

# WHAT RELIGIOUS FREEDOM JURISPRUDENCE REVEALS ABOUT EQUALITY

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## I. INTRODUCTION

The premise of this special volume of the *Journal of Law and Equality* is that we should consider how to promote equality through means other than section 15 of the *Charter*.<sup>1</sup> The suggestion has merit. For if, as Justice Peter Cory once wrote, section 15 reflects “the fondest dreams, the highest hopes and finest aspirations of Canadian society”,<sup>2</sup> too often the dream has suffered in reality. Establishing an equality rights claim has become increasingly complex, beset by multi-part tests and providing numerous opportunities for the state to justify discrimination.

In this article, I suggest that recent section 2(a)<sup>3</sup> jurisprudence may be more consonant with the Supreme Court of Canada’s own, early view of section 15 – what Cory J. referred to as “the foundation for a just society” – than equality jurisprudence itself. In contrast to section 15, establishing a *prima facie* infringement of section 2(a) is straightforward (because the right is defined broadly and from an almost completely subjective viewpoint); and there is more scrutiny of state justification. The judicial choices we find in many section 2(a) cases would greatly benefit equality claimants in non-religion based cases. In this article I offer some observations as to why it seems to be easier for courts to

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 [*Charter*].

<sup>2</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 67 [*Vriend*].

<sup>3</sup> Section 2(a) of the *Charter* guarantees everyone the fundamental freedom of “conscience and religion.”

“get” religious freedom claims than equality claims despite their frequent points of analytical intersection.

Part II reviews the state of equality jurisprudence in Canada, finding it to be in some difficulty. While Canada’s approach to its constitutional equality guarantees has much to laud, decisions in recent years have rendered section 15 an unstable platform for equality litigation. A highly formalized approach to equality rights makes it more difficult for claimants to succeed in demonstrating *prima facie* discrimination.<sup>4</sup> The formalized approach insists that equality breaches be evaluated only through a process of comparison; that the claimed benefit accord with the purpose and design of the law; and that any alleged discrimination be cognizable to a reasonable person. Recent cases also display increasing latitude to governments under section 1.

Part III of the article discusses freedom of religion, focusing on recent cases<sup>5</sup> demonstrating a broad and protective approach. The Supreme Court has made it easy to establish an infringement of section 2(a) and also has employed a rigorous analysis of justification. In these cases we see almost the exact converse of the trends in equality jurisprudence: powerful purposive descriptions of the right that are supported, not undermined, by the resulting analysis; a clear focus on the individual including a caution that judges not probe too deeply into the contours of someone’s belief system; an explicit acknowledgment of the importance of recognizing difference; and an expectation that the government will offer compelling justification for rights infringements. Courts in Canada display a sympathy to oppression of the religiously devout that often is absent in equality law.

Part IV of the article suggests why these markedly different approaches have emerged in equality versus freedom of religion cases and concludes with some final thoughts about how and whether equality law might be re-energized by some of the developments in s. 2(a)

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<sup>4</sup> Much recent criticism has been focused on the Supreme Court’s approach to section 15 outlined in *Law v. Canada*, *infra* note 15. In 2008, in *R. v. Kapp*, the Court appeared to retreat from some aspects of the *Law* decision, but it is too early to determine *Kapp*’s precise impact on equality analysis. *Kapp* is discussed, *infra*, at notes 28 and 65, and surrounding text.

<sup>5</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256. The Supreme Court’s decision in *Alberta v. Hutterian Brethren of Wilson Colony* 2009 SCC 37 is discussed in an addendum.

jurisprudence. While the path is not easy, it could be made easier for equality rights claimants to traverse.

## II. EQUALITY DENIED? THE CURRENT STATE OF SECTION 15

Section 15 of the *Charter* states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 refers to four rights: equality before and under the law, and equal protection and equal benefit of the law. Although s.15 cases do not consistently specify which equality right is implicated, the inclusion of four equality rights was deliberate. They were inserted in the hope that *Charter* equality law would not replicate the highly formalistic decisions under the *Canadian Bill of Rights*,<sup>6</sup> which guaranteed only “equality before the law and equal protection of the law”.<sup>7</sup> Though the Supreme Court’s general failure<sup>8</sup> to recognize inequality under the *Canadian Bill*

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<sup>6</sup> *Canadian Bill of Rights*, 1960, c. 44; Michael Mandel, *The Charter of Rights and the Legalization of Politics* (Toronto: Thompson Educational, 1994) c. 6.

<sup>7</sup> *Bill of Rights*, *ibid.*, s.1(b).

<sup>8</sup> Only one equality claim during that earlier period succeeded: in *R. v. Drybones*, [1970] S.C.R. 282 the Court found that a provision of the *Indian Act* that subjected Indians to prosecution if they were found intoxicated outside of a reserve violated equality. Speaking for the Supreme Court, Justice Ritchie held that:

[An] individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

*Drybones*, at 297. In the subsequent case of *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349 Justice Ritchie found no equality breach where the same *Indian Act* stripped Aboriginal women (but not men) of Indian status for marrying a non-status person. Another refusal to apply “equality before the law” in a gender-related case occurred in *Bliss v. Attorney General of Canada*, [1979]1 S.C.R. 183 where a harsher scheme for unemployment insurance benefits during maternity leave was not found to discriminate

of *Rights* cannot be traced solely to that document's words, feminists and other advocates fought to include the terms "equality under the law" and "equal benefit of the law" in the *Charter* to encourage, if not actually require, courts to engage in more rigorous review.<sup>9</sup>

During the *Charter*'s early days, a high proportion of section 15 cases was initiated by advantaged persons to roll back legislative initiatives meant to assist disadvantaged persons.<sup>10</sup> In *Andrews v. Law Society of British Columbia*, the Supreme Court limited these kinds of claims by holding that not every legal distinction leads to a *prima facie* violation of section 15.<sup>11</sup> Distinctions are an inherent part of law and policy-making; a state must assess the degree to which people in different social locations have different needs. What is prohibited by section 15 are those distinctions that are discriminatory because they impose burdens or withhold benefits on the basis of personal characteristics<sup>12</sup> that historically have been markers of group-based oppression.

Although the above-noted developments narrowed the scope of situations to which section 15 might apply, early section 15 decisions also significantly broadened the scope of the equality guarantee in those cases where it did apply. For example, the Court rejected the argument

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on the basis of sex because any distinction was traceable to the separate, voluntary condition of pregnancy.

<sup>9</sup> Dale Gibson, *The Law of the Charter: Equality Rights* (Scarborough: Carswell, 1990) at 42-45; Judy Fudge, "The Public/Private Distinction: The Possibilities of and Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485.

<sup>10</sup> The first section 15 cases included men challenging social benefits schemes for single mothers, and corporations challenging laws for discriminating against their right to engage in free enterprise. See e.g. *Attorney-General of Nova Scotia v. Phillips* (1986), [1987] 34 D.L.R. (4th) 633 (N.S.S.C.); Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989); Mandel.

<sup>11</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*]; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 [*Weatherall*].

<sup>12</sup> Those personal characteristics are found, first, in the prohibited grounds of discrimination already enumerated in section 15. Other characteristics may be deemed "analogous" and thus subsumed into section 15's text, so long as they fit within the section's larger "remedial" purpose. Thus, "sexual orientation" was recognized as an analogous ground but "province of residence" was not. See *Egan v. Canada*, [1995] 2 S.C.R. 513; *R. v. Turpin*, [1989] 1 S.C.R. 1296 [*Turpin*].

that section 15 prohibits only “invidious discrimination”<sup>13</sup> which would require that any alleged discrimination be unfair. The Court cautioned that building too much into the concept of discrimination would blur the distinction between section 15 and section 1, leaving little role for the latter.<sup>14</sup> Further expansion of section 15’s scope occurred when the Court held in various cases that discrimination must be analyzed from the perspective of the right-claimant<sup>15</sup> and need not be intentional;<sup>16</sup> and that any new prohibited grounds need not be biologically immutable.<sup>17</sup>

One of the Court’s most important choices was to recognize that equality has both formal and substantive aspects. Formal equality is achieved when similar cases are decided according to similar principles; it has often (though not always accurately) been used interchangeably with “similarly situated equality”. Although it is sometimes referred to disparagingly, formal equality incorporates the rule of law command against arbitrary treatment and is indispensable to a just society. The particular aspiration of section 15, though, is substantive equality. Substantive equality uses as its benchmark not the parameters of particular legislative regimes, but the broader social context in which people experience inequality. Although much of that inequality is not attributable to precise state action, addressing such disparities is subsumed within the state’s general governance obligations. Under the dictates of substantive equality it is neither sufficient nor appropriate to simply require that the law treat persons the same as others who appear to resemble them.<sup>18</sup> More is required; namely, consideration of “the content of the law, ... its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application”.<sup>19</sup>

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<sup>13</sup> *Andrews*, *supra* note 11.

<sup>14</sup> *Andrews*, *supra* note 11.

<sup>15</sup> *Andrews*, *supra* note 11; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [Law].

<sup>16</sup> *Andrews*, *supra* note 11.

<sup>17</sup> *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

<sup>18</sup> *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

<sup>19</sup> *Andrews*, *supra* note 11 at 169. See also, *Weatherall v. Canada*, [1993] 2 S.C.R. 872, holding that differential treatment based on sex did not necessarily violate section 15. In *Weatherall*, a male inmate argued that frisking by female guards constituted discrimination given that female inmates were not subjected to cross-gender frisks. Recognizing that women’s vulnerability to male sexual violence posed a distinctive concern not met in the converse situation, La Forest J. held that the facial inequality maintained by Corrections Canada did not violate section 15. (Some have criticized the case as relying on “biology” to set apart the nature of the frisks when performed by men on women versus by women on men: Margot Young, “Blissed Out: Section 15 at

The developments mentioned above signalled the potential for a true break from the past. By moving beyond the framework of the *Canadian Bill of Rights*; by adopting a definition of discrimination focused on the effects of not just state intent but state action (and, even, inaction)<sup>20</sup>; and by characterizing the purpose of section 15 as remedial and directed to historically disadvantaged groups the Court paved the way for a jurisprudence that might finally begin to unpack and repair the infrastructure (socio-economic, legal and political) by which inequality is maintained.

Later developments, though, were to make such a result a remote possibility. Indeed, some have argued that not even the most positive aspects of early section 15 jurisprudence really *compelled* the Court to ensure substantive equality outcomes.<sup>21</sup> For example, many of the developments were oriented towards a contextual approach that, because of its profound malleability, has permitted the Court to shelter highly deferential equality rights analysis behind pleasant slogans.<sup>22</sup> And, a close reading of numerous section 15 cases suggests that it has been difficult for courts to avoid applying similarly situated analysis.<sup>23</sup> In *Andrews* itself, the Court debated the extent to which citizenship is a proper basis for inferring a sufficient connection between lawyers and the legal system in which they practice. This is, really, a debate about whether such a connection is distinguishable for citizens and non-citizens on a general basis, as opposed to being different for each individual. In other words, a good part of the analysis focused on the degree of similarity between the two groups. A more recent example is provided by the same-sex marriage cases,<sup>24</sup> where a number of the equality arguments amounted to the assertion that because same-sex couples are just like opposite sex couples their continued exclusion from the legal regime of marriage was discriminatory.

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Twenty” in S. McIntyre and S. Rodgers, eds. *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, *infra* note 67 at 57.)

<sup>20</sup> *Vriend*, *supra* note 2.

<sup>21</sup> Diana Majury, “Equality and Discrimination According to the Supreme Court of Canada” (1990-1991) 4 *Canadian Journal of Women and the Law* 407.

<sup>22</sup> Mayo Moran, “Protesting Too Much: Rational Basis Review Under Canada’s Equality Guarantee” in McIntyre and Rodgers, *Diminishing Returns*, *infra* note 67 at 71.

<sup>23</sup> Majury, *supra* note 21.

<sup>24</sup> *Halpern v. Toronto (City)* (2003), 65 O.R. (3d) 151 (C.A.); (*EGALE Canada v. Canada (A.G.)* (2003), 13 B.C.L.R. (4th) 1, 2003 BCCA 251; *Hendricks c. Québec (P.G.)*, [2004] R.J.Q. 851 (C.A).

By 1995, the Court's section 15 jurisprudence displayed a serious lack of internal cohesion. In *Egan v. Canada*<sup>25</sup> and in *Miron v. Trudel*,<sup>26</sup> the Court split badly on the role that "functional relevance" plays at the initial stage of establishing discrimination. Analytically, the disagreement was over whether a prohibited ground of discrimination might nonetheless be an appropriate basis for legislated difference because the ground reflects a relevant categorization that the state is entitled to make. But the true source of the disagreement was whether certain personal characteristics (sexual orientation; a marital relationship), previously viewed as incontrovertible facets of family formation, had continuing importance for state policy. Even after the Court signaled that family policies could no longer parrot established patterns of heteronormativity, it continued to express grave concerns over the extent to which section 15 claims might require a significant diversion of state resources in order to remedy them.

In 1999, attempting to speak with a single voice, the Court declared that its earlier fractured decisions reflected a common understanding of section 15's central purpose: the promotion of "essential human dignity." In *Law v. Canada*,<sup>27</sup> human dignity became the new touchstone by which discrimination was to be measured.<sup>28</sup>

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<sup>25</sup> [1995] 2 S.C.R. 513 [*Egan*].

<sup>26</sup> [1995] 2 S.C.R. 418 [*Miron*].

<sup>27</sup> *Law*, *supra* note 14.

<sup>28</sup> The Court has since retreated from the argument that "human dignity" is central to the section 15 framework. In *R. v. Kapp*, [2008] 2 S.C.R. 483 the Court noted the deficiencies of the term as a "legal concept":

[A]s critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focused on treating likes alike.

*Kapp*, para. 22. The Court explained that the *Law* test is not "new and distinctive, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions." The post-*Kapp* jurisprudence is still evolving, but a few cases suggest that at least some members of the Court are relying heavily on the concepts of stereotype and prejudice, and even the previously rejected notion of "invidiousness", as factors constitutive of discrimination. See *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 and *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 as discussed in Carissima R. Mathen, "Developments in Constitutional Law: The 2008-2009 Term" (2009), 48 S.C.L.R. (2d) 71.

Dignity, described as an individual or group's feelings of self-respect and self-worth,<sup>29</sup> would be determined from the perspective of "a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity."<sup>30</sup> While the reference to a reasonable person sounds logical, its effect is to uncouple the concept of "discrimination" from the vantage point of the oppressed. Discrimination is instead firmly tethered to the rational individual able to look past a personal harm and evaluate a state law or policy within its larger context.<sup>31</sup>

In *Law* the Court also reaffirmed the judge's role in choosing an appropriate comparator group. While the complainant ordinarily selects the individuals with whom she wishes to be compared, a court may refine the comparison. This modest reminder to courts to scrutinize the choice of comparator group has morphed into an additional, critical ground for review. For example, in *Granovsky v. Canada (Minister of Employment and Immigration)*,<sup>32</sup> a claimant suffering from a temporary disability sought a comparison with able-bodied persons to show that pension

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<sup>29</sup> *Law*, *supra* note 15 at paras. 51-53.

<sup>30</sup> *Ibid.* at para. 61.

<sup>31</sup> The Court identified four "contextual factors" that would assist a court in determining whether a particular distinction on an enumerated or analogous ground constitutes discrimination: pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and the nature and scope of the interest affected by the impugned law. The factors were not ranked and were not supposed to comprise a checklist. However, subsequent cases tended to proceed through the list exactly as one would use a checklist, offering little or no explanation about how the factors relate to each other particularly where some favour the claimant and some the government. In *R. v. Kapp*, *supra* note 28, which downplayed *Law*'s precise framework, the Court still made use of the four contextual factors. It noted that the first and fourth factors do no more than consider whether the legislation in question perpetuates disadvantage and prejudice. The second *Law* factor assesses whether the legislation engages in unfair stereotyping. The third factor is relevant when determining whether the law in question is protected by section 15(2). Thus, the *Law* factors simply fleshed out the kinds of considerations that are important when applying the *Andrews* test. The Court's comments strongly suggest that the factors will continue to play a role in subsequent cases. See, for example, *Downey v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2008] N.S.J. No. 314 (C.A.) paras. 51-55.

<sup>32</sup> *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 [*Granovsky*].



entitlement criteria designed for the latter, but applied to him, failed to consider that disability. The Court held that Granovsky's proper comparator group was the *permanently* disabled who could apply for Canadian Pension Plan benefits under substantially modified criteria. Once it corrected this "error", the Court held that a reasonable person in Granovsky's circumstances would appreciate that a statutory provision meant to address the needs and circumstances of the permanently disabled did not discriminate against persons not disabled enough to fall within the provision.<sup>33</sup>

Another illustration is provided by *Auton v. British Columbia*,<sup>34</sup> which concerned a refusal to fund autism treatment for preschool-aged children. The lower courts in this case held that the children were denied a benefit based on age and mental disability.<sup>35</sup> The Supreme Court allowed the Crown's appeal because the requested medical treatment was not a benefit cognizable under the impugned legislation, so there was no violation of "equal benefit of the law".<sup>36</sup> However, it went on to discuss other aspects of the equality rights claim. Specifically the Court held that the claimants could not show that they were denied a benefit that had been provided to the appropriate comparator group. The lower courts had accepted the claimants' suggested comparator group consisting of non-disabled children and adult persons with mental illness. Chief Justice McLachlin found this comparator group did not reflect the fact that at the relevant time, the precise treatment sought was emergent instead than established. She therefore substituted the chosen

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<sup>33</sup> *Ibid.* See also *Lovelace v. Ontario*, (S.C.C.), *infra* note 63 for a similar analysis of claims in which one disadvantaged group sought a benefit granted to another disadvantaged group.

<sup>34</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 [*Auton*].

<sup>35</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* (2002), 220 D.L.R. (4th) 411, affirming [2000] 8 W.W.R. 227, 78 B.C.L.R. (3d) 55 (S.C.) at para. 121.

<sup>36</sup> The *Auton* plaintiffs demanded equal access to "medically necessary treatment" for their children, which included treatment for autism. The Chief Justice held that this argument had merit only if the legislation actually guaranteed the delivery of "medically necessary treatment" without qualification. Here, she found, it did not. The legislation designated two categories of service – "core" and "non-core" – of which only the former are fully funded. At the time of trial, autism treatment providers were not included under any of the categories of core service providers. Nor were they included in the category of "health care practitioners" (such as chiropractors and dentists) eligible for funding of "non-core" services. Therefore, the respondents sought a benefit other than what the law provided.

comparator group with “a non-disabled person or a person suffering a disability other than a mental disability, who seeks or receives funding for a non-core therapy that is important for his or her present and future health, is emergent and has only recently begun to be recognized as medically required.”<sup>37</sup> Because there was no evidence that the government had responded differently to the needs of autistic children than to others in need of “novel treatment”, there was no discrimination.

In dismissing claims of discrimination the Court has frequently referred to personal choice and autonomy. In *Nova Scotia (Attorney General) v. Walsh*<sup>38</sup> the Court declined to find discriminatory Nova Scotia’s failure to include heterosexual common-law couples within the family law regime governing property division upon partnership breakdown. While it was clear that unmarried couples historically had suffered various kinds of discrimination,<sup>39</sup> the majority held that in recognizing someone’s deliberate decision to remain unmarried the province was respecting the autonomous exercise of individual choice.<sup>40</sup> A similar emphasis in a different context is found in *Hodge v. Canada (Minister of Human Resources Development)*,<sup>41</sup> a challenge to the limitation of survivors’ pensions in the Canada Pension Plan to persons in common law or marital relationships at the time of their partner’s death. The “choice” in *Hodge* related not to the claimant’s refusal to marry but to her decision to separate from her common law spouse. The emphasis on that choice merged with the Court’s deference to the government’s stated purpose for the regime: “[dealing] with the financial dependency of a couple who at the date of death are in a relationship with mutual legal rights and obligations.”<sup>42</sup> Thus, the claimant’s circumstances (which were assumed to be of her own making) caused her to fall outside the law’s intended design.

Similar strands of reasoning appear in *Gosselin v. Quebec (A.G.)*,<sup>43</sup> for some the high water mark of equality equivocation post-

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<sup>37</sup> *Auton*, *supra* note 34 at para. 55.

<sup>38</sup> [2002] 4 S.C.R. 325 [*Walsh*].

<sup>39</sup> *Miron*, *supra* note 26 *per* McLachlin J. at paras. 151-154.

<sup>40</sup> *Walsh*, *supra* note 38 *per* Bastarache J. at paras. 55, 63.

<sup>41</sup> *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357.

<sup>42</sup> *Ibid.* at para. 47.

<sup>43</sup> [2002] 4 S.C.R. 429 [*Gosselin*].

*Law*.<sup>44</sup> In *Gosselin* five justices upheld a Quebec “workfare” program that reduced the base social assistance amount for those under 30 years of age to approximately \$170 per month. Writing for the majority, Chief Justice McLachlin said that the enumerated ground of age has not historically been “associated with discrimination and arbitrary denial of privilege.”<sup>45</sup> She noted that the workfare regime, though “harsh, perhaps even misguided”,<sup>46</sup> rested on inferences between age and the ability to work that actually reflect positive attitudes about young persons’ capacity to be self-sustaining. There, correspondence between the law and the personal characteristic incorporated both “logic” and “common sense”.<sup>47</sup> To the extent that some people would inevitably “fall through a program’s cracks”<sup>48</sup> this did not constitute discrimination but reflected the unfortunate fact that such persons, like Gosselin herself, had so many pre-existing difficulties that their needs could not be met through a social assistance regime. A rational individual better placed to exercise self-care not only would take advantage of the workfare, but would appreciate, even applaud, the legislature’s far-sightedness in recognizing young persons’ essential worth. The person would understand that one way to allow that worth to manifest is to deny young persons the assistance granted to those not similarly blessed with youth and vigour. Tough love, not coddling, is exactly what is needed.

The developments noted above have made it perilous for claimants wishing to traverse a section 15 claim. The journey does not end there, however, for section 1 functions as another mechanism to curtail section 15’s impact. In *Andrews* the Court considered<sup>49</sup> and ultimately rejected making the threshold for section 1 justification higher for violations of equality rights.<sup>50</sup> While the Court noted the importance of non-discrimination norms to a free and democratic society, it said that section 1 applies in the same manner to all *Charter* claims. Yet, because of the particularly complex test that must be established to make out a *prima facie* equality violation, section 15 provides numerous

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<sup>44</sup> Gwen Brodsky, “*Gosselin v. Quebec (Attorney-General):* Autonomy with a Vengeance” (2003) C.J.W.L. 194; Sonia Lawrence, “Harsh, Perhaps Even Misguided: Developments in *Law*, 2002” (2003) 20 Sup. Ct. L. Rev. 93.

<sup>45</sup> *Gosselin*, *supra* note 43 at para. 29.

<sup>46</sup> *Ibid.* at para. 69.

<sup>47</sup> *Ibid.* at para. 44.

<sup>48</sup> *Ibid.* at para. 55.

<sup>49</sup> *Andrews*, *supra* note 11 at 183.

<sup>50</sup> Sheilah Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) Can. Bar Rev. 229 at 227.

opportunities for state justification which are not present in most other *Charter* rights. In *Law* the Supreme Court identified as a contextual factor in discrimination claims whether the impugned law is ameliorative. This permits a court to find that exclusionary programs are not discriminatory if they are intended to benefit another group. The *Granovsky* case, previously discussed, provides one example of a case in which this reasoning was accepted. This was also the argument that won the day in *Lovelace v. Ontario*<sup>51</sup> in which an ameliorative program aimed at status Indian communities was upheld against a challenge by non-status communities who believed that their exclusion from the program compounded their historic marginalization. The result, while perhaps not deliberate, is that the threshold for justifying section 15 violations has become *lower* than for other rights and freedoms.

The number of section 15 cases where the government prevails under section 1 tends to be small because the complex analysis required at the *prima facie* stage makes it more likely that equality claims will fail there and not under section 1. Even so, courts have been willing to justify otherwise discriminatory laws. In *Egan*, Justice Sopinka argued that a state is entitled to engage in “incremental reform” in response to novel equality claims (in that case, sexual orientation discrimination).<sup>52</sup> An even wider role for section 1 was established in *Newfoundland (Treasury Board) v. N.A.P.E.*,<sup>53</sup> when the Supreme Court for the first time explicitly relied on fiscal concerns to justify a *Charter* violation. Previously, the Court had consistently rejected any analysis under section 1 of “rights versus dollars.”<sup>54</sup> In *N.A.P.E.*, the S.C.C. took judicial notice of a “severe fiscal crisis” confronting the Newfoundland and Labrador Government which led the government to partially repeal a pay equity agreement. It did so on the basis of a record – an extract from *Hansard* and some budget document<sup>55</sup> – that was in the Court's own

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<sup>51</sup> [2000] 1 S.C.R. 950 [*Lovelace*].

<sup>52</sup> *Supra* note 25 at para. 109.

<sup>53</sup> [2004] 3 S.C.R. 381 [*NAPE*].

<sup>54</sup> *NAPE, ibid.* at para. 75. The Court cites the following examples where fiscal concerns were held insufficient to justify limitations on *Charter* rights: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *R. v. Lee*, [1989] 2 S.C.R. 1384; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

<sup>55</sup> *NAPE, ibid.* at para. 58, referring to “the public accounts of the Province that are filed with the House of Assembly, and comments by the Minister of Finance and the President of the Treasury Board as to what they thought the accounts disclosed and what they proposed to do about it, which are reported in *Hansard*.”

words “casually introduced”.<sup>56</sup> But the Court was most reluctant to scrutinize budget choices, noting there are “serious limits to how far the courts can penetrate Cabinet privilege.”<sup>57</sup> In the circumstances it found that the essential relevant material was included. While the Court reaffirmed that budgetary constraints alone “cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*”,<sup>58</sup> where such constraints are “wrapped up with other public policy considerations”,<sup>59</sup> it is appropriate to afford the government a “large ‘margin of appreciation’ within which to make choices.”<sup>60</sup>

A final consideration in equality analysis is section 15(2) of the *Charter* which states that ameliorative programs are not “precluded” by section 15(1).<sup>61</sup> Generally referred to as the affirmative action clause, section 15(2) allows Canada to avoid battles over whether the state may constitutionally extend preferences to racial groups that have suffered discrimination.<sup>62</sup> In *Lovelace v. Ontario*<sup>63</sup> the Court upheld an Ontario government program establishing a profit sharing scheme for casino winnings among First Nations communities, defined as communities registered as bands under the federal *Indian Act*.<sup>64</sup> The Court held that the government was entitled to design a program for the specific needs of band communities without running afoul of the equality rights of other aboriginal communities. However, the Court rejected the Ontario government’s attempt to use section 15(2) to shield the program from all judicial scrutiny.

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<sup>56</sup> *NAPE, ibid.* at para. 59.

<sup>57</sup> *NAPE, ibid.* at para. 58. The section 1 analysis in *NAPE* is not limited to section 15 claims, but it has not yet been applied to other situations.

<sup>58</sup> *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 109, cited in *NAPE, supra* note 53 at para. 97.

<sup>59</sup> *NAPE, ibid.* at para. 69.

<sup>60</sup> *Ibid.* at para. 84.

<sup>61</sup> *Charter, supra* note 1 at s. 15(2).

<sup>62</sup> In the United States the Fourteenth Amendment states *inter alia* that no persons shall be denied “the equal protection” of the law and contains no equivalent to section 15(2). This has led to protracted and divisive litigation over “race-based preferences” that have been instituted to remedy and repair centuries of racial discrimination. See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

<sup>63</sup> [2000] 1 S.C.R. 950 [*Lovelace*].

<sup>64</sup> R.S.C., 1985, c. I-5.

In 2008, in *R. v. Kapp*<sup>65</sup> the Supreme Court changed course, stating that if a government program falls within section 15(2) further analysis under section 15(1) is unnecessary. The Court was careful to say that this does not make section 15(2) an “exemption” to equality. Rather, because substantive equality may require treating groups differently on the basis of personal characteristics, a program that falls within section 15(2) is not discriminatory. In the sense that it strengthens the *Charter*’s commitment to affirmative action programs, *Kapp* is certainly a positive development. But, it does so by granting near total discretion to the government to design ameliorative programs. So long as the government can point to some plausible understanding of the program as being at least *intended* to ameliorate the conditions of a disadvantaged group, the section 15 analysis ends and the *Charter* claim fails. This is an exceptionally deferential approach that may wind up cementing government power at the expense of persons excluded from ameliorative programs who are now largely constrained from challenging that exclusion.

The developments discussed above,<sup>66</sup> among others, have led to laments that section 15 has not lived up to its initial promise.<sup>67</sup> Courts have invested extraordinary energy in fleshing out the operative concept of “discrimination” in a way that makes the *prima facie* stage of an equality claim very burdensome. Discrimination is to be considered from the vantage point of the reasonable person, with the attendant risk that a court will be unable to appreciate what a reasonable perception might be for a person who is marginalized and oppressed. The initial equality infringement may be vulnerable if the claimed benefit is anchored to an underinclusive scheme, since the court can simply hold that the benefit sought is not cognizable under the particular legal

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<sup>65</sup> [2008] 2 S.C.R. 483 [*Kapp*]. The *Kapp* case arose when a group of commercial fishers took issue with a special, one-time 24-hour license granted to members of three aboriginal bands to fish for salmon in the Fraser River in British Columbia. In granting the license, the federal government said that it was both regulating the Canadian fishery as it is authorized to do under section 91 of the *Constitution Act, 1867*, and attempting to improve the situation of a group (aboriginal people) that suffers heavy disadvantage. Some mostly non-aboriginal fishers said that because the exclusive license was limited to aboriginal persons, it constituted race-based discrimination.

<sup>66</sup> While I have included in this discussion the very recent *Kapp* case, it is too early to draw firm conclusions about that case’s impact on equality jurisprudence.

<sup>67</sup> Sheila McIntyre and Sanda Rodgers, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Canada, 2006); Fay Faraday, Margaret Denike and M. Kate Stephenson, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

framework through which it would be granted. The section 15 analysis is dependent upon choosing the correct comparator which has been defined in terms that look very much like a similarly situated analysis. Section 15 has been somewhat more effective in vindicating harms to dignity interests which fit more easily into a traditional model of the harms caused by discrimination. Thus, a section 15 violation was recognized in *Vriend* because of the symbolic and legal effect on gays and lesbians of excluding them from human rights legislation.<sup>68</sup> But where the claim requires the Court to appreciate the harms that flow because of socio-economic disadvantage, as in *Gosselin*, establishing discrimination is far more difficult.

The individual most likely to succeed in a section 15 case is the rational liberal who seeks entry into the commons of society, often to compete with others; and who can demonstrate a legitimate expectation to be judged on his or her personal merits. Where the assessment of merit is complicated by pre-existing disadvantage, the claimant likely will have a harder time. Even where discrimination contrary to section 15 is established, the government has the benefit of (a) the same extensive section 1 framework available in other *Charter* cases (b) the recent expansion of section 1 to include fiscal concerns and (c) near immunity from section 15 scrutiny to the extent it can rationally describe its law or program as ameliorative.

### III. EQUALITY VINDICATED? THE SUCCESS OF RECENT SECTION 2(A) CLAIMS

In this section, I draw a contrast between the above-noted developments in equality law and recent trends in religious freedom cases. It should be stated at the outset that section 2(a) of the *Charter* does not exist in isolation, but as part of a complex structure of occasionally competing values. As a prelude to the discussion of section 2(a), therefore, it is worthwhile to consider why society should value religious freedom at all.

One reason that society values religious freedom is because religion promotes a sense of worth in a person's life, or personal self-fulfillment. Because of the human tendency to seek meaning and guidance in divine sources, it is assumed to be a good idea to permit every person some protected space to do so. The idea of space to pursue

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<sup>68</sup> *Vriend*, *supra* note 2.

self-fulfillment is also invoked for the constitutional freedom of expression.<sup>69</sup> The contrast with freedom of expression is that while virtually no human being can exist without engaging in expressive activity, many appear quite capable of ordering their lives without the assistance of religious guiding principles. Nonetheless, the experience is *sufficiently* common and generalized, to make the idea of some form of constitutional guarantee attractive.

One can also justify the privilege accorded to religious freedom on the basis that the practices that attend religion are a boon to society itself. Religious belief is often explicitly associated with values such as selflessness, charity, and community. An implication of this argument is that the degree of protection society confers is related to the freedom's instrumental value, suggesting that those aspects of religious practice which promote *social* good, are to be protected, while those aspects which are less helpful or, even, detrimental, ought to receive less consideration. Some argue that before society may legitimately grant some protection to actions motivated by faith, this second category of justification must be demonstrated beyond the realm of conjecture. For example, Timothy Macklem suggests that the only justification for religious freedom inheres in the extent to which faith exists as an alternative to "reason".<sup>70</sup> On this account faith exists as a source of guidance for people to make decisions in contexts where the reasons to follow a particular course of action are otherwise unknowable.<sup>71</sup> Macklem therefore derives a moral and secular justification for religious freedom from the unique nature of some questions which religious beliefs are deemed to address. This is related to, but not co-extensive with the broader instrumentalist view. Macklem's argument relies on the personal benefit which accrues to religious adherents. The broader instrumentalist view takes a more catholic approach, looking at the benefits not only to the adherents, but to society at large.

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<sup>69</sup> *Charter*, *supra* note 1 at s.2(b); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

<sup>70</sup> Timothy Macklem, "Faith as a Secular Value" (2000) 45 McGill L.J. 1.

<sup>71</sup> *Ibid.* at 57:

If traditional religions should continue to receive fundamental protection because and only because they constitute paradigmatic examples of beliefs... in relation to dimensions of life that those adherents reasonably regard as inaccessible other than on the basis of faith[,]... then traditional religions should be denied protection to the extent that they have misidentified those dimensions of life, so as to embrace matters in regard to which reason is not only accessible but constitutes a sounder guide to the achievement of human well-being.



A third way to conceptualize religious freedom is as an aspect of equal regard and concern. Indeed, some have argued that religious freedom operates *only* as an incident of equal liberty.<sup>72</sup> In line with this account, it is no accident that “religion” is a specific prohibited ground of discrimination in section 15. The state has no business making religious preferences for others. Not only does the state have no business in such affairs, it is peculiarly incompetent to do so, for, as Locke wrote: “The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind.”<sup>73</sup>

In *R. v. Big M Drug Mart Ltd.*,<sup>74</sup> Justice Dickson described freedom of religion as one<sup>75</sup> of the hallmarks of a truly free society.<sup>76</sup> The larger point to emerge out of *Big M* is that so far as possible the state must remain “neutral” with regard to the conditions under which people choose to exercise the fundamental freedoms. “Neutrality” is particularly important to freedom of religion, because people must be free to make choices about the role religion is to play in their individual lives and aspirations. Thus, a law motivated by a sectarian religious purpose will automatically fail the justification required by section 1 of the *Charter*.<sup>77</sup>

In its approach to religious freedom, *Big M* stresses individual autonomy and dignity, elements that have critically informed our understanding of the equality guarantee. The approach is strongly influenced by traditional liberal values of individualism, non-restraint

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<sup>72</sup> Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Harvard Univ. Press, 2007).

<sup>73</sup> John Locke, *A Letter Concerning Toleration* (1689).

<sup>74</sup> [1985] 1 S.C.R. 295 [“*Big M.*”].

<sup>75</sup> The other “hallmarks” were found in the other fundamental freedoms: freedom of expression and of the press; freedom of assembly; and freedom of association.

<sup>76</sup> *Supra* note 74 at para. 94. Note that while Justice Dickson recognized the equality element with respect to enjoyment of the fundamental freedoms, he distinguished it from any specific equality guarantee under section 15. This statement should be read in the larger context of the *Big M* case. Section 15, alone among *Charter* provisions, was enacted with a three-year moratorium so that it came into effect only in 1985. Therefore, while the earliest *Charter* challenges to freedom of religion - of which *Big M* is the most famous - analytically fell within the framework of equality they could be treated only as section 2(a) claims. Peter W. Hogg, “Equality as a Charter Value in Constitutional Interpretation” (2003) 20 Sup.Ct.L.Rev. 119-120.

<sup>77</sup> *Big M.*, *ibid.* at paras. 84-85, citing *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 at 88.

and choice. It is less clear whether the state may take a more activist stance over what constitutes the “public good”, for example by intervening in particular conflicts or situations. Noting that no right is absolute, Dickson C.J. said in *Big M* that religious freedom is “subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.<sup>78</sup> Yet, he cautioned against an unreflective equivalence between majority-affirmed morals, and legitimate state policy:

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”.<sup>79</sup>

It is beyond the scope of this article to canvass much further the constitutionality of state-expressed preferences for religion *per se*. It is enough to note that sectarian preferences are not permitted.

Similar to its freedom of expression jurisprudence,<sup>80</sup> but quite distinct from equality law, the Supreme Court has declined to impose many limits on the scope of the freedom within s. 2(a). In *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*,<sup>81</sup> a majority of the Court held that, though freedom of religion is not absolute, any limitations on it are best addressed under section 1. In that case, parents’ faith-based refusal of a medically necessary blood transfusion for their infant child was *prima facie* protected under s. 2(a), though the refusal ultimately was justified under section 1.<sup>82</sup>

Not all actions which interfere with freedom of religion will constitute a *prima facie* infringement of section 2(a). Legislative or

<sup>78</sup> *Supra* note 74 at para. 95.

<sup>79</sup> *Ibid.*

<sup>80</sup> The Court has stated that section 2(b) extends to all expressive activity, save for specific acts of violence. Advocacy of violence, or images of violence that are not real, do fall within the scope of the freedom. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452.

<sup>81</sup> [1995] 1 S.C.R. 315.

<sup>82</sup> *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 15. Compare the minority judgment, *per* Cory J. at 435, holding that “a parent’s freedom of religion does not include the imposition upon the child of religious practices which threaten the safety, health or life of the child”.

administrative action “whose effect on religion is trivial or insubstantial is not [an infringement upon] freedom of religion”.<sup>83</sup> And there has been an occasional tendency in the jurisprudence to approve of “graduated” degrees of protection, based on the degree to which the practice is related to a “core belief”. In *Ross v. New Brunswick School District No. 15*,<sup>84</sup> a high school teacher argued that disciplinary actions taken against him for disseminating anti-Semitic comments outside the classroom violated section 2(a). The Court held that religiously-motivated actions are due somewhat less consideration in the section 1 analysis where “the manifestations of an individual’s right or freedom are incompatible with the very values sought to be upheld” through section 1 itself.<sup>85</sup> *Ross* demonstrates that the Court is not always neutral about the particular content of religious beliefs, particularly where such beliefs translate into actions with a harmful impact on others. It matters, though, whether state attempts to regulate such impacts are analyzed chiefly under the religious freedom clause itself, or under section 1.<sup>86</sup>

In the last several years, religious groups and individuals have begun to make increasingly assertive rights claims, demanding that fundamental freedom of religion be understood to mandate the removal of burdens on religious practice that, inevitably, arise in a secular society. They have been aided by a remarkably generous approach to “the duty to accommodate” which has its origins in Canadian human rights law and by the broad approach to freedom of religion which has dominated recent section 2(a) cases.

In *Syndicat Northcrest v. Amselem*<sup>87</sup> a conflict arose between a Montreal condominium corporation and Orthodox Jewish owners, who wished to construct special huts, or “succahs”, on their individual

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<sup>83</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 58, citing *R. v. Jones*, [1986] 2 S.C.R. 284 *per* Wilson J, at para. 17..

<sup>84</sup> [1996] 1 S.C.R. 825.

<sup>85</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 94.

<sup>86</sup> In addition, to the extent that a religious practice claim is linked to an underinclusive law or a failure to act, one must consider the Court’s analysis of underinclusive claims in the context of fundamental freedoms as sketched out in *Dunmore v. Ontario*, 2001 SCC 94, [2001] 3 S.C.R. 1016 and recently applied in *Baier v. Alberta* 2007 SCC 31, [2007] 2 S.C.R. 673. This argument is beyond the scope of this article but further analysis can be found in Carissima Mathen and Michael Plaxton, “Developments in Constitutional Law: The 2006-2007 Term” (2007) 38 Sup. Ct. L. Rev. 112.

<sup>87</sup> [2004] 2 S.C.R. 551 [*Amselem*].

balconies during the Jewish holiday of *succot*.<sup>88</sup> The condominium bylaws contained a standard form prohibition on any structures on balconies, which the claimants had not read but nonetheless had signed prior to purchasing the units. Two lower courts found in favour of Syndicat Northcrest: one on the basis that the owners' beliefs regarding any obligation to build succahs was not specifically found within the tenets of Judaism itself; the other holding that the owners' signing of the condominium agreement constituted a waiver of their religious freedoms. The lower courts also found that the balance of interests weighed in favour of the corporation's desire to maintain aesthetic uniformity and optimal fire safety.<sup>89</sup>

Writing for the Supreme Court majority Justice Iacobucci defined "religion" as:

typically [involving] a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.<sup>90</sup>

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<sup>88</sup> *Amselem* arose in the context of the Quebec *Charter of Human Rights and Freedoms*, the relevant provisions of which are:

1. Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality.
3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.
6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.
- 9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

*Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

<sup>89</sup> Although *Amselem* involved a complaint under the Quebec *Charter of Human Rights and Freedoms*, the Supreme Court was careful to note that its analysis of religious freedom applies whether the case arises under that document or under the *Canadian Charter of Rights and Freedoms*. *Amselem*, *supra* note 87 at para. 37.

<sup>90</sup> *Supra* note 87 at para. 39. Some suggest that, in its emphasis on individual feelings of piety and faith, this definition borrows from William James. David Brown, "Where Can I pray? Sacred Space in a Secular Land" (2003) 17 N.J.C.L. 121 at 129, citing William James, *The Varieties of Religious Experience* (New York: Penguin Books, 1982), 31.

He described religious freedom as:

the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.<sup>91</sup>

Justice Iacobucci was concerned with ensuring that laws and policies not inhibit someone from free religious exercise. He downplayed any collective action element which could distinguish “religion” from “conscience”.<sup>92</sup> His choice stands in sharp contrast to some lower courts’ willingness to inquire into whether a belief or practice actually is required by a particular faith or faith community. In *Amselem* itself the trial judge considered two competing rabbinical authorities on the obligatory requirements attached to the observance of *succot*. In *Hall v. Powers*<sup>93</sup> a Catholic school board argued that permitting same-sex couples to attend a high school prom “would be seen both as an endorsement and condonation of conduct which is contrary to Catholic church teachings”.<sup>94</sup> Despite a supporting affidavit signed by a local Catholic bishop, the judge held that there “is no evidence of a single position within the Catholic faith community about what constitutes the most appropriate pastoral response to this issue.”<sup>95</sup>

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<sup>91</sup> *Supra* note 87 at para. 39. In a separate opinion Binnie J. held that the claimants had to take some responsibility for their decision to live in a condominium without fully reviewing its rules and could not rely on freedom of religion to escape those private obligations.

<sup>92</sup> In dissent, Bastarache J. found the majority’s definition of the freedom too broad in granting constitutional protection to act on purely private, individual beliefs untethered to any understanding of religion as a collective enterprise, the tenets of which *could* be objectively ascertained.

<sup>93</sup> [2002] O.J. No. 1803 (Sup. Ct) [*Hall*]. Hall, a gay grade 12 student at a Roman Catholic High School in Ontario, obtained a mandatory injunction restraining school officials from preventing his attendance at the prom with his boyfriend.

<sup>94</sup> *Ibid.* at para. 4.

<sup>95</sup> *Ibid.* at para. 23. At para. 31 the judge articulated a concern with permitting individual conscience to substitute for “faith-based beliefs” that are provable as matters of religious doctrine:

If individuals in Canada were permitted to simply assert that their religious beliefs require them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and

Iacobucci J. disagreed strenuously with that approach. First, he cautioned that courts are “not qualified to rule on the validity, or veracity of any given religious practice or belief, or to choose among various interpretations of belief.”<sup>96</sup> In other words the State is unsuited to arbitrating issues of religious dogma. Iacobucci J. was also concerned that an inquiry into “objective obligatory precepts” is itself inconsistent with a proper understanding of freedom of religion. What is important is not the degree to which the believer can fit her beliefs into an existing religious schema, but whether she *sincerely believes* that a particular practice is faith-based.<sup>97</sup> So long as the belief is sincere and the law or policy’s effect on that belief is non-trivial, it is irrelevant how long the person has subscribed to it<sup>98</sup> or whether other adherents of the same faith

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lesbians in Canada because everyone who wished to discriminate against them could make that assertion.

*Hall* differs from *Amselem* because (a) the faith-based belief forms the opposing value to a claim for inclusion and (b) the judge in *Hall* was not contesting an individual’s article of faith but taking issue with an institutional position. Nonetheless, it seems clear that Iacobucci J.’s concerns in *Amselem* would extend to the *Hall* judge’s inquiry. When Hall successfully sought leave to abandon the litigation in 2005, the Ontario Superior Court of Justice cast doubt on the earlier decision:

The Defendants are sympathetic to the Plaintiff’s stated desire to focus on his university studies. Further, they have graciously agreed not to seek costs from the Plaintiff, to which they would ordinarily be entitled on the filing of a Notice of Discontinuance. The Defendants are to be commended for their position. It is further regrettable that the Defendants will be deprived of the opportunity to advance their legal arguments with the benefit of a more complete evidentiary record that would be available to the Trial Judge. Their ability to assemble such evidence in the context of the original injunction, was necessarily constrained by the short time frame within which that motion had to proceed. On the basis of that evidence, a Trial Judge might have reached the conclusion that the Defendants’ legal position is correct. Accordingly, Justice MacKinnon’s Reasons should be read in light of these developments.

*Hall v. Powers*, [2005] O.J. No. 2739 at para. 7.

<sup>96</sup> *Supra* note 87 at para. 51.

<sup>97</sup> *Amselem, ibid.* at paras. 69-76. This was important in *Amselem* because the corporation had offered, as a compromise, a single, communal succah in the condominium gardens. This would appear to meet the basic tenet that meals and other activities be performed within the succah, but the inconvenience and distress it would cause to at least some of the owners was itself held to amount to a non-trivial burden. It should be noted that the compromise could not have accommodated the claimant Amselem because his belief did extend to having to construct an individual succah, but the other owners’ testimony was ambiguous on this point.

<sup>98</sup> *Ibid.* at para 70:

I do not accept that one may conclude that a person’s current religious belief is not sincere simply because he or she previously celebrated a religious holiday differently. Beliefs and observances evolve and change over time. If, as I have

would consider themselves obligated to obey it. If the adherent believes that the practice will facilitate his or her connection with the divine, the practice falls within the rubric of the fundamental freedom, and is *prima facie* infringed by non-trivial burdens.

*Amselem* arose under the Quebec *Charter of Human Rights and Freedoms* so there was no section 1 inquiry. However, because the Quebec *Charter* requires a “balance of interests” possible justifications were considered. Syndicat Northcrest’s chief justifications were that the succahs posed safety issues; and that permitting some owners to erect succahs would detrimentally affect the property’s economic and aesthetic value. Justice Iacobucci rejected these concerns because the appellants were willing to ensure that the succahs did not pose a safety risk; and because any aesthetic or monetary impact from setting up a succah for the duration of the holiday (nine days per year) was trivial.<sup>99</sup>

A subsequent case, *Multani v. Commission scolaire Marguerite-Bourgeoys*,<sup>100</sup> confirmed and built on *Amselem*’s approach. The claimant, a Sikh high school student, was forbidden by a school board from wearing the ceremonial dagger, or *kirpan*, required of all male Sikhs.<sup>101</sup> *Multani*’s sincere religious belief that he had to wear the *kirpan* rendered his ability to do so an incidence of religious practice. It was irrelevant whether something less than full compliance with this dictate<sup>102</sup> was acceptable to other Sikhs.<sup>103</sup> While recognizing the countervailing interest in ensuring school safety, the Court ruled that the School Board’s insistence on an absolute prohibition imposed a more than trivial burden on *Multani*’s s.2(a) rights.

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underscored, sincerity of belief at the relevant time is the governing standard to ensure that a claim is honest and not an artifice, then a rigorous examination of past conduct cannot be determinative of sincerity of belief.

<sup>99</sup> *Ibid.* at para. 86.

<sup>100</sup> [2006] 1 S.C.R. 256 [“*Multani*”].

<sup>101</sup> Initially the school, after consultation with the boy’s parents, had agreed that he could wear the *kirpan* if it was bound up in a wooden sheath, sewn into a cloth envelope and securely attached to *Multani*’s underclothes. Although the parents agreed to these and other restrictions the governing board of the school refused to ratify the agreement, citing art. 5 of the school’s *Code de vie* which prohibits the carrying of “weapons and dangerous objects”. *Multani, ibid.* paras. 4-8.

<sup>102</sup> It was suggested that *Multani* wear the *kirpan* in the form of a pendant, or carry one made of wood or plastic. Similar compromises had been reached with Sikh students in other schools. *Multani, ibid.* at para. 39.

<sup>103</sup> *Multani, supra* note 100 at paras. 38-39.

Unlike *Amselem*, *Multani* does contain a formal section 1 analysis. The facts in *Amselem* did not present a particularly strong justification for the infringement of religious freedom. *Multani* seems more compelling because the accommodation involved wearing a potentially dangerous object in a school. The Supreme Court has generally been sensitive to protecting children even where doing so might infringe upon others' fundamental freedoms.<sup>104</sup> Yet in terms of their analysis *Multani* and *Amselem* are not that different. The religious freedom appears paramount. The decision is marked by judicial concern for the specific harm suffered by the right-holder which outweighs any speculative and potential harm from the accommodation; an emphasis on sufficiency of proof; and an assumption that religious accommodation has significant social value.

Writing for the majority,<sup>105</sup> Charron J. accepted the respondents' argument that the respondent school board was motivated by a general desire to sustain an environment conducive to the development and learning of its students, and a specific desire to protect students.<sup>106</sup> But the pressing and substantial objective was determined to be not absolute safety, but only reasonable safety.<sup>107</sup>

Given the objective, the majority held, rational connection was established. Justice Charron analogized the minimal impairment inquiry to the concept of reasonable accommodation.<sup>108</sup> Because the absolute nature of the ban did not allow any adjustments to meet the needs of individual students, the absoluteness itself had to be justified. The respondent school board cited three reasons in its favour: eliminating the risk that kirpans could ever be used violently; discouraging other students from carrying similar weapons out of fear; and avoiding the problematic message, sent by the wearing of the kirpan, that it is acceptable to use force to defend one's beliefs.

The Court rejected all of the respondent's arguments. While safety could justify some restrictions on religious freedoms, such

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<sup>104</sup> See *Ross*, *supra* note 85; *Keegstra*, *supra* note 80.

<sup>105</sup> The concurring opinion by Abella and Deschamps JJ. also found in *Multani*'s favour but on administrative law grounds.

<sup>106</sup> *Multani*, *supra* note 100 at para. 44.

<sup>107</sup> *Ibid.* at para. 46. Absolute safety was held to be both "impossible to attain" and in conflict with "the objective of providing universal access to the public school system."

<sup>108</sup> *Ibid.* at para. 53.



restrictions were reflected in the accommodation measures previously agreed to by Multani and his parents, namely, that he only wear the kirpan in a closed sheath sewn into a cloth envelope firmly anchored to his clothes. The Court was unconvinced of the need to ban the kirpan outright. Noting that there had never been a single reported incident of kirpan-related violence in any Canadian school, the Court concluded that the risk of violence in the case at bar was extremely low.<sup>109</sup> Justice Charron also distinguished cases upholding an absolute ban on kirpans in courtrooms<sup>110</sup> and airplanes.<sup>111</sup> Airplanes were a “unique environment” bringing together strangers for brief periods of times, while in courtrooms adversarial groups “strive to obtain justice”<sup>112</sup> and must therefore be as free as possible from external influences.<sup>113</sup> Schools, in contrast, “are living communities”<sup>114</sup> with an interactive and stable membership. Thus, while the respondent need not point to harm done before a ban might be justified, in this case there was simply not enough evidence to satisfy an absolute ban.<sup>115</sup>

<sup>109</sup> *Ibid.* at para. 58:

In the instant case, if the kirpan were worn in accordance with those conditions, any student wanting to take it away from Gurbaj Singh would first have to physically restrain him, then search through his clothes, remove the sheath from his guthra, and try to unstitch or tear open the cloth enclosing the sheath in order to get to the kirpan. There is no question that a student who wanted to commit an act of violence could find another way to obtain a weapon, such as bringing one in from outside the school.

<sup>110</sup> *Multani, ibid.* at paras. 62 and 64, citing *Hothi v. R.*, [1985] 3 W.W.R. 256 (Man. Q.B.), aff’d, [1986] 3 W.W.R. 671 (Man. C.A.) [*Hothi*].

<sup>111</sup> *Multani, supra* note 100 at paras. 62-63, citing *Nijjar v. Canada 3000 Airlines Ltd.* (1999), 36 C.H.R.R. D/76 (Can. Trib.).

<sup>112</sup> *Multani, supra* note 100 at para. 65, citing *Pandori v. Peel Bd. of Education* (1990), 12 C.H.R.R. D/364 at para. 197 [*Pandori*].

<sup>113</sup> *Multani, supra* note 100 at para. 64, citing *Hothi, supra* note 110 at 259.

<sup>114</sup> *Multani, supra* note 100 at para. 65, citing *Pandori, supra* note 112 at para. 197.

<sup>115</sup> I have argued elsewhere that the Court’s attempt to distinguish these cases is not wholly persuasive:

It is, surely, equally “impossible” to create an atmosphere of absolute safety on an airplane *or* in a classroom. The special treatment accorded to courtrooms is even more difficult to justify given the inherent symbolism in citizens entering into the courtroom in order to have their interests vindicated. An absolute dictate to discard an important component of one’s religious identity in that context seems harsh and misguided, particularly if other risk minimization techniques are available.

C. Mathen, “Developments in Constitutional Law: The 2005-2006 Term” (2006) 35 Sup. Ct. L. Rev. 17 at 78.

The Court dealt with the second and third arguments together, the essence of which was that “the presence of kirpans in schools will contribute to a poisoning of the school environment [sending the message] that using force is the way to assert rights and resolve conflict.”<sup>116</sup> The school board also argued that other children might feel slighted, and view the accommodation of Gurbaj Singh as imposing a double standard. Characterizing this argument as “disrespectful to believers in the Sikh religion,”<sup>117</sup> Charron J. firmly rejected the idea that the “hurt feelings” of non-adherent students could outweigh the need to accommodate religious beliefs:

Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is[ at the very foundation of our democracy].<sup>118</sup>

The majority concluded that minimal impairment was not established. In *obiter* comments addressing the third part of the proportionality test it found that an absolute ban “would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others.”<sup>119</sup>

A third case appeared to further entrench the stringent approach to section 2(a). In *Hutterian Brethren of Wilson Colony v. Alberta*,<sup>120</sup> a majority of the Alberta Court of Appeal struck down a regulation which removed a long-standing discretion of the Registrar of Motor Vehicles to issue permanent drivers’ licenses without a photograph. The regulation was enacted as part of a provincial initiative making photos mandatory on all drivers’ licenses. The claimants, members of a religious community with long-standing roots in Alberta, argued that the regulation removed their ability to obtain licenses without violating their sincere belief that voluntarily submitting to a photograph offends the Bible’s Second Commandment against idols or graven images. The

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<sup>116</sup> *Multani*, *supra* note 100 at para. 70.

<sup>117</sup> *Ibid.* at para. 71.

<sup>118</sup> *Ibid.* at para. 76.

<sup>119</sup> *Ibid.* at para. 78.

<sup>120</sup> [2007] A.J. No. 518 [*Hutterian Brethren*]. The Supreme Court of Canada issued a judgment that reached a different result. See the addendum for discussion.

validity of the religious belief was not in doubt. The trial judge also accepted as a fact that the Hutterites' ability to live in their small, isolated communities would be impossible without the ability to drive on public highways. The trial judge found, additionally, that the desire to live in those colonies was itself a religiously-motivated decision that fell within the scope of s. 2(a).

The case thus turned on whether the Alberta government could justify the regulation, which it attempted to do by reference to numerous objectives including the prevention of identity theft; the harmonization of similar documents with other provinces and countries; and the reduction of terrorism-related activities. However, because the enabling legislation was the *Traffic Safety Act*<sup>121</sup> the Court of Appeal found that non-traffic safety objectives were irrelevant. It therefore reframed the objective as ensuring that every individual who has applied for a license is represented in the Province's facial recognition database in order to prevent someone from applying for a license in someone else's name, and to prevent the same person being issued multiple licenses.<sup>122</sup>

In *Hutterian Brethren* the state requirement of a photo as a pre-requisite for a state-regulated activity (driving on public roadways) is precisely the step in conflict with a religious dictate, illustrating how the same act can have completely different meanings in secular versus faith-based contexts. The fact that there is an exact correspondence between the rule and the religious belief renders accommodation more difficult. That aspect of the case did not receive much attention; the majority did not consider whether the government's desire for a facial recognition database is at least as compelling a reason for taking the photo as the claimant's faith-based reason for refusing to take it. This is partially due to the Court's limiting the scope of the law's pressing and substantial objectives. But it also was apparent in the minimal impairment analysis which focused on the government's offer of two forms of accommodation:

- a) Photos of the Hutterian Brethren will be taken and printed on their physical licences. Each licence will then be placed in a

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<sup>121</sup> R.S.A. 2000, c.T-6.

<sup>122</sup> The Province expressly did not rely on the objective that photographic licenses are necessary to assist law enforcement during events such as roadside stops. Presumably, the government felt that this argument would not be credible given that prior to 2003 photo exemptions were available.

special package which the licensee will never be required to open (when requested by a peace officer, the licensee will be able to offer the entire, sealed package). This will prevent the licensee from ever coming into physical contact with the printed photo. The photographs will also be stored in digital form in the facial recognition database.

- b) The respondents' photos will be taken but not printed on their physical licences. The digital images will only be stored in the facial recognition database.<sup>123</sup>

The Court of Appeal found the government's proposed accommodation unacceptable because both options required a photograph. The accommodation related to uses of the photo that the government assumed could mitigate the "sin" of the activity in the claimants' eyes (being sealed in a packet or existing only in digital form). Such arguments were unsustainable in the face of the claimants' testimony that no such reduction of the photograph's harm was possible. The government could never mitigate the sin perceived by the claimants. The Court of Appeal also rejected the government's broader assertion that, while not specifically concerned that the Hutterites themselves pose a particular fraud risk, it was concerned that a continued exemption (a) would be sought by far more persons than just Hutterians and (b) would require the government to accept at face value all claims of religious infringement since *Amselem's* only real "control" at the s. 2(a) stage is the claimant's sincerity (and trivial burdens).

In the foregoing cases<sup>124</sup> we can see a judicial determination to cut a broad swath for individual experiences of piety, faith and observance. The analysis of religious freedom occurs in primarily individualistic terms, even in *Hutterian Brethren*, which is closely tied to the needs of a particular faith-based community. The strong emphasis on individual impact may be partially explained because the cases involve members of religious minorities fighting for recognition and respect. *Amselem*, *Multani* and *Hutterian Brethren* clearly invoke the language and tenor of equality; the discrimination arises through the negative impact of facially neutral<sup>125</sup> rules. It is no doubt significant that

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<sup>123</sup> *Hutterian Brethren*, *supra* note 120 at para. 7.

<sup>124</sup> The Supreme Court of Canada's decision in *Hutterian Brethren* is considered below.

<sup>125</sup> It could be argued that, since the decisions by the respondents (whether the state or some other entity) continued in the face of an explicit request for religious accommodation, the cases hint of actual intolerance. Nonetheless, given that the

none of the cases involved large monetary expenditures. The positive outcome for the respective claimants may be further explained by the factual context. In *Amselem*, the succahs represented a temporary, non-economic impact on the condominium corporation, and the claimants were willing to adhere to safety concerns. In *Multani* an accommodation had already been reached. Gurbaj Multani did not demand an unfettered right to wear the kirpan; he challenged a dictate that he could not wear it at all. *Hutterian Brethren* also presented compelling facts since the removal of the exemption changed a long-standing policy to accommodate a known religious minority.

Nonetheless, the overall impression arising from these cases is that respect for religious difference is vitally important to Canadian courts. This is evident in the restrained treatment of section 2(a) itself. Admittedly, none of the cases discussed presented burdens on religious exercise that could be described as trivial. Still, there *were* some countervailing facts, perhaps most strongly in *Hutterian Brethren* where the community decided that it could tolerate some modern activities in order to maintain its traditional lifestyle, yet remained determined to resist a requirement (photo identification) that is commonplace in a large, modern state. The foregoing is not meant to cast aspersions on the claimants themselves, but to point out that the courts in these cases had a range of options.

The contrast with recent equality cases is striking. Because freedom of religion is determined almost solely from the point of view of the claimant, section 2(a) avoids the multiple steps of determining what precisely the right entails (equality under the law? equal benefit of the law?) and then determining whether that right has been infringed (would a reasonable person in the same circumstances perceive this treatment as discrimination?). Just as striking, is the section 1 analysis. In sharp relief from the section 15 case law, the government's assertions about its objectives are subjected to searching inquiry. The proscription against allowing the purpose to shift, which originated in *Big M*,<sup>126</sup> is strictly applied. Courts expect government speculations about a risk of harm to

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respective rules do not appear to have been adopted for (anti-) religious purposes the cases are more appropriately described as raising issues of adverse impact.

<sup>126</sup> *Supra* note 74 at para. 91: "[T]he theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of "Parliamentary intention". Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."

be supported by clear evidence (a standard that has been relaxed even in freedom of expression cases).<sup>127</sup> The religious freedom cases discussed here maintain a near complete focus on the rights-claimant's experience; and expect the government to approach its section 1 analysis with a seriousness of purpose that is "commensurate with the occasion."<sup>128</sup>

#### IV: LESSONS TO BE LEARNED

In recent years *Charter* jurisprudence has revealed distinct approaches to freedom of religion and equality. The contrast is particularly striking when one considers that, had any of the cases discussed in Part III been decided under the rubric of section 15, the claimant would face very different questions in establishing a *prima facie* infringement. Of course, it does not necessarily follow that the claimants in *Amselem*, *Multani* or *Hutterian Brethren* would have failed to make out an infringement. Nonetheless, to give just one example, it is interesting to consider whether the interference with Amselem's ability to erect an individual succah would be found to constitute discrimination in the eyes of a reasonable person. Although the Supreme Court has now said that "human dignity" operates more as a touchstone than as a legal tool,<sup>129</sup> the equality framework still requires the claimant to show discrimination in a substantive sense.

Why do courts seem more willing to recognize oppression for religious rights claimants than equality rights claimants? A number of factors may be at play. First of all, section 2(a) claims simply may provoke greater judicial sympathy. Judges are drawn, after all, from the ranks of older, settled Canadians for whom religion continues to have value.<sup>130</sup> Even where the adherent differs from the religious norm, he or she may still represent a worldview with which judges identify, namely, that religion is not to be regarded with indifference or scorn, but has intrinsic value. Elements of this reasoning can be found in *Chamberlain v. Surrey School District No. 36*.<sup>131</sup> In that case, while the Supreme Court quashed a school board's decision to refuse to approve children's

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<sup>127</sup> *R. v. Butler*, [1992] 1 S.C.R. 452.

<sup>128</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 67 quoting Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at p. 459.

<sup>129</sup> *Kapp*, *supra* note 28.

<sup>130</sup> Peter McCormick & Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lorimer & Company, 1990) at 64-67.

<sup>131</sup> 2002 SCC 86, [2002] 4 S.C.R. 710 [*"Chamberlain"*].

books discussing same-sex relationships and families, it was careful to carve out space for religious beliefs in the public commons:

The [*British Columbia School Act's*] insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the boardroom door.<sup>132</sup>

Second, the courts' robust response to freedom of religion claims may be part of a larger strategy against attacks on the Canadian multicultural mosaic. In recent years as Canada has become more diverse there has arisen a notable backlash grounded in the fear that our society will lose its essential identity.<sup>133</sup> Many of these concerns coalesce around immigrants, but they are also triggered by certain religious minorities who are perceived as hostile to a "Canadian" way of life. If the courts believe that they present one bulwark against increasing incursions of intolerance and misunderstanding they could be especially motivated to take a strong stand in favour of religious minorities who seek to balance their religious identities with their everyday activities, obligations and relationships. This attitude could explain, for instance, Justice Charron's careful insistence in *Multani* that there has never been a recorded incident of kirpan-related violence in a Canadian school. The courts may see themselves as engaging in a special form of public education.

Finally, many of the unsuccessful section 15 cases have involved challenges to benefit schemes, while recent religious freedom claims have fit more easily into the individual autonomy model of liberal rights.

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<sup>132</sup> *Ibid.* at para. 19. The Court continued: "What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community."

<sup>133</sup> Some of these fears are recounted in The Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building The Future: A Time for Reconciliation* (Québec: Bibliothèque et Archives nationales du Québec, 2008); Margaret Wentz, "So Who's Fuelling the Prejudice?" *The Globe and Mail* (6 December 2007) A23.

While religious freedom cases do make demands on the state, they tend to be framed in the negative. The state may be forced to reconsider the terms of a general obligation or prohibition such as maintaining a valid drivers' license or refraining from carrying a weapon. Of course, religious freedom can demand more extensive accommodation, such as when an employer must take special care around something, like scheduling, that does have an economic impact. But because religious freedom generally is perceived to exist in the private domain it is inherently less threatening to the state's infrastructure when an individual requires a particular dispensation to engage in religious practice. At a basic level the state is being asked to refrain from interference. This is different even from many "symbolic" equality cases, such as same-sex marriage, where the state is asked to permit access to a particular legal regime granting significant benefits.

What might equality advocates take from the recent rights-affirming decisions on freedom of religion? Section 2(a) case law does not, as yet, provide fertile ground for successful arguments in cases where state benefits are underinclusive or non-existent. However, given the increasing profile of religious freedom claims, it is likely that future section 2(a) cases will require courts to determine that some allocation of state resources is required in order to ensure the religious adherents are able to engage in the secular playing field on a substantively equal level. In the interim, it may be fruitful for equality rights claimants to highlight the contrast between section 2(a) and section 15 in terms of making out a *prima facie* infringement, drawing attention to the more carefully confined role for state justification in the former set of cases. Given the fact that religion is, itself, a prohibited ground of discrimination, it is difficult to offer a principled distinction for why the approach to that freedom is so markedly different under distinct sections of the *Charter*.

Though it is in an uncertain state, I am guardedly optimistic about the future of equality jurisprudence. Although it is beyond the scope of this article the Supreme Court of Canada's recent decision in *Kapp* provides an opportunity to rethink how to approach equality issues. In doing so, equality advocates would do well to study the recent section 2(a) jurisprudence, which shows that progressive, rights-affirming decisions are both possible and can thrive in Canadian constitutional law.



**ADDENDUM:**

This article was in the pre-publication stages when the Supreme Court of Canada released its judgment in *Hutterian Brethren*.<sup>134</sup> In a narrow, 4-3 ruling<sup>135</sup> a majority of the Court upheld the photograph requirement as a reasonable limit under section 1 of the *Charter*. The decision covers a number of important issues in section 1 analysis. I will focus my comments here on the split among the justices that is relevant to the interplay between equality and religious freedom jurisprudence.

Writing for the majority, Chief Justice McLachlin accepted that the mandatory photo regulation constituted a *prima facie* s.2(a) violation, though she was careful to note that the record seemed to indicate that the Crown conceded only one element of the test – a sincere religious belief – and did not touch on the second element: a significant level of state interference with that belief.<sup>136</sup> With respect to s. 1 of the *Charter*, the Chief Justice accepted the government's stated objectives of promoting highway safety and addressing the collateral problems associated with the licensing system such as the widespread use of drivers' licenses as identification and their vulnerability to fraud and identity theft. In so doing the majority expressly rejected the Court of Appeal's insistence that the law's objective had to relate solely to traffic safety. The dissenting opinions did not take issue with this point. However, the majority also accepted that the government was entitled to restrict its program to identity theft occasioned by misuse of drivers' licenses. In this way, the majority blunted the dissent's criticism that any exception granted to a few hundred religious adherents pales in comparison to the 700,000 Albertans who, not having a drivers' license, are not included in the database.

Both the majority and dissenting opinions agreed that rational connection was established. Where the justices sharply divided was over the minimal impairment and proportionality stages. McLachlin CJC

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<sup>134</sup> 2009 SCC 37.

<sup>135</sup> The Chief Justice wrote the majority decision in which Justice Binnie, Deschamps and Rothstein joined. Justice Abella wrote the chief dissent, joined by Justice Fish. In a separate dissenting opinion, Justice LeBel signaled his agreement with Abella J., but also engaged in a detailed discussion of a number of issues involving section 1. As his reasons do not specifically engage freedom of religion a discussion of them is omitted here.

<sup>136</sup> *Hutterian Brethren*, *supra* note 134 at para. 34.

stressed that minimal impairment requires evaluation of the right in relation to the objective. While “the court should not accept an unrealistically exacting or precise formulation of the government’s objective”<sup>137</sup> less drastic means which do not actually achieve the objective are ineligible. The photo requirement was part of a “complex regulatory scheme” aimed at addressing “an emerging and challenging social problem.”<sup>138</sup> That problem, identify theft, would be “significantly compromised”<sup>139</sup> by the Hutterites’ proposed solution of a photo-less license. The Chief Justice argued that such “all or nothing”<sup>140</sup> dilemmas were not unusual in freedom of religion claims. Similar to my observation in Part III, above, she recognized that there is a particular problem when the state program requires an action that is precisely in conflict with a religious dictate. The Chief Justice argued that this sort of tension falls to be resolved not under minimal impairment but during the final consideration of overall proportionality. In other words, where this kind of total conflict arises, the state is not required to abandon its objective simply because of the impact on a protected right.

The majority asserted that the concept of reasonable accommodation – which the lower courts had used in this case – is not properly considered under minimal impairment, and certainly not where the object of analysis is a law rather than state action or policy. They thought it necessary to keep separate the notions of reasonable accommodation and minimal impairment because the relationship that exists between the legislature and the people subject to its laws is entirely distinct from the kinds of relationships – normally, employment-related – in which the accommodation rubric has emerged. A legislature “cannot be expected to tailor a law to every possible future contingency.”<sup>141</sup> The majority criticized especially the idea that “undue hardship” should be incorporated into minimal impairment analysis, since many legislative objectives will not lend themselves to the kinds of costs that are so characterized.

Turning to the final stage of section 1, overall proportionality, McLachlin CJC acknowledged criticisms that the stage is redundant.<sup>142</sup>

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<sup>137</sup> *Ibid.* at para. 55.

<sup>138</sup> *Ibid.* at para. 56.

<sup>139</sup> *Ibid.* at para. 59.

<sup>140</sup> *Ibid.* at para. 61.

<sup>141</sup> *Hutterian Brethren, ibid.* at para. 69.

<sup>142</sup> *Ibid.* at para. 75, citing Peter Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.12.

But she found that it performs a distinct role because while the first three stages of section 1 analysis “are anchored in an assessment of the law’s purpose [, only] the fourth branch takes full account of the ‘severity of the deleterious effects of a measure on individuals or groups.’”<sup>143</sup> Where no alternative means exist to satisfy the law’s purpose, the section 1 framework provides a final safeguard by providing that even the most worthwhile objective may require too high a cost.

Turning to the licensing scheme itself, McLachlin CJC found three attendant benefits: enhanced security; roadside safety and identification; and inter-jurisdictional harmonization. Most of her analysis focused on enhanced security. She held that mandatory photos provide “a significant gain to the integrity and usefulness of the computer comparison system”.<sup>144</sup> She specifically distinguished the benefit here from previous religious freedom cases<sup>145</sup> where certain proposed benefits were judged too speculative.

With respect to deleterious effects the majority held that not all infringements of religious belief are equally serious. Cases of direct state compulsion are very grave. But cases where the compulsion is indirect may prove more challenging. The effect of indirect compulsion is most severe where it “effectively deprive[s] the adherent of a meaningful choice.”<sup>146</sup> In the case at hand, while the Hutterites will experience some difficulties if they are unable to drive, it cannot be said that they are deprived of a meaningful choice with respect to their religious beliefs. For example, they can engage drivers to perform the transport duties that they require.<sup>147</sup> The majority made a rather cryptic reference to driving being a privilege and not a right,<sup>148</sup> apparently to suggest that driving is

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<sup>143</sup> *Ibid.* at para. 76.

<sup>144</sup> *Ibid.* at para. 80.

<sup>145</sup> The Chief Justice cited *Amsalem, supra*, and *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772.

<sup>146</sup> *Hutterian Brethren, supra* note 134 at para. 94.

<sup>147</sup> *Ibid.* at para. 97.

<sup>148</sup> The reference to driving as a privilege is found at para. 98:

On the record before us, it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion. The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver’s licence must permit a photo to be taken for the photo identification data bank. Driving automobiles on highways is not a right, but a privilege. While most adult citizens hold driver’s licences, many do not, for a variety of reasons.

not such an important social activity that barriers to its access should count for much in the deleterious effects analysis. In the end, the majority found the Hutterites are not being forced to choose between their religion and their communitarian lifestyle.

Writing in dissent, Justice Abella took issue with several points in the majority decision. She argued that her colleagues had overstated the benefit to the province of insisting on a mandatory photo requirement given that so many residents are not represented in the data base at all. If the database is necessarily incomplete, it can not minimally impair the claimants' section 2(a) rights to require the system to accept a few hundred photo-less licenses. More significantly, she claimed that the majority had badly misrepresented the law's actual impact on the claimants. Similar to the trial judge, Abella J. accepted that the peculiarly isolated and self-sufficient nature of the Hutterite community was, itself, a religious dictate inspired by a particular worldview. Therefore, the majority's suggestion that the Hutterites rely on non-adherents to provide for their transportation needs "fail[ed] to appreciate the significance of [the Hutterites'] self-sufficiency to the autonomous integrity of their religious community."<sup>149</sup> Given this context, the Hutterites' choice was not uncoerced. Abella J. also took great exception to the majority's characterization of driving as privilege which in her view suggested "a legal hierarchy attracting diminishing levels of scrutiny."<sup>150</sup>

Clearly, *Hutterian Brethren* is a loss under section 2(a), and it is the first such loss in some time. The *prima facie* infringement was acknowledged by the entire Court, but the section 1 arguments proved more divisive. The majority accepted the government's need for a universal program – admitting of no exceptions – to enhance security from fraud. This acceptance provides a striking contrast to the Court's rejection of "absolute safety" in schools as a pressing and substantial objective in *Multani*. The majority also took pains to stress that the benefits have been immediate, despite some contrary evidence.<sup>151</sup> It also took into account benefits (such as increased harmonization) that have not yet materialized. Where the majority's approach is the most discordant from the religious freedom analysis canvassed in this article, is in its assessment of the law's impact on the religious community.

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<sup>149</sup> *Hutterian Brethren*, *supra* note 134 at para. 167.

<sup>150</sup> *Ibid.* at para. 173.

<sup>151</sup> *Ibid.* See Abella J.'s analysis at para. 155.

Here, the majority's decision seems almost dismissive. Given the Hutterites' belief in the importance of remaining socially isolated, the majority's casual suggestion that they employ drivers suggests that it either did not fully appreciate the religious beliefs involved, or did not accept them as sufficiently serious to pass the *prima facie* stage of a *Charter* claim. The dissenting opinions are far more alive in my view to the true effect of this suggestion.

All this having been said, it is premature to declare that the best days of section 2(a) are past. *Hutterian Brethren* is the narrowest possible decision issuing from a reduced panel.<sup>152</sup> The decision illustrates the specific challenge face by religious adherents when they attack a general requirement in a state program that has been enacted with specific security and crime-prevention goals. The fact that members of the Court may be reluctant to require the state to significantly alter such goals is a risk in any *Charter* case.

In fact, it is possible to read *Hutterian* as an equality case, or even a section 1 case. The majority applies only one case: *R. v. Oakes*. Numerous religious freedom cases are cited but not explicitly followed. Continuing the equality reading, *Hutterian Brethren* may be described as a decision that turns on a particularly narrow view of adverse impact discrimination: an equality claim that is deemed too threatening to permit an aggressive judicial remedy. As in other equality cases, the majority was inclined to simply accept the government's stated objective and the benefits flowing from it. The majority also adopted a narrow view of the law's effect, artificially confining the issue to the bare fact of whether the Hutterites were literally "forced" to submit to a photograph as opposed to interrogating the impact on their small, isolated community of imposed transportation dependency.

The Supreme Court's decision in *Hutterian Brethren* does not undermine the thrust of this article, which is that religious freedom jurisprudence as a whole has something to offer equality rights. But it does interject a sobering caveat: the relationship is not uni-directional. In reflecting some of the less progressive aspects of equality law canvassed in Part II of this article, *Hutterian Brethren* stands as a stark reminder

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<sup>152</sup> The case was heard by a panel of seven judges instead of the usual nine because the hearing date fell between the departure of Michel Bastarache and the appointment of Thomas Cromwell.

that while religious freedom jurisprudence has much to offer equality's barren landscape, it may not fully escape the drought.