke's writing. Perhaps this a reflection of the humbling historical reality that both sides of the Christian divide were equally guilty of being intolerant at different times and in different contexts.

[333] [2001] 1 SCR 772, 2001 SCC 31 [*TWU 2001*].

school system. The concern was that graduates of TWU might display anti-homosexual attitudes or behavior once they entered the public school system thereby discriminating against homosexual students.[334]

In the end, the majority in *TWU* was able to avoid a s. 1 analysis by finding that the identified potential conflict could be resolved on the basis that there was no actual, concrete evidence that the program at TWU was, in fact, producing graduates, who, once in the public school system, discriminated against homosexual students. In adopting this approach, the court was able say that there was no conflict between the competing rights and so, there was no need to impose a limitation on the s. 2(a) right. TWU students would continue to enjoy their right to religious freedom and the students in the public school system would enjoy a discrimination free school environment. If there were any cases of discrimination, they could be dealt with through disciplinary channels.

This first *TWU* decision illustrates well the public/private divide and Locke's church/state separation. TWU was free to hold and teach its religious views within the confines of its own classrooms as a private, Christian organization. It did so within the role Locke assigned to the church and in private. The moment, however, that TWU sought to enter the public domain by seeking public accreditation and the ability to produce graduates that would qualify for employment in the public school system, thereby participating in an activity that would draw value from the public domain, TWU's religion had left the private domain and entered the public domain. Their

[334] The dissenting opinion in *TWU 2001* went further and framed the concern in a manner more parallel to *Ross*. Students of TWU had, by agreeing to the mandatory covenant, expressed publicly their religious views concerning homosexual intimacy. How could they ever be teachers within the public system unless they publicly disavowed those discriminatory views?

religious freedom would have to be reconciled with the equality rights of other participants in the public domain in accordance with the values accepted within the public domain. One notes the admirable restraint exhibited by the majority in *TWU* and the respect implicitly shown to TWU's religious views as evidenced in the Court's attempt to find a way to resolve the conflict and allow TWU to participate in the broader, public domain. One has a sense that the members of the Court did not agree with TWU's religious beliefs. It was clear that the court would not tolerate discrimination within the public domain, but the law was able to tolerate TWU's exercise of religious freedom within its private sphere and by not acting on its judgment on TWU's religious beliefs, the Court showed respect for the Court's limited role. *TWU* represents the strength of religious freedom as tolerance.[335]

Chamberlain v. Surrey School District No. 36 falls in step with *TWU*'s approach to resolving the tension between religious belief and the equality rights of persons of same-sex orientation and also sounds a note of balance.[336] *Chamberlain* is relevant because of the Court's interpretation of provincial educational legislation that required a school board to comply with strict secularism in deciding whether to approve the use of three books depicting same-sex parented families.[337]

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[335] Berger maintains that the underlying logic of the *TWU 2001* decision is that "tolerance was in order inasmuch as the religious beliefs comported with law's understanding of religion as dominantly a private issue and could be contained within law's structural commitment to the public/private divide": Berger, "Cultural Limits", *supra* note 3 at 262. The sole dissenter in this first *TWU* case went much further into the moral fray, expressing rejection of the religious beliefs of TWU. I contend that, in so doing, L'Heureux-Dubé strayed out of the role of the court as arbiter of public goods and fully into the realm of faith, the definition of sexual morality and the interpretation of Scriptures as to the divine will.

[336] [2002] 4 SCR 710, [2002] SCJ 87 [*Chamberlain*]

[337] A full discussion of secularism and its "spectrum of definitions" is beyond the scope of this paper: see Benjamin L. Berger, "Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed", (2011) 19 Const F 41 at 42 [Berger, "Key Theoretical Issues"]. Berger observes that liberal societies turn to secularism as another means of dealing with conflicts that arise between liberal values and religion: Berger, "Limits of Belief", *supra* note 278 at 48. He writes that secularism is a tool that has the

The school board had relied entirely on the religious views of certain concerned parents to the exclusion of the values of other members of the community, namely those of same-sex orientation in rejecting the use of the books. Former Chief Justice McLaughlin, writing for the majority, gave a balanced direction that the board should have considered all views.[338] At length, she wrote that,

> A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others.

This is a masterful balancing of religious freedom and equality. The former Chief Justice went beyond tolerance and showed respect for the religious convictions of the concerned

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"ability to reconcile competing claims to ultimate authority, to confine the influence of religion on state power, and to limit actions based on personal conscience": *Ibid* at 49. A society may be considered secular if there is some form of official recognition of the need to maintain a separation between the church and the state (i.e. Locke's separation). Secularism may denote the aim of some to purge out of society everything religious. Extreme advocates of this form of secularism might seek the complete eradication of all traces of faith from society because faith is undesirable. Less extreme positions might limit the exclusion to debates with respect to public policy. Individuals must articulate their positions in relation to public policy using reasons to which all citizens, religious and non-religious, have access, meaning arguments based on facts and reason. In some situations, secularism merely describes a state of society or the direction in which society is moving, referring to the "general decline of religious belief and practice in society": Berger, "Key Theoretical Issues", *supra* note 337 at 48. Berger borrows ideas from the Canadian philosopher Charles Taylor in depicting the "essence of modern secularism" as the "comparatively modern shift 'from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others'": *Ibid*. Under this view of secularism, a secular society is one that allows for pluralism by creating space within the public domain for all systems of belief, giving no special favour to any one point of view. Berger describes this as a "gesture towards a kind of pluralism or inclusiveness based on multicultural equality": *Ibid* at 43. In 1971, Canada officially recognized pluralism in adopting a policy of multiculturalism which has now been enshrined with the *Charter*: Berger, "Religious Diversity", *supra* note 331 at 20; Berger, "Limits of Belief", *supra* note 278 at 50; and Berger, "Cultural Limits", supra note 3 at 249. Berger contends that Canadian law operates with a concept of secularism that "preserve[s] a public space within civil society in which no single religious stance can claim supremacy": Berger, "Limits of Belief", *supra* note 278 at 51. He views the role of the law as "to operationalize a political commitment to multiculturalism by serving as custodian and wielder of the twin key tools of tolerance and accommodation": Berger, "Cultural Limits", supra note 3 at 245. Secularism is a "precondition to pluralism": Berger, "Limits of Belief", *supra* note 278 at 51.

[338] *Chamberlain*, *supra* note 336 at para 19.

parents. She did not pass judgment on their views. She enjoined the decision-maker to hear all parties and consider their views, even "addressing their religious concerns". Within the public sphere, however, decision-makers must respect equality. Though some religious views are entitled to consideration, a religious view that denies to other views the right to be heard and considered is not to be relied on to exclude some participants from the public discussion. Her concern with showing fairness to both sides of the debate illustrated her respect for religious views and non-religious views. She observed the concept of reciprocity in saying that "each group is given as much recognition as it can consistently demand while giving the same recognition to others". She affirmed the right of parents to hold their religious moral views but said that if the school is to exhibit qualities of tolerance and respect, "that a certain lawful way of living is morally questionable cannot become the basis of school policy".[339] She did not undermine the right of religious persons to hold their moral, religious views and even express them publicly. Instead, she insisted that a secular school system cannot make policy decisions on the basis of the moral views of some of the parents to the exclusion of others.

Chamberlain was not really a s. 2(a) case. It did, however, show once again the right to religious freedom in tension with the right to equality. It illustrates again Berger's private/public divide and Locke's church/state divide. Persons on both sides of the conflict are fully entitled in their private spheres to believe what they believe. Most interestingly, both sides are likewise permitted to manifest what they believe publicly. Neither side can exclude the other from public debate. One steps across the line within

[339] *Ibid* at para 20.

the public domain when one insists that one's views be the sole basis for public policy. One has a right to speak; one has no right to exclude others from the debate.

One notes McLachlin C.J.'s care in *Chamberlain* not to undermine the right of the religious person to hold that a way of living is "morally questionable". She even affirmed the believer's right to manifest their views. She is clear, however, that a moral, religious view cannot demand hegemony in the realm of public policy formation. McLachlin C.J. showed the expected restraint of the law in delving into private, religious matters. She did not allow the law to pronounce itself in relation to the religious beliefs of the participants. *Chamberlain* was an admirable example of the law seeking to preserve the conditions of healthy, democratic debate.

Although not the focal point of *Chamberlain*, some aspects of that decision may raise the question whether religious freedom is coming to be understood simply as a form of equality right. *Chamberlain* speaks to equality in the right to be respected, heard, and considered. Religious freedom protects this right to equality of consideration. Is it not then just another form of equality? And if so, does it protect anything more than equality? If it is only a form of equality, why is there a need for a guarantee of religious freedom at all? Arguably, however, while religious freedom cannot undermine equality, that does not mean that the right to freedom of religion is merely a right to equality.[340]

[340] Berger views *Chamberlain* as a further illustration of the public/private divide. He writes that, "The deep logic of this decision is that this expression of religion is impermissible because it fundamentally offends law's conception of the public/private divide; once in the public realm, religion had to comply with the value of equality that has been so deeply internalized in Canadian constitutional culture": Berger, "Cultural Limits", supra note 3 at 263.

In *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c Lafontaine (Municipalité)*, [2004] 2 SCR 650, [2004] SCJ 45, various court opinions combine to give rise to the certainty that the right to freedom of religion entitles religious organizations to acquire land to build their places of worship.

In *Syndicat Northcrest c. Amselem*, the majority of the Court once again spoke in the language of tolerance, stating that "respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy".[341] At the same time, says the court, that respect must live "alongside the societal values that are central to the make-up and functioning of a free and democratic society".[342] Respect and tolerance in *Amselem* upheld the right of Jewish tenants of an apartment building to erect a succah on their balconies nine days a year in accordance with their interpretation of biblical teachings during the festival of Succot in apparent violation of the by-laws of their signed declaration of ownership.

Amselem is most important for the definition of religion that the Court provides:

> Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[343]

Acknowledging how difficult it must be to arrive at an accurate, comprehensive definition of something as complex as religion, I contend that the Court has laid an element of human autonomy at the core of the concept. The Court said that religion in its essence is "about freely and deeply held personal convictions". The person holds the convictions. The person may do so freely, but the person is active in holding the convictions. One acknowledges the connection to spiritual faith, but then the religion is linked to how one defines oneself. *Big M* and courts since then have invoked the concept

[341] [2004] 2 SCR 551, [2004] SCJ 46 at para 1 [*Amselem*].
[342] *Ibid*.
[343] *Ibid* at para 39.

of autonomy as underlying religious belief. Persons are said to choose freely their religious beliefs. Perhaps I am reading too much into the definition and the Court is just trying to gather all of the related concepts into one sentence. The definition went on to include references to self-definition and fulfillment, terms that speak of personal identity and human flourishing. The Court's definition contains elements of faith, the exercise of personal autonomy and identity. Later, the Court emphasized that religion "revolves around the notion of personal choice and individual autonomy and freedom".[344] Nonetheless, the acknowledgement that religion involves some relationship to the divine placed religion clearly outside the usual realm of the state domain.

The court in *Amselem* also addressed the purpose of s. 2(a), drawing on something said by Dickson C.J. in *Videoflicks*, a case in which the Court upheld legislation that replaced the religiously motivated Lord's Day legislation, saying that the

> purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices.[345]

In accordance with this deeply personal nature of belief, the Court opted for a "personal or subjective conception of freedom of religion", stressing the "subjective aspect of the believer's personal sincerity rather than the objective aspect of the conformity of the beliefs in question with established doctrine".[346] As a consequence of this opting for the subjective, in the analysis of religious freedom claims, the Court seeks to determine

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[344] *Ibid* at para 40. Berger contends that the characterization of religion as an expression of autonomy and choice is an example of liberalism reflecting its own views back upon religion, casting religious issues in its own liberal image. Liberalism exalts reason and then breaks religion down into preference and choice, excluding it from the public discourse: Berger, "Law's Religion", *supra* note 231 at 283.
[345] *Amselem*, *supra* note 341 at para 41; *Videoflicks*, *supra* note 292.
[346] *Amselem*, *supra* note 341 at para 42.

whether the person sincerely believes in what they allege and not whether their alleged belief conforms to a broader, organized system of faith.[347]

Of importance and underlying this decision to opt for a subjective approach to religious belief, the Court reaffirmed that neither the courts nor the state should weigh in on matters of religious faith, stating that,

> … the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.[348]

This is a clear affirmation of the Lockean divide between the state and religion, a strong statement in support of the contention that the state has no business delving into questions of religious belief. This thinking gives maximum freedom to religion within its domain, and indicates that courts should show restraint in interpreting or defining the content of a person's religious belief, exercising care to allow the person to define their belief and the import of their belief. The mention of explicit or implicit determination of what a person believes highlights the need for the courts to avoid acting, perhaps unconsciously, on a rejection of a person's faith. One notes the broad range of forms that belief can take. A belief can be a "religious requirement, "obligation", precept, "commandment", custom or ritual". The court should not become "unjustifiably entangle[d]… in the affairs of religion".

[347] *Ibid* at para 43.
[348] *Ibid* at para 50.

The Court referred to the interference of the state with religious belief as "invidious" and its intrusions as unwarranted.[349] This is strong language in defence of freedom of religion.[350] A subjective approach to religious belief will keep the state out of the affairs of religion. A litigant need only establish a sincerely held belief or a practice that is connected to religion and establish that state action has interfered with the manifestation of that belief in a manner that is more than trivial or insubstantial.[351]

Like many freedom of religion cases, *Amselem* raises the question as to why religious beliefs are entitled to respect, one of the questions frequently addressed by Richard Moon. Given that the dispute in *Amselem* pitted one individual's religious freedom against another individual's contractual rights, the question becomes even more pressing. Why should religious beliefs prevail over contractual rights or other rights? Why are religious claims of any special value? Moon offers two options.[352] Perhaps belief systems, religious or otherwise, are of value and entitled to respect because of the inherent value of the individuals that have freely chosen those beliefs, being the product of their personal commitments or individual judgments. Out of a desire to respect persons

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[349] *Ibid* at para 55.

[350] Perhaps the Court can speak in such strong terms because the conflict in *Amselem* was between two non-state parties. The Quebec *Charter* applies to relationships between individuals and not just between the state and the individual.

[351] *Ibid* at para 58. This language is taken from Wilson J.'s minority judgment in *Jones*, *supra* note 274.

[352] Moon seems to canvas a third possibility in asking why, if the court has chosen a subjective approach to establishing religious belief, would one person's religious beliefs be entitled to any special treatment in relation to the beliefs of others. Perhaps the justification for special treatment of religious beliefs is that these beliefs address the "most fundamental questions about existence and morality" and in the minds of believers, these beliefs are of a higher order because they are attached to "divine sanction": Moon, "Hutterian Brethren", *supra* note 8 at 119; ----- Moon, "Introduction", *supra* note 312 at 15 and 16; ------ Moon, "Limits of State Neutrality", *supra* note 8 at 505 and 506. Perhaps religious beliefs demand special protection because humans are "spiritual beings who have both a need and a capacity to reflect on and give form to ultimate reality and to do so in concert with others": ----- Moon, "Introduction", *supra* note 312 at 16 and Moon, "Limits of State Neutrality", *supra* note 8 at 499. Out of respect for humans that are essentially spiritual beings, persons should be free to seek truth and live according to their understanding of such truth.

that are all of equal value, law respects their religious beliefs as part of a "broader public commitment to individual liberty".[353] The value of religious belief then derives from the value of the person that chose those beliefs.

Moon's second option, somewhat related to the first option, is that religious beliefs demand respect because individuals' deepest religious convictions form part of their essential identity.[354] Recognizing how deeply believers hold their beliefs, beliefs which give life meaning and form one's understanding of the world and society, grounding one's very being and guiding one's sense of right and wrong, they are entitled to respect because they are intimately tied to the accepted "intrinsic value" of each individual.[355] They are held so close to the person's core that they meld into the person's identity and so demand equal respect. Moon also adds a recognition of a communal dimension to religion. Religion creates communal ties and provides the neighborhood in which religious individuals live their lives.[356] Within these communities of faith, persons define who they are. The identification with a religious culture again places religious belief within a category of identity.[357] Moreover, Moon writes that,

> The special protection granted to the individual's religious beliefs and practices must rest on a belief or assumption that the individual is committed,

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[353] Moon, "Introduction", *supra* note 312 at 15; ----- Moon, "Religious Accommodation and its Limits: The Recent Controversy at York University", a text of a talk given at the Noor Cultural Centre in Toronto on January 30, 2014, electronic copy available online at: http://ssrn.com/abstract=2399846 at 1 [Moon, "Controversy at York University"].
[354] Moon, "Hutterian Brethren", *supra* note 8 at 117 and 99.
[355] Moon, "Liberty", *supra* note 8 at 569 and Moon, "Limits of State Neutrality", *supra* note 8 at 499 and 508; Moon, "Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality", *supra* note 288 at 323; Moon, "Limits of State Neutrality", *supra* note 8 at 53 and Moon, "Hutterian Brethren", *supra* note 8 at 117. Waldron writes that the idea that human beings have "a basic dignity that must be respected, simply because they are human" is a value that persons of many value systems can accept: *Ibid* at 115 and 138.
[356] Moon, "Limits of State Neutrality", *supra* note 8 at 53.
[357] Moon, *Introduction*, *supra* note 312 at 15.

> or connected, to his religious values and practices in a way that is fundamental, and different from his commitment to other views or values.[358]

Herein lies Moon's basis for special protection of religious beliefs.

Having offered the above two basic ways of viewing religious belief, Moon contends that religious beliefs are *both* personal choices and deeply held core beliefs tied to one's identity. He encourages courts to see the two-sided dimension of faith. He writes that,

> The challenge for the courts is to articulate a richer or more complex conception of religious adherence. Religious belief is not simply a personal choice or preference, nor is it simply a fixed attribute. Indeed, the significance or value of religion, from the broader public perspective, may depend on its dual character as both a personal commitment to certain truths or values and as a deeply rooted part of the individual's cultural identity.[359]

The state should view religion not as one or the other, but as both. He then goes on, however, to add that in light of the strength and closeness with which some hold religious views and given the sensitive nature of discussion of the matter, "it makes sense for the state sometimes to treat religion as a matter of identity".[360]

Though Moon argues that religious belief is both personal choice and deeply held, he perceives a shift in the way Canadian courts have dealt with religious freedom since the early days of the *Charter* until the present day. The early emphasis, as seen in *Big M*, was on religious freedom as the absence of coercion.[361] Moon says that this pointed to a concern for respecting individual choices. Persons must be free to make up their own

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[358] *Ibid*.
[359] Moon, "Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality", *supra* note 288 at 337.
[360] *Ibid*.
[361] *Big M*, *supra* note 4.

minds. Courts have moved from emphasizing choice to relying primarily on the second view.[362] With the appearance and then increase in the use of language related to inclusion and equal respect, Moon contends that courts are now thinking more in terms of personal identity.[363] He sees this as a move toward interpreting the right to freedom of religion as a form of equality right.[364]

Berger too speaks of seeing a trend in the jurisprudence and scholarly writing toward framing the right to freedom of religion in the "language of equality".[365] He too sees this as a reliance on conceptions related to identity, writing that, "In the language of equality there is a seeming invocation of conceptions of cultural identity rather than autonomy: equality logic is about protection from identity-based harms".[366] As such, religion is given respect and protection as it is considered an "aspect of one's identity".[367]

However, Berger is not prepared to go too far in finding the purpose of protecting freedom of religion in the link between religion and identity. In the final analysis, he favours the concept of autonomy as the foundation for freedom of religion. Berger writes that,

> There is no doubt that there is some dimension of religious freedom that has a cultural or identity-based component. Most simply, religion is not merely a choice like any other; not all choices are treated with the constitutional protection that religion enjoys. My claim is not that Canadian law's

[362] Moon, "Limits of State Neutrality", *supra* note 8 at 499 and 510; Richard Moon, "Preface in Freedom of Conscience and Religion", *Essentials of Canadian Law* (Toronto: Irwin Law Inc, 2014) at xi [Moon, "Preface"].
[363] Moon, "Liberty", *supra* note 8 at 569; ----- Moon, "Christianity, Multiculturalism, and National Identity: A Canadian Comment on Lautsi and Others v. Italy" in *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, ed J Temperman (Brill: Martinus Nijhoff, 2012) 241, online: <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=390771> at 246.
[364] Moon, "Limits of State Neutrality", *supra* note 8 at 499 and 510 and Moon, *Preface*, supra note 362 at xi.
[365] Berger, "Law's Religion", *supra* note 231 at 297.
[366] *Ibid*.
[367] *Ibid*.

> understanding of religion is bereft of a cultural or identity-based dimension. However the work that "identity" does in Canadian adjudicative culture is comparatively light, and this holds true not only for religion, but also for the constitutional guarantee of equality.[368]

Berger does not see that equality-as-identity provides entirely the necessary justification for religious freedom. He remains rooted in the idea that the justification for freedom of religion is ultimately about respecting choices and human dignity.[369]

It is my contention that Moon's two suggested ways that courts are thinking of religious belief represent a loss of foundational ground for the right to religious freedom.[370] They both lead to an argument that there is no real need for a separate right to freedom of religion and no reason to accord religious belief any special respect in relation to other beliefs.[371] Whether one views religious beliefs as the product of an autonomous being's personal choices or as part of the person's identity denies to religion any higher, ontological ground. One is left with something that looks like a right to equality. The result is that freedom of religion falls in amongst the many other competing equality claims, gets lost in the world of personally chosen beliefs, and is too soon overlooked and forgotten.[372] Religious freedom as equality yields quickly to other equality claims. The

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[368] *Ibid* at 299.
[369] *Ibid*.
[370] Waldron too rejects autonomy and equality as the grounds for religious freedom: Waldron at 72.
[371] One wonders why the framers of the *Charter* chose to create a separate guarantee of the right to freedom of conscience and religion if equality could have done all the necessary work: Waldron at 72. Berger asks "why constitutions continue to single out and protect religion". "If religion has become one possible means of human flourishing among many other options", why should religious belief receive any special protection? Berger speaks of a "kind of levelling move". Religious freedom is just one application of general constitutional protections: Berger, "Key Theoretical Issues", *supra* note 337 at 43, 44, 46 and 49A.
[372] In fact, viewed as an equality right, religious freedom may receive even less respect. Waldron notes how persons consider protecting freedom of conscience and religion as a "different, and less worthy, project" than protecting persons from distinctions based on "gender, ethnic history, or physical or mental limitations". Persons had little to do with those characteristics, but those who hold a religious belief have in choosing religion "freely acquiesced in or embraced something with which we disagree or which we may even despise": Waldron at 73.

grounding of freedom of religion in equality makes the individual the ultimate source of the right. The individual's views are given respect only because they are the individual's views. They are entitled to the same respect as would receive the individual and one might add, no more. Placed in conflict with any other interest also grounded in equality and entitled to no special protection, religious freedom will give way.[373] This is likely so because courts find that religion enjoys enough freedom within the private realm and that it need not lay any claim for a right to express itself in the public realm. Religion can thrive in the personal realm. It will be denied the right to manifest itself if that manifestation is perceived in any way to encroach on someone else's equality rights. Equality does not lead the courts to consider whether society can tolerate a given religious belief or conduct; it simply leads the court to find a balance.[374]

I contend that in both options presented by Moon, the courts are failing to account for the historical rationale for religious freedom. Both have lost sight of why Locke first argued for the right. In addition to his appeal to an end of suffering and death brought on by religious intolerance, Locke held to a belief in religious truth, arguing that individuals should be free to seek out the truth for themselves. Finding the justification for religious freedom in the value of the individual and in equality concerns alone gives no consideration to the possibility that religious views expressed by the individual may in fact be true apart from any reliance on the individual or his self-worth. There is an

[373] The opposite is also true. When religious claims closely resemble equality claims, Waldron says that "courts are most comfortable with recognizing rights to religious freedom": Waldron at 72.
[374] Waldron notes how vulnerable religion is as equality "particularly when the freedom threatens majority values": Waldron at 95. She also sees equality as lacking content. What does equality mean? She asks, "Equality for whom, equality with whom, equality for what, and equality how?": Waldron at 96. Waldron writes that, "Thus a pronouncement from the judiciary, or in private argument, that 'it's a matter of equality' settles the debate about what should be done in a particular case only for those who are already convinced of the justice of the outcome": Waldron at 96.

implicit reduction of the value of religious claims in the move to framing the right to freedom of religion in concerns of equality. There is an implicit denial of the truth ground for religious claims. Recall that law should refrain from meddling in questions of truth. Moon wrote of the duty of the law to "remain neutral in matters of faith and take no position on the truth or falsity of spiritual beliefs".[375] If Moon is correct, courts too quickly cede the truth territory and deny to religion the higher ground that it should receive freedom because it may in fact be true.

Both of Moon's options would be unacceptable to many believers. Some believers would find it incomprehensible that their religion should have value merely because they have chosen it. For such individuals, the value of one's religious claim does not lie in their own personal worth. No believer would accept being cut off from the claim to truth. Like Locke, a believer asks for freedom for all because of the conviction that truth exists and that persons should be free to seek and attain that freedom. Though they believe that persons of contrary persuasions may be mistaken, they recognize their freedom to so err.[376] It would seem an odd and unstable thing that courts would justify a person's right to freedom of religion on a basis that many believers would personally reject. Diminishing the foundation of one's right to freedom of religion to the respect owed to one as a person would in the eyes of some religious person be an affront to their dignity and self-respect and offense to the divine that they worship.[377] The feared loss of value in religious claims may come to light in the next case.

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[375] Moon, "Hutterian Brethren", supra note 8 at 116.
[376] Moon, "Liberty", *supra* note 8 at 564.
[377] In *Reference re Same-Sex Marriage*, *supra* note 268, the Court was asked whether legislation changing the definition of marriage to allow same-sex marriages would violate religious freedom. The Court was confident that most conflicts could be addressed within the *Charter* through balancing and delineation of

In *Hutterian Brethren of Wilson Colony v. Alberta*, the provincial government's decision to require that all applicants for a driver's licence submit to having their photo taken led to a re-examination of the manner in which alleged breaches of the right to freedom of conscience and religion are to be analyzed.[378] The Wilson Colony sincerely believes that the creation of a digital image of the human faces is a violation of the second commandment that prohibits making any image or likeness of anything on earth.[379] On this basis, drivers in the colony refused to allow photos to be taken of their faces and placed on their driver's licences. For many years, with the permission of the government, and without any negative incidents, drivers in the colony had carried drivers' licences that contained no photo. In a move to combat identity theft involving the use of fake drivers' licences, however, the government decided to make the taking of a photo mandatory with no exemptions, arguing in relation to the colony that if even the relatively small number of Hutterites had licences without photos, the usefulness of the facial identification system would be compromised. The government advanced this argument even though some 150,000 Albertans did not even have drivers' licences. Both

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the rights. Of interest is the Court's opinion that religious freedom in s. 2(a) is expansive (para 52) and that the protection afforded religious freedom is "broad and jealously guarded in our Charter jurisprudence" (para 53).
In *Multani c Marguerite-Bourgeoys (Commission scolaire)*, [2006] 1 SCR 256, [2006] SCJ 6, s. 2(a) protected the right of an orthodox Sikh student to wear his ceremonial kirpan (a knife) carefully secured so as to be almost inaccessible within his clothing despite school regulations prohibiting the carrying of weapons. The Court speaks in terms of tolerance and the outcome reflects concerns of accommodation. The case is of some interest due to the discussion as to the proper s. 1 analysis to conduct in relation to administrative decisions.
Marcovitz v Bruker, [2007] 3 SCR 607, [2007] SCJ 54 marks the emergence of the concept of neutrality though in dissent. Abella J., writing for the majority, continued to use the language of tolerance. In *Marcovitz*, a Jewish man attempted unsuccessfully to shield himself through s. 2(a) from civil action for damages for his failure to grant his estranged wife a *get*, a Jewish divorce, though he had many years before entered into a contract that included a term that he would provide the divorce. The majority decision is marked by concerns of equality.
[378] *Hutterian Brethren of Wilson Colony v Alberta*, [2009] 2 SCR 567, [2009] SCJ 37 [*Hutterian Brethren*].
[379] This commandment is one of the Ten Commandments found in Exodus 20.

sides of the dispute made gestures of accommodation. The Hutterites offered to carry licences without photos that stated expressly on the licences that they were not to be used for identification purposes. The government offered to take digital photos and either place them on the licence and then seal the licence in an envelope that the Hutterites would never have to open or keep the digital photos on file within the provincial system. In either case, the government accommodation required the taking of a photo and this was obviously unacceptable to the religious colony. The consequence of not having drivers' licences for the colony was significant as the Hutterites pursue, also for religious reasons, a form of isolated communal living. Though they seek to minimize their dependence on and contact with the outside world, they rely very much on the ability of some of their members to drive to and from their community for commercial reasons.

Alberta conceded that the photo requirement violated s. 2(a).[380] In three carefully reasoned opinions, the Supreme Court of Canada split on the issue as to whether this infringement was justified.

The majority decision, written by McLachlin C.J., found that there was no other way to ensure the integrity of the facial recognition system. In dissent, Abella J. made a strong case that the government had overstated the benefits of insisting that this small number of believers comply with the photo requirement.

On the most central issue, whether the government objective was of sufficient importance to outweigh the harm caused to the believers' religious way of life, the majority concluded that it did, taking the position that in determining the seriousness of a

[380] McLachlin C.J. questioned whether the government should have conceded the breach of s. 2(a).

limitation of freedom of religion, the court must assess the "impact in terms of Charter values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy" of which the most important is that of liberty, "the right of choice on matters of religion".[381] For the majority, "[t]he question [was] whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices".[382] Of some importance, the majority wrote that,

> There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.[383]

The majority was clearly of the opinion that the religious practice of the Hutterites was closer to a matter of personal choice or an option. They spoke of compulsion, but of compulsion that deprives the "individual of the fundamental right to choose his or her mode of religious experience, or lack thereof.[384] In some cases, a limit does not take away the right to choose "as to religious belief or practice, but it does make it more costly", in terms of money, loss of tradition or inconvenience.[385] Notwithstanding these costs, the believer may still have a "meaningful choice". Religion was still free and for the majority, the colony would have to incur the costs of its personal choices. That the colony might have to hire persons from outside of the community to be their drivers was a burden that they would simply have to bear as a cost of their faith. Perhaps one sees here

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[381] *Hutterian Brethren*, *supra* note 378 at para 88.
[382] *Ibid*.
[383] *Ibid* at para 89.
[384] *Ibid* at para 92.
[385] *Ibid* at paras 93 and 95.

how the emphasis on personal choice was used to undermine the importance of the religious belief. Locke too spoke of a believer having to pay the cost of one's convictions.

Once again, Abella J., in dissent, zeroed in on the final requirement in the s. 1 analysis wherein the "government must demonstrate that the benefits of the infringement outweigh the harm it imposes".[386] She argued that even where the government objective is of sufficient importance to override a *Charter* right, "it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve".[387] The question seems to be whether the state interest is so necessary or weighty that a limitation on the right to religious freedom is justified at all, given the heavy burden on religious freedom of the particular limitation that is under discussion. Echoing *Big M*, she reiterated that the "liberal conception" of religious freedom, one of the fundamental freedoms, rests on concerns for autonomy and dignity, values that lie at the "heart of the democratic political tradition".[388] She made a small nod toward the past invoking the freedom that has been "dearly won over the centuries" reflected in pluralism.[389] Abella J. concluded, rightly so I believe, that the government objective did not rise to the level of importance that justified violating the community's religious freedom.

Lebel J. also dissented in *Hutterian Brethren*. Of interest is his acknowledgement that the interpretation and application of s. 2(a) continues to be difficult. He suggested

[386] *Ibid* at para 110.
[387] *Ibid*.
[388] *Ibid* at paras 127 and 128.
[389] *Ibid* at para 128.

that "Perhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of religion for the purposes of the Charter". At length, he questioned why the right was necessary, writing that,

> 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.[390]

Lebel J. affirmed that the freedom includes the right to believe or not and to manifest that belief or lack thereof, including to "express disagreement with the beliefs of others".[391] Like Abella J., he too questioned whether at the stage of proportionality, one must ask whether the objective of the state is one that "ought to be realized".[392]

The decision in *Hutterian Brethren* is strongly reasoned on all sides. The Court took seriously the right to freedom of religion. In my opinion, however, clarity of reasoning and some respect for religious freedom was not sufficient to bring the majority to a proper weighing or judgment as to the real importance of a mandatory photo requirement balanced against depriving the religious colony of its way of life. It may have been true, as per the former Chief Justice's thinking, that the omission of some 150 photos would have had some effect on the facial recognition system. Obviously, there would be 150 licences for which there was no photo. On the other hand, the effect would have been negligible, particularly in light of the accommodation offered by the colony and given that over 150,000 Albertans did not even have licences.

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[390] *Ibid* at para 180.
[391] *Ibid* at para 181.
[392] *Ibid* at para 192.

I contend that this case demonstrates well the vulnerability of religious freedom in Canada and that vulnerability seems to be at the level of s. 1 assessments. If the government objective is at all a worthy one and rationally connected to the means chosen to implement it, it seems all too easy to override religious freedom. I would argue that the majority reasoning reflects an underappreciation of the significance of disobeying the second commandment for these believers and diminishes the high importance to their having drivers' licences to sustain their challenging way of religious, communal living. The majority court appears to have failed to think in terms of Locke's tolerance and its sister concept of accommodation. The question that should be asked is whether society could tolerate 150 Hutterites holding licences without photos. If the majority had given less emphasis to the concept of autonomy and choice and gone back in history to renew its insight as to the historical rationale for this freedom, they might have allowed the colony to continue peacefully along its way. The state objective could have been adequately achieved without overriding the colony's freedom of religion, particularly in light of the compromise that the colony offered. The result in *Hutterite Brethren* is discouraging for religious freedom.[393] Abella J. came closer to asking the right questions.

Hutterian Brethren illustrates well a certain danger that I perceive in the way courts assess the value of religious belief when emphasis is placed on religious belief

[393] Given their clear articulation of why they should not submit to the taking of photos, the dire need within their communities to be able to use the highways to maintain their existence, and the unrealistically costly alternatives of paying outside drivers, one wonders whether the community would have been better served by disregarding the law and showing their determination to live in accordance with their faith by submitting to the consequences of their disobedience as suggested by Locke. If 150 believers spent periods of time in jail, perhaps the reasonable accommodations that they had offered would have appeared more attractive to the state. Religious freedom may be granted for "prudential reasons" as state interference in the realm of the religious "may result in civil disobedience and social conflict": See Moon, "Limits of State Neutrality", *supra* note 8 at 507; Moon, "Controversy at York University", *supra* note 353 at 6.

being the product of human choice.[394] I contend that this emphasis on personal choice represents in some sense a misunderstanding of the nature of faith. I would also argue that the emphasis on human choice weakens the protection afforded to religious belief. Both of these matters are related to the loss of historical perspective. That a religious belief is viewed as the product of human choice suggests that a person is actively, choosing to hold the belief. But for the person's holding on to the belief, the belief would simply drift away. The problem, if there is one, is not so much the religious belief, but the fact that the person is voluntarily choosing to adhere to that belief. Law is quite used to dealing with the results of bad human decisions in both civil and criminal law contexts. Religious belief is potentially just one more, bad human decision. Such an approach raises the possibility that if the religious belief is a particularly unpopular one, not only would it not be seen as entitled to any special status, one might reasonably expect that the person should merely decide not to hold that religious belief. As suggested above, when religious views are unpopular, it is a short move to the position that religious persons should perhaps be caused to suffer in some way for holding such bad ideas in hopes that they might reflect on their poor choices of religious views and might come to adopt freely

[394] I contend that whether Moon is speaking of religious belief as human choice or deeply held core values, he places an exaggerated emphasis on human choice. He consistently refers to believers in terms that portray them as persons that have come to their religious convictions by some wilful action on their part. He refers to believers as religious adherents: Moon, "Liberty", *supra* note 8 at 564, 568, and 570; Moon, "Limits of State Neutrality", *supra* note 8 at 504; Moon, "Controversy at York University", *supra* note 353. Believers are the ones that actively adhere to these beliefs. He speaks of their "personal commitments", another act of the will: Moon, "Liberty", *supra* note 8 at 568 and 570; Moon, "Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality", *supra* note 288 at 323; Moon, "Controversy at York University", *supra* note 353; Moon, "Hutterian Brethren", supra note 8 at 115. Even when he references religious truth, he speaks of religious commitment and the making of one's own judgments about religious truth: Moon, "Liberty", *supra* note 8 at 564 and 570. He speaks of the acceptance of truth and coming to truth willingly and voluntarily: *Ibid* at 568. He speaks of the person's freedom to practice a "chosen religion": *Ibid* at 568. He describes beliefs as deeply held. I note that he is not alone in that. Dickson C.J. in *Big M* used the phrase "conscientiously held beliefs" and referred to choice: *Big M*, *supra* note 4 at para 124.

and voluntarily better religious views, views more palatable to the majority of persons. McLaughlin C.J. might even be taken to be suggesting that if one does not make wiser religious choices in the future, one should not come asking for accommodation.

Moon himself raises a similar question in asking why it is necessary to accommodate religious practices. [395] He writes, "Why should the negative impact on a religious practice, of an otherwise legitimate law, not be viewed as simply a consequence and cost of the individual's religious commitment?"[396] The challenge to one's faith is a cost of one's faith, a faith to which one has made a free will commitment. Why should the state have to bend to give room to those who have chosen beliefs that place them in conflict with valid laws? Moon considers whether this is just not part of living in a democracy. Many persons live under laws that they do not support. Policy decisions privilege the views of some voters over others. In normal circumstances, the state has no duty to accommodate the views of those who lost the vote in the struggle for the implementation of a policy. It is enough if the state allows every citizen the right to participate in the public debate and process leading up to decisions. The state is not obliged to accept one's views.[397] To treat citizens with equal respect may be satisfied as long as each person is able to participate in democratic debate and decision-making, whether or not her or his views are adopted.[398] All of this seems to have lost sight of

[395]Moon, "Hutterian Brethren", *supra* note 8 at 115. Berger commenting on this case wrote that, "There are scholars who, seized with a sense of the challenges and possible hypocrisies of seeking to afford specific constitutional protection to religion, have argued that the constitutional protection of religious freedom is impossible, or that religion ought not to be given special constitutional status, preferring to subsume freedom of religion into more generalized principles of equality and liberty, disavowing any peculiar relevance to the religious component of freedom of religion": Berger, "Limits of Belief", *supra* note 278 at 20 and 21.

[396] *Ibid*.

[397] *Ibid*.

[398] In some sense, this argument shows the weakness of Waldron's essential contention that religion should be free as one of the conditions of democracy.

Locke's concept of religious freedom as tolerance and the need to create space to allow for diversity of belief. Religion is not so much being tolerated as ignored.

I contend that religious belief is not the mere result of a human mental act, a human decision. Berger writes that, "[R]eligious conscience orients itself to a point beyond human institutions and human will".[399] Religious belief appeals, unmediated by human decisions, directly to the transcendent. It has *being* or existence within a relationship with the transcendent. It is perhaps what flows from the inner awareness of the consequence of the existence of the transcendent. It appeals to grounds that go beyond the public realm and reaches further back to ontological foundations that do not depend on human will for their existence.[400] How religious belief is related to human will remains a mystery, but in some sense, it precedes it. The human will responds or fails to respond to religious belief.

Religious belief does not fit easily within the liberal mindset.[401] Religion makes radically different ontological claims than liberalism, seeing the world, for instance, as a creation of the divine, subject to the divine's expectations. Religion speaks to conduct, the product of will, but it also goes deeper and addresses attitude, thinking, and moral positions.[402] Religion "provokes action as much as it evokes emotion or internal

[399] Berger, "Limits of Belief", *supra* note 278 at 43.
[400] *Ibid*. According to Berger, Heschel too suggests that faith is not the result of an act of the will. He quotes Heschel as saying that, "The world of faith is neither the outgrowth of imagination nor the product of will": Berger, "Limits of Belief", *supra* note 278 at 47.
[401] *Ibid* at 43.
[402] *Ibid*.

dispositions".[403] All of this challenges the liberal concept of society and accounts for some of the conflicts that arise between religion and the liberal democracy.[404]

Arguably, when courts overemphasize human choice as the foundation of religious belief, they tend to have a lower appreciation of the value of religious freedom. The majority in *Hutterite Brethren* accepted as justifiable significant costs for the community at least in part on the basis that they chose that belief, a view of faith, I contend, that fails to grasp the true nature of belief as better understood by Locke. As well, if the Court had turned its mind to whether society could, in keeping with the historical conception of religious freedom, tolerate a small number of Hutterites using licences without photos, I contend that the result might have been different. In the end, it seems that a rather limited public interest was able to override a comparatively large private, religious concern. The struggle for finding the proper boundary between the state and the church or the public and the private continued in the next case.

In *S.L. c. Des Chênes (Commission scolaire)*,[405] a group of parents unsuccessfully sought an exemption for their children from participating in a mandatory Ethics and Religious Culture course created by the Quebec government, contending that exposing their children to the program would inhibit their ability as parents to pass on their Catholic faith. The majority in the Supreme Court of Canada did not share their concerns, opining that merely exposing children to a neutral presentation of the various religions present in their society did not amount to indoctrination so as to violate parents' freedom

[403] Berger, "Law's Religion", *supra* note 231 at 312.
[404] Berger, "Limits of Belief", *supra* note 278 at 48; Even Moon seems to recognize that belief is more than choice in writing that, "Religious belief may deserve protection because religious belief is more than the product of mere human choice, imagination or judgment": Moon, "Introduction", *supra* note 312 at 16.
[405] [2012] 1 SCR 235 [*SL*].

of religion. The contrary suggestion, as advanced by the concerned parents, amounted, according to the majority of the Court, to a rejection of multiculturalism and failed to give weight to the government's responsibilities in the education of children to prepare them to live within a diverse society.

SL still fits within the church/state or public/private divide. The court was able to confirm the parents' right to educate their children with respect to religion, but also give weight to the parallel and legitimate concern of the provincial government to prepare the children of the province to deal with the many different religions present in the province. Tactically, the parents' complaint came too soon. As the program had not yet been fully implemented, the parents were unable to establish the evidentiary record necessary to make their case that the manner in which the program was being taught violated their rights. The broad outline of the program in principle did not infringe their freedoms.[406]

Most importantly, the majority decision in *S.L.* is marked by repeated references to the court's obligation in religious matters to maintain neutrality. Deschamps J., writing for the majority opinion, stated that, "Religious neutrality is now seen by many Western states as a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights".[407] The court wrote that,

> [S]tate neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the affected individuals affected.[408]

[406] The parents in the future case of *Loyola*, *infra* note 441 did not face the same evidentiary obstacle.
[407] *SL*, *supra* note 405 at paras 10,11, 17, 32, and 44.
[408] *Ibid* at para 32.

In one sense, neutrality is perhaps another way for the state to incarnate the duty to show tolerance. In my opinion, this approach to maintaining religious freedom still holds faithfully to that of Locke. Nothing deprives the parents of their ability to indoctrinate their children within the home. They may even go as far as to contradict what is being taught by the state in the public school. The decision reflects the provincial government remaining well within its state role. The case is reminiscent of *Jones.*

Berger has observed this change in the language used by courts, as court speak less of tolerance and more in terms of "neutrality".[409] Tolerance tends to operate well in a society in which most people openly share the same religious views and the need to accommodate divergent views arises infrequently,[410] but the concept becomes less workable, says Berger, in a deeply divided society in which there are numerous divergent, by times, highly challenging views. Berger sees neutrality as a better, more sustainable concept.

Neutrality on behalf of the state refers to the "evenhandedness necessary in a religiously and culturally plural society".[411] The state aims to treat all views, including religious views, in the same way. Neutrality is a form of equality, equality of state treatment. The state seeks to avoid favouring or disadvantaging one religion over another. Berger believes that the law's use of an even hand eliminates the hint of condescension implicit in tolerance.[412] Law steps outside of the *us/them* divide and "casts [itself] in the role of disinterested conciliator rather than boundary-setter".[413] Perceived as neutral,

[409] Berger, "Religious Diversity", *supra* note 331 at 118.
[410] *Ibid* at 119.
[411] *Ibid*.
[412] *Ibid*.
[413] *Ibid*.

courts are accepted as fair arbiters between different views, able to reconcile conflicting right claims.[414] One might hope that neutrality would also obviate the risk that the state would enshrine "any particular metaphysical views—including agnosticism or atheism—as a de facto state religion".[415]

True to his main contention that law is culture, however, Berger points out that by positioning itself outside of disputes, law behaves as though it is not subject to its own cultural, value-laden, baggage, which, of course, it always is. He writes that,

> [T]he language of neutrality appeals to a powerful myth that underwrites contemporary law. The conceit of autonomy upon which modern liberal legal orders lean for their political authority works by depoliticizing law's rule sufficiently to attract broad assent".[416]

The concept of neutrality invokes the image of law being above the fray as though it had no commitment to any underlying worldview. Berger would contend that this is not the case. Law has its own belief system and its worldview is liberalism and the "liberal conception of society is not a neutral or value-less one".[417] Despite its rational self-image, liberalism contains its own set of values, values that at some level of justification are themselves not rooted in reason alone. Liberalism is also a system of belief, not so unlike other systems of belief.[418] For Berger, the air that law breaths is still liberalism. He makes this point but does not see anything amiss with it. Although the law must be neutral as between religions, it "need not… be neutral about the nature of a good society".[419] The

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[414] *Ibid* at 120. Berger quotes Deschamps J.'s dissenting opinion in *Bruker v Marcovitz*, *supra* note 377.
[415] *SL*, *supra* note 405 at 120.
[416] *Ibid* at 119.
[417] Berger, "Limits of Belief", *supra* note 278 at 40.
[418] Undoubtedly, Berger's main claim over the years has been that law and religion are *both* cultures, meaning that they are both overarching systems of belief that come to the public discussion table or the courtroom pre-loaded with accepted values: Berger, "Law's Religion", *supra* note 231 at 280; Berger, "Cultural Limits", supra note 3 at 247; Berger, "Hutterian Brethren", *supra* note 278 at 28.
[419] Berger, "Religious Diversity", *supra* note 331 at 121.

state is not indifferent to the "conditions necessary for a healthy civic life",[420] human dignity, autonomy, and equality. State neutrality does not mean that the state ceases to protect the "conditions necessary for a just and ethical common world".[421] Neutrality does not translate into an anything-goes approach, "confusing the neutral state with an inert state, one not permitted to act in the interests of the political community".[422] State action, however, concerned with neutrality would be marked by a willingness to consider different views and would allow for open and critical discussion.

Moon observes that some believers experience this move to neutrality as "neither neutral nor inclusive".[423] Believers live the changes in society as anything but shifts to neutrality and equality. Perhaps they hold "unrealistic expectations" that neutrality means that their views will be treated equally,[424] but the new reality is not a positive and faith encouraging one. For Moon, what explains this negative experience is that for a long time, society had been operating within forms that were originally inspired by the perspective of a given dominant faith. Society had adopted these forms many years prior based on some position of faith. For this reason, as society moved toward neutrality, most of the changes resulted in the removal from society of something that formerly represented faith. Rather than representing a neutral position, an attempt to stay out of the arena of competing religious or non-religious views, this new approach is felt like the triumph of a rival or opposing view.[425] More and more, believers find themselves restrained in their ability to live out their faith in the public realm and it appears to them

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[420] *Ibid*.
[421] *Ibid*.
[422] *Ibid*.
[423] Moon, "Liberty", *supra* note 8 at 571.
[424] Moon, "Limits of State Neutrality", *supra* note 8 at 504.
[425] Moon, "Liberty", *supra* note 8 at 571.

that society is increasingly organized in conformity with the views of the non-religious. This move to a secular state that they were assured would be neutral appears instead to be against them and they have watched as their religions were pushed into the background and out of the public realm. The views left standing are those that oppose faith.

In any event, rather like Berger, Moon believes that the concept of neutrality is oversold. Absolute neutrality is an impossibility.[426] The concept is unworkable.[427] A society must organize itself around some values.[428] Decisions must be made and as neutral as any society may wish to be or appear to be, inevitably, a society must choose someone's values over others.[429] When society so decides, someone will be happy, and someone will be angry. In almost every political decision, someone's values and aspirations are ignored or rejected.

Moon sees another challenge for society in treating religions in a neutral way. The challenge comes from the nature of religious belief. As private as religious views may be, religion cannot help but speak to public matters. Religion speaks to how people should treat and view other people. It has much to say about what is right and wrong. Religion conveys views about human behavior. It defines what is desirable in community.[430] More importantly, religious views when translated into action impact the rights and interests of others and the private affects the public. For this reason, Moon contends that religious

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[426] *Ibid*.
[427] Moon, "Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality", *supra* note 288 at 321.
[428] Moon, "Liberty", *supra* note 8 at 573.
[429] Moon, "Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality", *supra* note 288 at 337.
[430] *Ibid* at 324; Moon, "Liberty", *supra* note 8 at 571.

views must be subject to being challenged publicly and even rejected.[431] The state may be able to remain neutral in relation to certain parts of religious belief or practice, but when religion strays out into the public domain, it must be subject to the normal public debate.[432]

For my part, I contend that the move to neutrality will work when the differences between religious values and societal values are small and manageable. Neutrality seems like a weaker form of tolerance. When religious belief challenges society more deeply, courts will have to return to Locke's clearer language of tolerance or religious freedom will face limitation under s. 1. After the Court's emphasis on neutrality in *S.L.*, the Supreme Court of Canada moved back – at least for a time – to analysis that seems more in keeping with Locke's understanding of toleration and prime examples of this are the following two cases.

In *R. v. N.S.*, the religious freedom of a Muslim woman who had allegedly been sexually assaulted by two male relatives was insufficient to guarantee her right to wear a veil on her face at all times while testifying in court.[433] Former Chief Justice McLachlin crafted a common sense, reasonable, flexible approach that gives trial courts the discretion to accommodate a witness' religious convictions as much as possible, recognizing that the right to religious freedom in the form of veiling one's face must at times yield to the accused's right to make full answer and defence in a criminal matter. Oddly enough, the same judge that refused to accommodate the Hutterian Brethren in

[431] Moon, "Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality", *supra* note 288 at 337.
[432] Moon, "Limits of State Neutrality", *supra* note 8 at 501 and 502.
[433] [2012] 3 SCR 726, [2012] SCJ 72 [*NS*].

their struggle to maintain their religious, communal living, spoke rather glowingly of the duty to respect and accommodate sincere religious convictions, saying that the need to accommodate was deeply entrenched in Canadian law.[434] Other members of the court speak of neutrality and religion as part of one's core identity.[435] Lebel J. writes that,

> The religious neutrality of the state and of its institutions, including the courts and the justice system, protects the life and the growth of a public space open to all regardless of their beliefs, disbeliefs and unbeliefs. Religions are voices among others in the public space, which includes the courts.[436]

I would contend that *N.S.* shows the Court honoring its commitment to respect religious belief and doing its utmost to accommodate the exercise of faith even in the public realm. It seems reasonable that religious freedom would have to yield in situations that its exercise might affect the ability of an accused person to answer a criminal charge. *N.S.* holds the line with religious freedom as tolerance.

Whatcott v. Saskatchewan Human Rights Tribunal returned the Court to the interpretation of human rights legislation that targeted publications that promoted hatred against persons of same sex orientation.[437] After paring away a portion of the legislation that did not meet the case law definition of hatred, the court upheld the finding that some of Mr. Whatcott's writings did contravene the provisions of the legislation. Having upheld the constitutionality of the remaining portions of the legislative provision and recognizing that it did impose some limitation on religious freedom, the court opined that religious expression might be captured by the provision if "viewed objectively, the

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[434] *Ibid* at para 54.
[435] Recall the discussion of Moon's view of the two ways in which he believes that courts view religious belief.
[436] *NS*, *supra* note 433 at para 73.
[437] [2013] 1 SCR 467, [2013] SCJ 11 [*Whatcott*].

publication involves representations that expose or are likely to expose the vulnerable group to detestation and vilification".[438] The infringement of religious freedom would still be justified for reasons similar to those used to uphold the hate crime legislation in *Keegstra* and the human rights hate promotion legislation in *Taylor*.[439] The court then gave a refreshing simple summary statement of the law on this point:

> In other words, Mr. Whatcott and others are free to preach against same-sex activities, to urge its censorship from the public school curriculum and to seek to convert others to their point of view. Their freedom to express those views is unlimited, except by the narrow requirement that they not be conveyed through hate speech.[440]

This is masterful Lockean toleration. The Court upholds Mr. Whatcott's freedom to hold and express his religious views. He may even express those views publicly and even in the context of public policy debate. He may seek to persuade and convince others of his views. He enjoys great freedom in this respect. He is only limited by one small consideration. He may not convey his views through hate speech. Moreover, the imposition of a limitation on the manifestation of religious belief at the point that it crosses over into speech that promotes hatred seems entirely consistent even with Locke's approach to religious freedom. He based his call for freedom on the dictates of love contained with the Christian gospel. The Court showed significant tolerance of Mr. Whatcott's religious views; it seems a reasonable limitation that he refrain from

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[438] *Ibid* at para 163.

[439] *R v Keegstra*, *supra* note 220 and *Canada v Taylor,* [1990] 3 SCR 892, [1990] SCJ No 129 involved constitutional challenges to hate promotion provisions, *Keegstra* under the *Criminal Code* and *Taylor* under the *Canadian Human Rights Act*, SC 1976-1977, c 33 s 13 (s. 13(1) has now been repealed). Both cases were framed as freedom of expression cases. In both matters, the Court found that the legislation constituted some infringement of the right to freedom of expression, but upon carefully defining hatred to connote "emotion of an intense and extreme nature that is clearly associated with vilification and detestation" (*Keegstra* at para 121), the Court found that the legislation (or some portion of it as in *Taylor*) was a reasonable limitation under s. 1.

[440] *Whatcott*, *supra* note 437 at para 163. One wonders how the reasoning in *Ross* would apply to Mr. Whatcott if he were a government employee.

promoting hatred. *Whatcott* draws on the private/public divide and bases its decision on a public domain concern related to the highly prejudicial effects of hate speech on the rights of LGBTQ persons within society. The court refrained from judging Mr. Whatcott's religious dogma and allowed him to manifest his religious belief, but it drew the line at speech that would harm other persons.

As an interesting follow up case to *S.L.*, the success of Loyola High School, a private Catholic institution in Quebec, in defending its right to be able to take a nuanced, more religiously specific approach to the presentation of the same mandatory religious and ethics course shows the court turning from the use of the language of tolerance back to the language of neutrality. I contend that *Loyola* exhibits a more Lockean approach. The Court demonstrated understanding of both sides of the religious debate and applied restrained wisdom in its efforts to find the appropriate balance between a desirable state objective and Loyola's freedom of religion.[441] The Court found fault with the Minister of Education's refusal to grant Loyola an exemption under the legislation on the basis that the Minister's reasoning treated "teaching any part of the proposed alternative program from a Catholic perspective as necessarily inimical to the state's core objectives" in creating the course and that that reasoning gave "no weight to the values of religious freedom engaged by the decision". The Court concluded that, "There [was], in short, no balancing of freedom of religion in relation to the statutory objectives. The result is a disproportionate outcome that does not protect *Charter* values as fully as possible in light of those statutory objectives".[442] This is more in keeping with Locke's tolerance

[441] *Loyola High School v Quebec (Attorney General)*, [2015] 1 SCR 613, [2015] SCJ 12 [*Loyola*].
[442] *Ibid* at para 68. In the end, the Court allowed Loyola to teach about Catholicism from a Roman Catholic perspective but upheld the government requirement that the ethics component of the course be presented in

approach.[443] The Supreme Court wavers in its respect of religion in keeping with Lockean tolerance in the next case.

The majority decision in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* illustrates law's forgetting the historical foundation of religious freedom. The judgment seems simply to represent a point-blank refusal on the part of the Court to see the deeply religious nature of the dispute, namely that if the Ktunaxa were sincere in their beliefs, there was no question that the administrative decision under examination would severely impact their right to practice their religion. In many cases, the Supreme Court of Canada recognizes that s. 2(a) is engaged and the main part of the discussion centers on whether a given limitation is justified under s. 1. In *Ktunaxa*, a majority of the Court found that s. 2(a) did not extend to cover claim being made by the Ktunaxa Nation. The refusal to recognize how the proposed development would infringe the nation's religious beliefs and their ability to practice those beliefs seems to depart from Locke's approach to tolerance.

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a more neutral fashion. By the time that the case had arrived at the Supreme Court of Canada, Loyola had accepted to do so.

[443] *Loyola* is also important as it reflects the Supreme Court of Canada's growing acceptance of the *Doré* approach to reviewing administrative decisions: *Doré*, *supra* note 219. Under this approach, administrative decision-makers, in the exercise of their discretion, must "proportionately balance… *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue": para 4. Though some contend that this approach to analyzing allegations of interference with *Charter* rights exercises the same justificatory muscles as the *Oakes* approach, I would contend that it deprives religious claimants of a thorough review by the courts that may weaken the guarantee of religious freedom. A full discussion of the implications of *Doré* are beyond the scope of my thesis.

In *Mouvement laïque québécois v Saguenay (City)*, [2015] 2 SCR 3, [2015] SCJ 16, the Court invoked once again the principle of neutrality to find that the practice of a town official of commencing town meetings with a prayer was a violation of an atheist's freedom of religion. Essentially, the town council was using its power to promote a particular belief. State neutrality implies that the state must "neither encourage nor discourage any form of religious conviction whatsoever". The case fits nicely within the church/state and public/private divide. In an unusual twist, however, the Court applied the correctness standard, though notably in a case involving freedom from religion.

After years of consultation with the Ktunaxa and late in the planning and approval stages of a commercial development of a ski resort in a remote part of their traditional lands, the Ktunaxa advised the government that they would not approve the project under any conditions on the basis that the territory was sacred due to the presence of a large grizzly bear population, and more particularly, the presence of Grizzly Bear Spirit, an important spirit within their religion. It was feared by the Ktunaxa that any development, no matter how carefully done, would drive Grizzly Bear Spirit from the area and put an end to their spiritual practices.

The majority of the Supreme Court found that the Ktunaxa's s. 2(a) right was not engaged because the government decision affected neither the Ktunaxa's freedom to hold to their belief in Grizzly Bear Spirit nor their freedom to manifest that belief.[444] That, after all, is the essence of freedom of religion. It also seems overly simplistic.

The decision is illustrative of one important consideration. How a court chooses to formulate the complainant's religious belief impacts greatly how the court then goes on to analyze whether and how s. 2(a) applies. Courts can take a broad and understanding view of the complainant's religious contention or the court can set up a narrow, straw man version of the belief and both greatly influence the outcome. A failure to see the religious nature of the claim may lead the court not to understand the scope of the application of religious freedom in the context. Here, with all due respect, the majority in *Ktunaxa* seems to play with words to arrive at the opinion that the destruction of Grizzly Bear Spirit's roaming grounds, which would put an end to the Ktunaxa's religion, would

[444] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 SCR 386 [*Ktunaxa*].

not interfere with the tribe's freedom to practice their religion. According to the majority, they can still believe in Grizzly Bear Spirit and they can still speak of that belief. It seems not to matter that Grizzly Bear Spirit has left forever due to the development of a ski resort in his sacred grounds. This approach seems to depart from Dickson C.J.'s vast and expansive approach to defining the scope of religious freedom. Surely, the better approach would have been to acknowledge the effect on the Ktunaxa's religion under s. 2(a) and move to a consideration of s. 1.

One wonders whether the majority lost sight of its responsibility not to judge religious dogma, which would include native spiritual religious dogma. Locke's call for tolerance extends to the unfamiliar beliefs of other cultures. One wonders if this is a failure on the part of the Court to maintain neutrality. The court took an artificially technical, bare bones approach to the issue of whether the tribe's religious freedom was affected.[445]

A concurring minority opinion, written by Moldaver J., did a better job of treating the Ktunaxa religious claim with fairness and depth, accepting that the development affected their right to freedom of religion interfering with their s. 2(a) freedom: driving away Grizzly Bear Spirit would effectively put an end to a religion based on his presence. On the other hand, turning to the s. 1 analysis of the reasonableness of the limitation on their religious freedom, the minority judgment noted that the government consultation

[445] The majority position seems overly narrow. Courts have great power to formulate the nature of the religious belief underlying a religious claim. In an earlier footnote, reference was made to a case involving another indigenous spiritual issue. A man had killed a deer and burned the meat in observance of a religious rite: *R. v. Jack*, *supra* note 273. Like in *Ktunaxa*, the Court narrowly defined his religious claim, arguing that he did not have to kill the deer in order to satisfy his religious belief. He could have used frozen deer meat that had been killed legally. The Court could have taken a more generous and broad approach to the definition of what his religion required and have recognized that the meat burned had to be meat that he had just killed for the purpose of the religious rite.

process was long and thorough, and the Ktunaxa had raised their objection too late in the day. The developers who had invested a great deal of time and money in the project were more than prepared to do all they could to respect the Ktunaxa's demands in relation to the use of the land. Moldaver J. concluded that the minister's decision to allow the development to proceed was reasonable, and balanced the Ktunaxa's religious claim in a proportional manner within the statutory objectives that governed the exercise of his discretion.

In keeping with the focus on the historical justification for freedom of religion, I contend that *Ktunaxa* illustrates an important potential reason for religious freedom that may be visible only to the eyes of the believer. Berger hints at this reason when he raises the suggestion that granting freedom to religion is law's way of acknowledging that there are questions that law cannot answer. Liberalism claims to build its system of value on reason alone and is adamant in its claim that it is in no way relies on an appeal to a worldview. It avoids metaphysics; accordingly and likewise, law does not weigh in on metaphysical questions.[446] Law deliberately has nothing to say about ultimate meaning. Berger asks, "[D]oes freedom of religion serve as a marker for a kind of anxiety about metaphysical certainty within the law?"[447]

Law does not have the ability to answer life's ultimate questions and lest it overreach and stifle individuals in their search for deeper meaning and certainty, law stays its hand allowing religion to live and thrive in freedom. Berger suggests that law's leaving religion alone "may be a cautionary principle – an expression of law's modesty

[446] Benjamin L. Berger, "Polygamy and the Predicament of Contemporary Criminal Law", electronic copy available online at: http://ssrn.com/abstract=2081142 at 9, 16, and 23.
[447] Berger, "Key Theoretical Issues", *supra* note 337 at 49A.

about what it can say about the structure of things and meaning of an individual or community's experiences".[448]

A related claim that religion makes that is often seemingly ignored or overlooked by the courts in their approach to religious questions and one to which I have already alluded several times is that religion should continue to be free because the claims of religion are or may be true. Law purports not to want to enter the realm of ultimate truth. Law claims not to be making up its mind as to whether what religion says is true or not. In the majority judgment in *Ktunaxa*, one might think that law was implying that it did not matter whether the tribe's religious claims were true or not. Perhaps law ignores a conflict or diminishes the importance of a religious claim on a pretext of not concerning itself with truth when in reality law is actually communicating that religion is not just something other but is rather nothing. It is untrue, equally untrue. Whether a religion might actually be true is considered by law to be beside the point and seemingly even unlikely. If this were to occur, I would contend that law ignores the very claim of religion that truly justifies its existence and freedom from the perspective of the believer.

A concept of religious freedom grounded more fully in the historical context identified by Locke would have changed the majority's analysis of how the development would impact the Ktunaxa's religious freedom. The outcome in the case would likely have been the same, but it seems clear that s. 2(a) was engaged and that the Court should have dealt more fully with a s. 1 analysis.

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[448] *Ibid* at 49A; Benjamin L. Berger, "The Virtues of Law in the Politics of Religious Freedom", (2014) 29:3 JL & Religion 378–395, online: <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=376756> at 379.

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall is a wonderful example of Lockean thinking in relation to the separation of state and the church.[449] Wall had brought an application for judicial review of a decision of an internal discipline body of church elders that had removed him from the fellowship, deeming him insufficiently repentant of sin. Wall complained of procedural unfairness and alleged that the decision had an impact on his employment as a realtor as the members of the church would no longer do business with him.

Reminiscent of Locke, the court emphasized the voluntary and religious nature of the association or congregation. Judicial review, said the Court, is restricted to the review of the exercise of state authority by public decision-makers. The Court recognized no "free-standing right to procedural fairness absent an underlying legal right". If Wall's legal rights had been at issue and he had had a valid cause of action, he could have contested the manner in which he was treated. This reflects the requirement that spiritual matters enter the public domain and create a public, legally recognized grievance before the matter would be one appropriate for the law courts. Lastly, the issues raised by his case were not justiciable, meaning that the matters involved in his case were not appropriate for a court to decide.

It is this last point that is of the most relevance to this project as the Court recognized its inability to delve into matters of faith. The case is of particular value because the Court reaffirmed that issues of theology, including questions of morality and the interpretation and application of Scripture are not justiciable.[450] The Court should not

[449] 2018 SCC 26 [*Highwood Congregation*].
[450] *Ibid* at para 12.

get involved in deciding what is or is not sinful behaviour. Nor could the Court evaluate for itself whether Mr. Hall was truly repentant. Such subject matters are beyond the ken of the courts of law.[451] Whether the tenets of a particular religion are true or false is not a matter for the courts to consider. Courts lack the "institutional capacity and legitimacy to adjudicate" such matters. Involving the courts in such questions would not be "an economical and efficient investment of judicial resources".[452] It is doubtful that the parties to a given case could ever provide a "sufficient factual and evidentiary basis" on which the courts could make rulings on religious questions. Nor is it likely that persons not involved in the case would accept that the parties to a given matter had made an "adequate adversarial presentation" of the various positions on the issues.[453] In the end analysis, courts would be passing judgment on "religious dogma", deciding whether religious claims were true or false.[454] As stated by the court in *Syndicat Northcrest v. Amselem*, "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."[455] "The courts have neither legitimacy nor institutional capacity to deal with such issues".[456] *Highwood* illustrates well the church/state and public/private divide.

I come now to the most recent Supreme Court of Canada cases in relation to religious freedom: *Law Society of British Columbia v. Trinity Western University*[457] and

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[451] The chambers judge in *Highwood Congregation* was ready to deal with such questions, even saying that expert evidence could have been called to allow the Court to pass judgment on the interpretation that the Witnesses placed on Scripture as to what was sinful. He was prepared to weigh in on the criteria used by the leaders in the church to determine whether Mr. Hall was truly repentant: *Ibid* at paras 8 and 32.
[452] *Ibid* at para 34.
[453] *Ibid*.
[454] *Ibid* at para 36.
[455] *Ibid*; *Amselem*, *supra* note 341 at para 50.
[456] *Highwood Congregation*, *supra* note 449 at para 36.
[457] 2018 SCC 32 [*TWU-LSBC*]. In what follows, I focus on this *TWU-LSBC* decision.

Trinity Western University v. Law Society of Upper Canada[458]. On TWU's latest trip to the highest court, the nature of TWU as a private, Christian university and its religious campus life sustained by a mandatory community covenant that included restrictions related to same sex marriage, had not changed. This time, however, TWU wished to create a law school. Perhaps anticipating the same treatment from the Court as in *TWU 2001*, the university instead found itself fighting a reformulated battle with equality under the *Doré* framework.[459] In *TWU 2001*, one lone judge opposed their bid to prepare teachers for employment in the public school system; in *TWU-LSBC*, seven of the nine judges opposed TWU's proposal. Though TWU's proposal to create a law school had been approved by both the Federation of Law Societies of Canada and the British Columbia Minister of Education, the provincial law societies decided not to recognize TWU's proposed law school as an institution the graduates of which would qualify for admission to their respective bars.

The majority reasons acknowledged the biblical nature of the authority on which TWU's community covenant was based but focused on the prohibition of "sexual intimacy that violates the sacredness of marriage between a man and a woman".[460] The majority highlighted that a failure to comply with the covenant could result in "disciplinary measures including suspension or permanent expulsion".[461] They also noted that not all students at TWU "identify as Christian" and that students at TWU "may, and

[458] 2018 SCC 33.
[459] *Doré*, *supra* note 219.
[460] *TWU-LSBC*, *supra* note 457 at paras 4 to 6.
[461] *Ibid* at para 7.

in fact do, hold and express diverse opinions on moral, ethical and religious issues and are encouraged to debate different viewpoints inside and outside the classroom".[462]

In keeping with the *Doré* approach, the issue identified by the majority was the reasonableness of the decision of the LSBC to refuse to recognize TWU's proposed law school,[463] which narrowed down to whether the decision constituted a "proportionate balance between the limitation on the religious freedom of members of the TWU community and the statutory objectives governing the LSBC".[464]

The central question in *TWU-LSBC* was the reasonableness of the law society's interpretation of its statutory obligations to "protect[…] the public interest".[465] The majority concluded that legislative provisions directing the society "to uphold and protect the public interest in the administration of justice… by preserving and protecting the rights and freedoms of all persons" could reasonably be interpreted as empowering them to consider the discriminatory policies of TWU related to same sex marriage.[466] TWU contended unsuccessfully that the law society should have concerned itself solely with the academic qualifications and competence of potential TWU graduates and not involve itself in the evaluation and judgment of TWU's admissions policies or even its mandatory

[462] *Ibid* at para 8.
[463] TWU argued for the application of the correctness standard, but the majority opinions found that the proper standard of review was reasonableness.
[464] *Ibid* at para 3. The majority made a point of how narrow the law society's rejection of TWU's proposal was. Specifically, the law society was only rejecting TWU's proposed law school *with* a mandatory covenant. It seems clear that if the mandatory covenant were removed, the proposal would otherwise be acceptable to the Supreme Court of Canada: see para 27. As long as the school maintained its mandatory covenant prohibiting homosexual intimacy, the provincial law society could reasonably place barriers in the way of law graduates of TWU practising in their provinces.
[465] *Ibid* at para 31.
[466] *Ibid* at para 32. The provisions were contained in s. 3 of the *Legal Profession Act*, SBC 1998, c 9.

covenant.[467] The majority showed deference to the law society's interpretation of its enabling statute and acknowledged the society's "broad public interest mandate".[468]

Accordingly, the LSBC was entitled to consider that the mandatory covenant discriminated against homosexuals, "effectively impos[ing] inequitable barriers on entry" to the proposed law school and thereby creating barriers to the entry to the legal profession itself. The potential exclusion of homosexual persons from the proposed law school would also further contribute to a potential decrease in diversity within the law society and could affect the competence and quality of the bar. Finally, the effect of the covenant could be harmful to LGBTQ individuals, "undermin[ing] the public interest in the administration of justice".[469] The majority found the law society's decision rejecting the proposed law school to be reasonable and that the administrative decision had "upheld to the fullest extent possible given the statutory objectives" TWU's religious freedom.[470]

The majority reasons are grounded in concerns of equality. The exercise of TWU's religious freedom was negatively impacting an equality interest. They spoke of resorting to "fundamental shared values, such as equality" and of "look[ing] to instruments such as the *Charter* or human rights legislation as sources of these values".[471] These "values… underpin each right and give it meaning" and "help determine the extent of any given infringement in the particular administrative context".

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[467] *TWU-LSBC*, *supra* note 457 at para 29.
[468] *Ibid* at para 34.
[469] *Ibid* at paras 39 and 42.
[470] *Ibid* at para 57.
[471] *Ibid* at para 46.

In turning to the matter of religious freedom, the majority mentioned the broad and purposive approach of *Big M*, noting that the "Court's interpretation of freedom of religion reflects the notion of personal choice and individual autonomy and freedom".[472] Applying the *Amselem* criteria for establishing an infringement of s. 2(a), they examined the evidential record in search of the religious interest that TWU claimed was at stake in their insistence on the covenant.[473]

Though the majority concluded that,

> It is clear from the record that evangelical members of TWU's community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development,[474]

They also took to time to highlight weaknesses in the evidential record. Persons who testified in support of TWU's claim believed that the enforcement of the community covenant "*optimize*[d]… [the university's] capacity to fulfil its mission and achieve its aspirations" (emphasis added).[475] They spoke of the covenant "mak[ing] it *easier* for them" to abide by their beliefs (emphasis added).[476] The majority concluded that attending such a school was only a preferred option that some persons would have liked to have had, not a necessary one.[477]

The majority concluded that law society decision "interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious

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[472] *Ibid* at para 64.
[473] *Ibid* at para 65.
[474] *Ibid* at para 70.
[475] *Ibid* at para 71.
[476] *Ibid* at para 72.
[477] *Ibid* at paras 88 and 89.

practices", a violation of s. 2(a).[478] Under s. 1, however, the majority determined that the LSBC decision represented a proportionate balancing of the statutory objectives that governed their decision and this identified religious interest. In keeping with the need to show deference and the reality that there "may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives", the majority concluded that the law society's decision "[fell] within a range of possible, acceptable outcomes" and was accordingly reasonable.[479] In fact, in light of the binary nature of the decision that the law society had to make – either approving or rejecting the proposed law school – the majority felt that the decision to refuse to recognize the law school was the only option that satisfied the important statutory mandate given to them.[480]

Moreover, the majority opined that the LSBC rejection "did not limit [TWU's] religious freedom to a significant extent".[481] It related only to a specific proposal that included the mandatory covenant. Evangelical Christians that wished to hold to the covenant could still do so.[482] Even on the record before them, the mandatory covenant was "not absolutely required for the religious practice at issue: namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct".[483] The removal of the mandatory covenant would only deprive the claimants of their "*optimal* religious learning environment where everyone has to abide by the Covenant" (emphasis added).[484] The majority referenced McLachlin C.J.'s remarks in

[478] *Ibid* at para 75.
[479] *Ibid* at para 79.
[480] *Ibid* at paras 81 and 84.
[481] *Ibid* at para 85.
[482] *Ibid* at para 86.
[483] *Ibid* at para 87.
[484] *Ibid*.

Hutterian Brethren about practices that may be "optional or a matter of personal choice".[485] "[P]rospective TWU law students effectively admit that they have much less at stake than claimants in many other cases that have come before this Court".[486] No one was forcing the potential TWU law students into "forced apostasy".[487]

Though TWU maintained that its law school would be open to all, the majority noted that the "reality is that most LGBTQ people [would] be deterred from applying to [it] because of the Covenant's prohibition on sexual activity outside marriage between a man and a woman".[488] Sixty law school seats would be closed to these students. Even if LGBTQ people had many other law school options and though the creation of a new law school would actually increase the number of available law school seats, the majority felt that "an entire law school would be closed off to the vast majority of LGBTQ individuals on the basis of their sexual identity".[489] The majority added that, "LGBTQ individuals would have fewer opportunities relative to others [which] undermines true equality of access to legal education, and by extension, the legal profession".[490] The Court spoke of preventing "the violation of essential human dignity and freedom" and of treating people as "less worthy than others".[491]

The majority also considered the potential harm that might occur to LGBTQ people who might choose to attend the new law school and spoke of them having to "live a lie to obtain a degree", "sacrifice important and deeply personal aspects of their lives,

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[485] *Ibid*.
[486] *Ibid* at para 90.
[487] *Ibid*.
[488] *Ibid* at para 93. Interestingly, this is the one place that the majority decision refers to the old TWU case.
[489] *Ibid* at para 95.
[490] *Ibid*.
[491] *Ibid*.

or face the prospect of disciplinary action including expulsion".[492] The covenant would reach into the privacy of their bedrooms, apply on and off campus, and require that "LGBTQ students would have to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education".[493] The Court echoed the dissenting opinion in *TWU 2001* in stating that it is not possible "to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood".[494] LGBTQ students attending the new school could "suffer harm to their dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation".[495] For the law society to approve such a law school could undermine the "public confidence in the administration of justice".[496]

Even in the face of the rejection of their law school, the majority maintained that the TWU community was religiously free. They can still hold and manifest their beliefs individually and even in community, but in this case, their religious beliefs impacted others and had to be balanced with the statutory objectives.[497]

The majority recognized the inevitability of conflict between "the pursuit of statutory objectives and individual freedoms",[498] particularly in a "multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs". The Court referred to the limitation

[492] *Ibid* at para 97.
[493] *Ibid*.
[494] *Ibid*.
[495] *Ibid* at para 98.
[496] *Ibid*.
[497] *Ibid* at para 99.
[498] *Ibid* at para 100.

here, however, as a minor one,[499] not a serious one,[500] even suggesting that TWU's exercise of religious freedom was injuring or harming others. Their religious freedom was interfering with other persons' "parallel rights to hold and manifest beliefs and opinions of their own".[501] The Court wrote that, "Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion".[502] In the end, TWU's "religious difference" is not supressed; the decision only prevents the imposition of their religious beliefs on others.

McLachlin C.J. gave concurring reasons, showing an appreciation of the significance and value of the community covenant. Nonetheless, she wrote pointedly that, "[T]he most compelling law society objective is the imperative of refusing to condone discrimination against LGBTQ people, pursuant to the LSBC's statutory obligation to protect the public interest".[503] In a third concurring opinion, Rowe J. would have gone even further and found that on a proper delineation of the scope of the right to freedom of religion, TWU's s. 2(a) right was not even engaged by the law society decision. He emphasized notions of personal choice, personal commitment, and the exercise of free will. In his analysis, the members of TWU's community are still free to believe in and act on the sacredness of marriage between a man and a woman.[504] They are not, however, free to impose those beliefs on others. He wrote that, "Where the protection of s. 2(a) is

[499] *Ibid*. In her concurring reasons, McLachlin C.J. disagreed that the interference was minor.
[500] *Ibid* at para 102.
[501] *Ibid* at para 101.
[502] *Ibid*.
[503] *Ibid* at para 137.
[504] *Ibid* at paras 226 and 227.

sought for a belief or practice that constrains the conduct of nonbelievers — in other words, those who have freely chosen not to believe — the claim falls outside the scope of the freedom".[505]

TWU-LSBC is a highly significant case for the purposes of my analysis for several reasons.[506] It brings together many of the themes that I have attempted to address. One sees once again the way in which the majority is able to influence the analysis of religious freedom by its own moulding of the evidential record in relation to the religious interest that is at stake. The majority cast the issues in a particular light. The religious interest that the majority identified was not important. One might wonder whether the claimants in this matter would agree that they had gone so far in a legal fight for a mere preference or for something that just makes their religious educational lives easier.

Most importantly for my purposes, *TWU-LSBC* seems to blur the lines in relation to both Berger and Moon's public/private divide and Locke's church/state separation. In relation to the public/private divide, it must be noted that TWU is a private, religious institution, that operates in compliance with the provincial human rights legislation even in relation to the requirement of compliance with the mandatory covenant. TWU's religious beliefs seem to operate within its private domain. The majority, however, came down strongly in protection of the equality interests of persons of same-sex orientation that may be harmed by TWU's religious beliefs. How would they be harmed? The

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[505] *Ibid* at para 239.

[506] *TWU-LSBC* is relevant for religious freedom in general. I would contend that the case illustrates the more limited access to judicial supervision now available in relation to decisions made by administrative decision-makers that affect religious freedom. Obviously, TWU had hoped that the Court would apply the correctness standard. The strong tone of the three majority reasons that concurred in the result, however, suggest that even if the standard of review had been correctness, in this case, the result would have been the same. The majority agreed with the rejection of TWU's proposed law school so long as it comes with a mandatory covenant.

majority identifies that there would be inequitable barriers to persons of same-sex orientation access to the TWU community. They would not be able to go to the school. If they went, they would only do so at great personal cost. But is that not consistent with a separation of society into public and private domains? Within TWU's private domain, is it not free to set conditions of admission?

The majority was also concerned that persons of same-sex orientation that might go to the law school would themselves be harmed. The majority acted in defence of their interests. Again, I would ask whether that is based on a blurring of the lines. If religious freedom, including freedom from religion, is based on personal autonomy and choice, why would it be necessary for a court to protect persons from harm that they might experience due to the exercise of their own personal autonomy in the form of their decision to attend a private religious school? Would those persons not be voluntarily leaving their private space and entering the private space of someone else? Little to no consideration was given to the fact that it would only be persons that voluntarily chose to leave their private domain and even the public domain and enter TWU's private domain that would be affected by TWU's religious freedom. The majority gave little weight to respecting TWU's private domain.

On the other hand, the public/private grid could be shifted or reoriented and lead to a different result. Perhaps it was TWU that wished to leave its private domain and enter the public realm, straying too far out of its private, religious domain into the public domain. It was seeking to enter the public domain through receiving the approval of the law societies to prepare individuals that would be qualified by virtue of that approval to enter into a public, commercial profession, that of practising law. On this angle, TWU

would have been left alone if its religious, educational activities remained within the religious community, but TWU wanted to be able to offer legal training that only drew its value from the approval of an institution that operated in the public domain. Perhaps, having left the private realm, TWU should have expected to be bound to comply with public interests and the prevalent concerns of equality that dominate the public realm.

One might also perceive in *TWU-LSBC* some potential blurring of the lines between church and state. I am referring to the underlying, condemning tone of the majority judges in their rejection of the faith of TWU as expressed in their community covenant and related to morality of human behaviour. The rightness or wrongness of human behaviour is one of those questions that depends for an answer – if there is one – on an appeal to an ontological claim that goes beyond law's capacity to make. In *TWU-LSBC*, there is no sense of judicial restraint on the part of the majority in the face of such ultimate questions. Courts may elevate personal autonomy and human freedom and make them the sole basis of value, but that excludes the recognition that some questions, including moral questions, are not fully answered within the state domain. Principles of equality alone do not provide an answer as to morality. Unlike Locke's approach to tolerance, there is no sense that the law leaves room for any recognition that TWU's moral views may, in fact, be true.[507]

[507] See Mullan, "Underlying Constitutional Principles", *supra* note 106 at 99 to 101 and the reference to a "general posture of humility". An additional concern that arises in *TWU-LSBC* is the role that majority votes played in the decisions of the law society. TWU lost based on the majority votes of members of the society. The *Charter* was meant to protect minorities from the tyranny of the majority and yet, one might have the perception that what occurred in this case was the eclipse of a minority, religious community's religious interest on the basis of a popular vote.

Finally, I reiterate my main contention in this thesis: the majority in *TWU-LSBC* lost sight of the rationale for religious freedom as grounded in history. It never posed the tolerance question. It gave no expressed consideration to whether a small, private Christian law school of only 60 seats, open to all that would wish to attend and who would be voluntarily prepared to abide for a short period of time by the community's religious beliefs could be tolerated within Canadian society. The complete absence of the language of tolerance from the majority reasons is indicative of the manner in which religious freedom is vulnerable and easily displaced when placed on a playing field opposite only equality. When the highest court wishes to give primacy or even space to religious freedom, it adopts the language of tolerance (or at least neutrality) but when it intends to impose limitations on freedom of religion, it resorts to the vocabulary of equality. In all, the four judges that wrote opinions in 2018 *TWU* used some form of the word *equal* (equal, equality, etc.) more than 60 times. The dissenting opinion, recognizing where the battle was being fought, was responsible for over 30 of those uses. In total, the members of the Court used a form of the word *tolerate* only six times and all six occasions of the appearance of any concept of tolerance were contained within the dissenting opinion. Recognizing that the majority had to address questions related to equality, the absence of any consideration of the need to show tolerance is telling.

Members of the Court showed some understanding but little respect for the faith of the individuals that make up TWU. At no time did the majority ask whether in all the vast and open space of Canadian society, there might be a little room for a group of believers to remain faithful to their convictions, to affirm one another in a community setting in doing so, and to prepare some of their number and others that might voluntarily

choose to join them for public service as lawyers. The majority judges in *TWU-LSBC* seems to have lost sight of the historical rationale for allowing religious freedom and allowed equality to define what is acceptable religious behaviour.[508]

[508] In relation to *TWU 2001*, Berger said the following:

> Recall the constitutional logic employed when analyzing whether an aspect of religious culture that might appear to chafe on the commitments of the liberal rule of law ought to be tolerated: before limiting the right, the courts should carefully consider whether the religious expression that is producing the apparent conflict can actually be satisfyingly digested within the values and commitments of the rule of law. This reflective process demands a continual refinement and perhaps even expansion of the realm of indifference. Law asks itself to reconsider and reconfigure the geography of indifference using its own categories, like the private/public, and its own values, like autonomy and choice. Perhaps what we thought, on first glance, was objectionable is actually something that we can convince ourselves we shouldn't really mind after all. On first blush, the code of conduct at issue in TWU appears beyond the pale seen through the values dear to the culture of Canadian constitutionalism. On reflection, though as always within the boundaries of law's structural and normative commitments and its conception of religion, the Court concluded that the belief was sufficiently private so as not to trouble the law. There is real liberty within this margin created by an expanded and continually refined indifference. An assiduously cultivated liberal "tolerance as indifference" is a meaningful virtue. Nevertheless, when toleration of a given religious commitment would require the law to actually cede normative or symbolic territory, law trumps it in the name of procedural fairness, choice, autonomy, or the integrity of the public sphere; with this, tolerance gives way to conversion: Berger, "Cultural Limits", *supra* note 3 at 265-266.

Chapter 7 Conclusion

The *Canadian Charter of Rights and Freedoms* guarantees everyone in Canada the fundamental freedom of conscience and religion. The *Charter*, however, did not create the concept of religious freedom; it guaranteed it. The concept dates further back. John Locke saw the historical justification for religious freedom within the history of suffering and death brought on by religion itself as Christians on both sides of the Protestant and Catholic divide persecuted each other in the name of religious purity. Believing that the well being of one's soul was a highly personal matter, Locke urged that persons should be free to seek out and find, if possible, religious truth for themselves. Locke called for mutual toleration and a separation between the state and the church.

The ideal of religious freedom as toleration is reflected in the way in which Canadian courts protected the right of the Jehovah's Witnesses at the time of the World Wars to propagate their religious beliefs, largely in the Province of Quebec. Their legal struggles illustrate that even in Canada, the law must work to uphold the societal conditions that allow religion space to live on its own terms, even when religious belief might present a challenge to a majority of Canadians. The example of the Witnesses shows the capacity of Canadian law to tolerate unpleasant and unpopular religious belief and teachings.

Chief Justice Dickson understood the historical nature of religious freedom and as he first came to define what s. 2(a) meant in Canada, he looked back in time and then standing on what he saw, he looked ahead, far ahead. He understood the need for toleration, sometimes taking the form of accommodation, perhaps even a position of state

neutrality. Religion would sometimes challenge society. Understanding freedom of religion as an absence of compulsion, he highlighted personal, human autonomy and dignity. In a move that would not have troubled Locke, he also saw the importance of equality and recognized that religious freedom would not be absolute. It would, however, be "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In recognizing the highly personal nature of religious belief, one also sees the emergence of a perspective on the relationship between law and religion that assigns religion to the private domain and seeks to limit its incursion within the public domain.

Since that first interpretation of s. 2(a), more than thirty years of litigants have come before the highest court raising questions of the application and limitation of religious freedom in Canada. *Big M* has served the country well, but on occasion, courts have faltered. It has not always been easy to navigate the division between the public and the private.

Religion still challenges Canadian society and it always will. Courts will ever be called on to preserve space for religious freedom if Canada wishes to continue to bear the marks of a free society. Courts best preserve space for religion when they adopt the language of toleration and turn their focus on determining whether Canadian society can absorb a challenging religious belief or practice and still carry on.

To maintain a healthy and robust protection for religious freedom, courts would do best to hold firmly to Locke's concept of toleration. It is when courts strive to tolerate religion even in the face of apparent conflict with the perceived interests of equality that courts arrive at a proper understanding and application of the guarantee. With one eye on

history and grounded in an acceptance of the nature of religious belief as grounded in the mystery of faith, courts need to be the ever steady voice of toleration of religious difference in Canada. If courts allow concerns of equality to dominate the discussion in relation to religious freedom, s. 2(a) will become weaker and increasingly vulnerable to unnecessary limitation. Focusing solely on equality leads courts to decrease the available space to religion.

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