

Religious Freedom in Canada: whither the Community?

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ABSTRACT

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This article examines the evolution of the Supreme Court of Canada's understanding of religion as it applies to religious freedom cases since the establishment of the Canadian Charter of Rights and Freedom in 1982. In particular, I highlight a change in the Court's view with the *Syndicat Northcrest v. Amselem* case in 2004. This shift, involving a view of religion as both collective and individual to a view heavily weighted to an individual perspective, has later resulted in disastrous consequences for the Wilson Hutterian Brethren of Alberta in their bid to be exempted from providing photos for their driver's licenses in Alberta.

INTRODUCTION

Since the establishment of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada has provided the contours of how it imagines religion through its adjudication of religious freedom cases. The object of this article is to examine the evolution of the Court's understanding of religion since the establishment of the Charter. In particular I show that the change in the Court's view on the nature of religious belief and practice, from being embedded in community to being an individual and subjective pursuit, is problematic for the Wilson Hutterian Brethren community in Alberta.

The Canadian Constitution, through section 2 of the Canadian Charter of Rights and Freedom, guarantees freedom of religion. It also requires that the freedoms guaranteed under section 2 be interpreted through the lens of section 27, which refers to the "preservation and enhancement of the multicultural heritage of Canada". The Charter limits those freedoms under section 1 of the Charter: "The Canadian Charter of Rights and Freedom guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".¹ The Court's decisions have import on the lives of Canadians; they establish normative ideals and practices. As Berger explains: "Because it both commands the coercive power of the state and always implicitly assumes the ultimacy of its authority, law's rendering of religion assumes the force and significance of a total claim about what matters about religion" (Berger, 2008: 286).

In this paper, I posit that the *Syndicat Northcrest v. Amselem* case (*Amselem*), adjudicated in 2004, was pivotal in how the Court imagines religion. With *Amselem*, the Court shifted the balance between the previously established view of religion as both collective and individual to a view heavily weighted to an individual perspective. As a result of this shift, three years after *Amselem*, the Wilson Hutterian Brethren Colony was marginalized by the Court in its adjudication of its case. In my examination of the change in the Court's conception of religion, I highlight the tension within the court around the collective/individual nature of religion. I argue that the entanglement of these two polarities for devout individuals compels the Courts to account for the importance of community in their adjudication of religious freedom cases, both from a principle and from an effects point of view.

A comparison of early post-Charter cases with *Syndicat Northcrest v. Amselem* shows that in early cases, the Court imagines religion as embedded in community and uses collective terms to refer to religion;

whereas in *Amselem*, the Court's view of religion is highly individualistic and, although the communal nature of religion is not totally rejected, collective terms are seldom used.² I contend that the individual conception of religion in *Amselem* severed religion from its communitarian moorings and resulted in a disastrous outcome for the Hutterites.

The idea that Western-based legal systems are rooted in Christian liberal ideology, and give primacy to the individual in the tradition of Locke and Stuart-Mill, is not controversial.³ Canada's legal system, also a product of liberalism, follows in this tradition and considers the individual as the possessor of the rights. Canadian Prime Minister Pierre Elliott Trudeau, at the time of the adoption of the Canadian Charter of Rights in 1982, indicated that individuals

[t]ranscend the accidents of place and time, and partake in the essence of universal Humanity. They are therefore not coercible by ancestral tradition, being vassals neither to their race, nor their religion, nor their condition of birth, nor to their collective history. It follows that only the individual is the possessor of rights. A collectivity can exercise only those rights it has received by delegation from its members. (Axworthy and Trudeau, 1990: 364)⁴

Thus the relationship of the state with its citizens is unmediated by cultural affiliation or religious membership, and the rights language that establishes the contours of our relationship to the state does not recognize our social or relational nature.

EARLY POST-CHARTER CASES

Despite the "individualism" bias of the Charter, in early post-Charter cases the Court recognized the embeddedness of the religious individual in her community. I will now discuss how two cases, *R. v. Big M. Drug Mart* and *R. v. Edwards Books and Art Ltd.*, set the tone for the definition of religion in the Court's imagination. In both these cases, religious practice is deemed to be communal as well as individual.⁵

Because *R. v. Big M Drug Mart* [1985] (*Big M*) was the first Charter case to deal with religious freedom, it set the tone for future cases.⁶ The case involved a drugstore that opened for business on a Sunday in contravention to the federal *Lord's Day Act*. *Big M* was notable in two ways: it put forward the principle that the Charter should be interpreted based on Canada's commitment to multiculturalism, thus anchoring

religion in culture and community; and it took a broad view of religion, extending it to include freedom from religion, specifically state sanctioned religion as in the Christian day of rest (Sunday) being imposed on non-Christians.⁷

Justice Dickson, writing for the majority in *Big M*, defined religion as follows:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the rights to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. (para. 94)

Dickson expanded by stating that freedom represents a protection from state coercion:

Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. (para. 95)

The most relevant element to my hypothesis is the fact that although the definition of religion is focused on the individual's rights as a "person", elements such as the "right to manifest religious belief by worship and practice or by teaching a dissemination" reflect the communal and social aspect of religious practice and belief.

Following the *Big M* case, *R. v. Edwards Books and Art Ltd. (Edwards)*, adjudicated in 1986, was about the Province of Ontario's *Retail Business Holidays Act*, specifically in regards to the fact that Sunday was identified as a "secular" pause day for workers in the retail sector. Four Ontario retailers were charged for being open and serving customers on a Sunday, against the provisions of the Act, which stated that retailers (other than those exempted under section 3(4) of the Act) must close on Sunday. The finer points of this case turned on whether the Act's purpose was to confer holidays for retail workers or whether it was to promote religious observance by a dominant religious group. In addition to reviewing the purpose of the law, the Court examined its effects.

This case is replete with references to community or groups (see note 2). Particularly relevant here is whether, in discussing religion, one can separate the individual from her community. For example, Justice Wilson stated that an interpretation of section 2a) that protects the religious freedoms of individuals but not the groups they belong to is precluded by section 27, and in doing so she clearly articulates the collective nature of religion:

Yet it seems to me that when the Charter protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the Charter expressly precluded by s. 27 which requires the Charter to be interpreted “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” (para. 207)

Judge Dickson, writing for the majority in the same case, also acknowledges that freedom of religion has both an individual and a collective aspect:

In this context, I note that freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects. Legislatures are justified in being conscious of the effects of legislation on religious groups as a whole, as well as on individuals. (para. 145)

For our purpose, the most engaging feature of this judgment is that the Court characterizes religion as being a group or community endeavour.

Both *Big M* and *Edwards* entrenched the definition of religion as being based on individual beliefs strongly embedded in community activities and practices – here, religion is both individual and communal. This characterization went unchallenged until 2004, when the Court, in its adjudication of the *Syndicat Northcrest v. Amselem* case, shifted its conceptualization of religion to a decidedly more individual and subjective understanding (see note 5).

THE TURN TO INDIVIDUALITY

In *Syndicat Northcrest v. Amselem* a devout Orthodox Jew (Mr. Amselem) and two other residents of the condo building they inhabited wanted to build a *Succah* on their balcony. Mr. Amselem claimed that the *Succah* was required by his religion. Other residents in the building through Syndicat Northcrest sued Mr. Amselem claiming that the *Succah* interfered with their enjoyment of the building. The Court supported Mr. Amselem 5-4 in a split decision.

In this case the Court altered its view of religion to a more individualistic stance. Justice Iacobucci for the majority defined religion as follows:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith. (para. 39)

This view of religion focuses on the personal and individual spiritual experience, which fits within the classic definition of the religious experience as characterized in William James' *The Varieties of Religious Experience*: "Religion ... shall mean the feelings, acts and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine" (1994: 43).

For James, the individual who had true religious experiences (as opposed to a traditional and conventional religious life) was a "religious genius."⁸ It would appear that Justice Iacobucci imagined religion as the domain of religious geniuses, as opposed to ordinary individuals integrating their religious practices in their daily lives and their community. While the highly individualistic conceptualization of religion allows for the protection of a greater variety of religious practices and expressions, it may do so as against the communal and intersubjective nature of religion. Whether one uses a Durkheimian view of religion, which places religion as constitutive of the community,⁹ or McGuire's (2008) more unstable and fluid notion of the lived religious experience as an expression of chosen practices of shared values and experiences, community is an important component of the religious life.

The minority opinion in *Amselem* took a less individualistic view. Justice Bastarache, writing for the minority, acknowledged the collective aspect of religion:

However, a religion is a system of beliefs and practices based on certain religious precepts. A nexus between personal beliefs and the religion's precepts must therefore be established. ... Religious precepts constitute a body of objectively identifiable data that permit a distinction to be made between genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience. Connecting freedom of religion to precepts provides a basis for establishing objectively whether the fundamental right in issue has been violated. By identifying with a religion, an individual makes it known that he or she shares a number of precepts with other followers of the religion. (para. 135)

There are two elements to draw from this statement. The first is that for the minority, the difference between freedom of religion and freedom of conscience rests on the fact that religion is based on doctrine which frames shared religious practices. In other words, a link with doctrine is necessary for the determination that a practice or belief is religious in nature. The second point is the importance of community (shared practices). Justice Bastarache, relying on Macklem (2000), highlighted the collective aspect of religion more precisely:

Notwithstanding the wide variety of religious experience, no religion is or can be purely individual in its outlook, as ultimate concern is said to be. On the contrary, religions are necessarily collective endeavours. By the same token, no religion is or can be defined purely by an act of personal commitment, as the ultimate concerns of an individual are said to be. Instead, all religions demand a personal act of faith in relation to a set of beliefs that is historically derived and shared by the religious community. (para. 137)

Amselem also brought in the notion of sincerity of beliefs as a way to establish whether someone's practices and beliefs would be covered by the freedom of religion guarantee. Justice Bastarache explains the Court's understanding of sincerity of beliefs as being personal and subjective:

Although any analysis of freedom of religion must include an inquiry into the sincerity of the beliefs of those who assert it, such an inquiry must be as limited as possible, since it will “expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting”: *Edwards Books, supra*, at p. 779. (para. 142)

Because sincerity of beliefs can only be assessed from an individual perspective, as a measure of religious freedom it may undermine the associational dimension of religious belief integral to many religions (Brown, 2005: 141). Religious freedom, after all, is about more than private and individual practices. In the words of Van Dyke, freedom of religion “is not the right of an individual to go into a closet and worship alone. It is a communal right, and it includes the right (widely recognized) to maintain the community” (1982: 27). There are many religious experiences that are not attainable individually. For example, the sense of being transported to another realm in the presence of a group of monks engaged in Gregorian chants in a small chapel or the feeling of total unity and/or loss of self during an experience of group meditation has a different texture than the experience of communion with God that one may feel praying individually in the privacy of their home. Considering religion as solely an individual matter basically delegitimizes those religions for which communal worship and other types of community activities are at the heart of their practice. It is difficult to imagine a meaningful concept of religious freedom without the existence of some protection for religious communities.

Another element of importance in the parsing out of the collective nature of religion is the fact that religion is embedded in culture. Moon argues that in Western democracies, public discourse around religious freedom is now framed in more secular terms and that this has resulted in a shift in our understanding of religious freedom “from individual conscience or autonomy to cultural identity, as the foundation for freedom” (2008: 217). The shift to cultural identity is rooted in the contemporary Western view of religious beliefs as an exercise in agency – individual choices of life-guiding principles rooted in community and produced through cultural socialization – rather than as an expression of divine revelation. In a way, the Court’s view reflects this more secular understanding of religious beliefs as individual choice, but it misses out on the cultural foundation of those choices. Cultural identity is by definition intersubjective and collective. Thus religious beliefs should not be framed solely in terms of individual choice, but also as embedded in community. This change in public discourse is in contradistinction with the Charter, which “always seeks to define rights exclusively as belonging to a person rather than a collectivity” (Axworthy and

Trudeau, 1990: 365). This points to a gap between the Court's view of religion and how individuals experience their religion. Nowhere is this gap more evident than in litigation. In their attempts to isolate the core issues of matters under discussion, judges risk losing sight of the multifaceted nature of lived experience. Differentiating between the communal, individual, cultural, and religious aspects of being in the world may prove difficult:

Because the rights-based paradigm encourages litigants to emphasize the religious aspect of themselves to the potential exclusion of other aspects, parties before the court may feel compelled to present distorted representations of themselves. And because questions of religious freedom are so closely bound with the personal and communal identities of litigants, the harm sustained when they are forced to adopt the language of rights can be understood as an instance of misrecognition. (Kislowicz, 2010: 9)

I argue that the Court's shift from a community-minded definition of religion in early post-Charter cases to and individual/subjective view in *Amselem* is detrimental to those religious groups that embrace communitarianism. I will now turn to an examination of the negative impact of this change on the Wilson Hutterian Brethren colony.

...AND ITS DISASTROUS CONSEQUENCES

The turn to individuality by the Court has many positive aspects, not the least of which is the recognition that religion is often expressed in a private moment of communion with one's God, unconstrained by doctrine. However, balancing the individual and communal aspects of religion is a site of struggle for the Court. Justice Iacobucci illustrated this struggle in *Amselem*:

First, there is the freedom to believe and to profess one's beliefs; second, there is the right to manifest one's beliefs, primarily by observing rites, and by sharing one's faith by establishing places of worship and frequenting them. Thus, although private beliefs have a purely personal aspect, the other dimension of the right has genuine social significance and involves a relationship with others. It would be an error to reduce freedom of religion to a single dimension,

especially in conducting a contextual analysis like the one that must be conducted under s. 9.1 of the Quebec *Charter*. (para 137)

This struggle to balance the communal and individual nature of religious practice is at the root of the *Hutterite* case. In the *Alberta v. Hutterian Brethren of Wilson Colony* case, the Province of Alberta was asking the Court to rule on the requirement for all citizens to hold a driver's licence with a photograph. In 2003, the Province made the photo requirement universal for security purposes – in particular to prevent identity theft – thus cancelling Code G exemptions, which had been in effect since 1974.¹⁰ The Wilson colony objects to having their photograph taken as it contravenes their interpretation of the Second Commandment: “You shall not make for yourself an idol, or any likeness of what is in heaven above or on earth beneath or in the water under the earth”: (*Exodus 20:3-17*, from the Appellant's Record, vol. II, p. 206). The Alberta Hutterites use a strict interpretation of the commandment to mean the forbidding of the creation of graven images apply to human faces as well as to God, since humans were created in God's image. Photography is not officially approved (Janzen and Stanton, 2010: 170). In a close decision (4-3), the Supreme Court held that the Province of Alberta's requirement of a photograph on its drivers' licences was a reasonable limit of the Hutterites' freedom of religion, in a reversal of the decisions of the Alberta Court of Queen's Bench and the Alberta Court of Appeal.

The religion of the Hutterites is unique amongst Anabaptist sects in their commitment to communal living in which all material things are held in common. Living communally is a large part of how they honour God: “Honoring God, they say, requires communal living, devout pacifism, and proper observance of religious practices” (Huntington and Hosteller, 2002: 1). This is based on the teachings of Jesus and the community life he shared with his disciples. Hutterites believe community of goods is the highest command of love. A spiritually successful community is one that has “*gman urnung*”, which translates as “community order” (Hofer, 1998: 17). All members of the colony are provided for equally and nothing is kept for personal gain. Hutterites do not have personal bank accounts; rather all earnings are held communally, and funding and necessities are distributed according to one's needs, as “[p]rivately owned material possessions lead human beings away from God” (Huntington and Hosteller, 2002: 12). Self-sufficiency is part and parcel of their communal life.

The community lives in rural Alberta and drives for the purposes of commercial activities, as well as health purposes (to see doctors), and emergencies (driving the fire truck). The requirement to have a

photograph on their driver's licence puts them in the difficult position of having to choose between acting against their religion and foregoing their driver's permit with considerable consequences to their survival as a community.

The notion that religious beliefs and practices are not only individual, but represent “a significant connection with others – with a community of believers – and structures the individual's view of herself and the world” (Moon, 2008: 217), is particularly salient for the members of the Wilson colony. They exercise their religion both individually and communally. If they leave their community and do not join another Hutterite community, they do not maintain or practice their religion. They are no longer Hutterites. Their community legitimates and authenticates the Brethren's religious practices, which in turn reinforces their religious identity. Judge LeBel identified the importance of community for the Wilson Colony:

Religion is about religious beliefs, but also about religious relationships. The present appeal signals the importance of this aspect. It raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations. As Justice Abella points out, the regulatory measures have an impact not only on the respondents' belief systems, but also on the life of the community. The reasons of the majority understate the nature and importance of this aspect of the guarantee of freedom of religion. This may perhaps explain the rather cursory treatment of the rights claimed by the respondents in the courts of the s. 1 analysis. (para. 182)

There is no argument in this case as to the existence of an infringement of freedom of religion. The Province of Alberta concedes that fact. The case hinges on whether the infringement is reasonable under section 1 of the Charter. The majority concluded that the requirement for a photograph on the drivers' permits satisfied the *Oakes* test (see note 1). Justice McLachlin attests that the photo requirement is connected to the state objective, that religious freedom is not limited more than is necessary to attain the objective, and that the benefit to the state outweighs the infringement of the right.

At the outset of her opinion, Justice McLachlin states the basis from which she interprets the case:

Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community. (para. 36)

There is much in the above paragraph that is problematic on many levels. Legal method aims to get at the truth of a matter. But, as Beaman explains, there are many versions of the truth (2008: 8). In one paragraph, Justice McLachlin identifies whom she represents (a modern state) and whose interests she has at heart (the broader community), using loaded categories. Categories are usually defined in opposition to other elements. For example, heterosexuality is produced only in opposition to homosexuality. And there is little need here to review the literature about the category of religion. But a reminder that the term "religion" has its roots in the late 19th century colonialist West and was created as an academic category to study religions *other than Christianity* may be useful.¹¹ Thus, inherent in the category religion is the "other", represented by the Hutterites in this case. As Beckford explains, the process of "othering" stems from a perceived rejection of our secular normal ways of life:

The fact that some members of some minority religious movements choose to order aspects of their lives in accordance with different priorities makes them objects of suspicion because, among other things, their non-conventional ways of living imply that something is wrong with the machinery of "normalization". (Beckford, 2001: 14)

It is apparent to me that the modern state in Justice McLachlin's statement is defined in opposition to the "pre-modern" way of life of the Hutterites.¹² The fact that the Hutterites reject the normal path of the Canadian institutionalized life (public education, employment, geographic isolation, driver's licence with photo, etc.) offends McLachlin's conception of Canada as a modern state complete with modern individuals who embrace freedom, autonomy, and the rationality of liberal democracies. Justice McLachlin's "othering" of the Hutterites reduces them to a few individuals (perhaps acting in a vacuum) and eradicates their strong collective identity.

However, Justice McLachlin still recognizes the communitarian aspect of religion in general:

Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others. (para. 89)

Nonetheless, she relegates the Hutterites' desire for self-sufficiency as a matter of personal choice and convenience. In opposing the rights of the Hutterites to refuse to be photographed for their drivers' licence and attempting to balance it against the greater good of the broader community, Justice McLachlin states that the solution for the Hutterites is to

hire people with drivers' licences for this purpose, or to arrange third party transport to town for necessary services, like visits to the doctor ... Obtaining alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency. But there is no evidence that this would be prohibitive. (para. 96)

This is somewhat dismissive of the Hutterites communal integrity. Justice McLachlin assumes that the inconvenience of having to hire drivers will be the same for the Hutterites as it would be for a person living in Calgary! The post-*Amselem* shift to a more individual understanding of religion for the Court is clear in the following statement by Justice McLachlin in her discussion of the deleterious effects of the photo requirements on the Hutterite community as a whole:

As stated in *Amselem*, per Iacobucci J., religious freedom “revolves around the notion of personal choice and individual autonomy and freedom” (para. 40). The question is whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices. (para. 88)

Justice McLachlin is careful to specify that, in her view, the effects of the legislation are on the Colony's individual members, not the Colony itself: “At this point, the seriousness of the effects of the limit on Colony members' freedom of religion falls to be addressed” (para. 85). She fails to understand that the responsibility for driving for the few members of the community who have a driver's licence is a

communal duty, not a personal choice. As Justice Abella states: “Their inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community” (para. 115), whereas the benefits to the province are “at best marginal” (para. 116). For the majority opinion, the province’s goal of ensuring the integrity of the driver’s licence system to minimize identity theft is deemed pressing and substantial in accordance with the requirements of the *Oakes* test. Justice Abella is critical of this characterization. She points out that there are over 700,000 Albertans who do not have a driver’s licence (thus will not be in the facial recognition database) and that the missing 250 Hutterites will not have any discernable impact on the province’s attempt to reduce identity theft (para. 115). As the Canadian Civil Liberties Association points out in its factum for this case: “Put another way, would it constitute an undue hardship if Alberta’s facial recognition database were only 99.98984% complete?” (Jamal et al., 2008: 9). In fact, given the missing 700,000 people, the database will be short by about 20% of the Alberta population,¹³ which does not bode well for the integrity of the system. Justice Abella also states for the minority: “An exemption to the photo requirement for the Hutterites was in place for 29 years without evidence that the integrity of the licensing system was harmed in any way” (para. 156). In this context, the Canadian Civil Liberties Association’s claim that the province of Alberta is attempting to create an identity card regime by “stealth sheltered under the traffic-related purposes of the *Traffic Safety Act*” is not far fetched.¹⁴ This has implications that reach beyond the Hutterite community. Two examples are the effectiveness of the *Oakes* test in religious freedom cases and the impact of this decision on the Muslim community.¹⁵

In Canadian society, religions that are at the margins of McLachlin’s modern state tend to have their freedom limited. “Such groups are most likely to find themselves outside the bounds of legal protection when their beliefs/activities intersect or conflict with other discursive imperatives” (Beaman, 2008: 46). In the *Hutterite* case, the security imperative (the protection from identity theft) trumps their freedom of religion and triggers a technique of governance that aims to control how they carry commercial activities or pursue basic activities like going to the doctor.

CONCLUSION

In her article “Is Religious Freedom Impossible in Canada?”¹⁶ Beaman (2010) – argues that religious freedom in Canada – compared to the US – is actually (more) possible, based on three reasons. First, the largely Roman Catholic social structure in Canada is more amenable to a less intellectual, more embodied

view of religion; secondly, group rights are recognized in Canada via the constitutional recognition of multiculturalism; and lastly, the court's understanding of the religious experience as subjective reflects an understanding of lived religion. Beaman's argument is based on the same logic that Justice Wilson used in the *Edward's* case – that section 27 precludes an individual interpretation of religious freedom. She also quotes Justice Iacobucci whose first sentence in his general discussion of the *Amselem* case is: “An important feature of our constitutional democracy is respect for minorities, which includes, of course, religious minorities” (p. 11). For Beaman, this statement, coupled with the requirement to interpret religious freedom through the multicultural heritage of Canada under section 27, opens up a space for what she terms a “soft” protection of religious groups. She also asks whether the “soft” recognition of group rights in the constitution will result in a protection of religious minorities from the “dominance of the protestant conceptualizations of religions” (p. 12). In view of the outcome in the *Hutterite* case, the answer is clearly no. Contrary to James' (1994) view of the religious life as “second-hand” religion set apart from the religious experience, the boundaries between the individual and the collective aspects of religion are often inexistent and where they exist, they tend to be fluid and messy. The life of a religious person, including her beliefs and practices, tends to be solidly anchored in collectivity.

The change in the Court's conceptualization of religion since 2004 is striking and shows a gap between how the Court now imagines religion – mostly as an individual and personal endeavour – and how people experience and live religion, often with a strong communal component. In my examination of two early post-Charter cases and *Amselem*, I have shown that the shift in the balance between the collective and the individual nature of religion as viewed by the Court resulted in little consideration given to the community impact of the legal ruling in the *Hutterite* case. In my view, the right to religious freedom presupposes, in principle, the protection of religious communities from detrimental state action.

One has to wonder whether the outcome of this case signals a stricter analysis of rights under section 1 in future religious freedom cases. It certainly puts into question the ability of members of religious groups, for whom community life is a main characteristic, to argue their freedom of religion. There is a note of optimism, however, in the fact that the case was a split decision with minority opinions being very critical of the majority analysis. On the other hand, that could simply signal that we are witnessing the beginning of a more fractious Supreme Court.

¹. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, s. 1. The Court uses the *Oakes* test to determine whether an infringement of a right is justifiable under section 1 of the Charter. There are several conditions that must be examined under the *Oakes* test: there must be a pressing and substantial objective to the reason for the violation; the means of the violation must be rationally connected to the objective of the state; there must be minimal impairments of the rights; there must be proportionality between the infringement of the right and the objective of the state. The *Oakes* test comes from *R. v. Oakes* [1986] 1 S.C.R. 103. The first application of the *Oakes* test to a religious freedom case was done in *R. v. Big M Drug Mart* [1985].

². For instance, there are over 75 references to groups, community, and collectivity by the justices in the *R. v. Edwards Books and Art Ltd.* Case, and less than 20 such references in *Amselem*.

³. See Berger BERGER, B. L. 2008. *Law's Religion: Rendering Culture*. In: MOON, R. (ed.) *Law and Religious Pluralism in Canada*. Vancouver: UBC Press., for a discussion of how liberalism drives the individualistic character of the Canadian Charter. Also see Darian-Smith DARIAN-SMITH, E. 2010. *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law*, Oxford, Portland, Oregon, Hart Publishing., for a historically based review of Anglo-American legal systems.

⁴. Trudeau viewed collective rights as delegated by an aggregation of individual rights. It is noteworthy that in the discussion leading to the adoption of the Charter, Trudeau was against collective rights, except for the protection of education in French and English. In the end he agreed that the rights of Aboriginals should be included as a collective right, with the result that the collective rights that are protected in the Charter are Aboriginal rights and language rights, which the Canadian Courts have interpreted as being rights to those communities – English and French – to control their schools SANDERS, D. 1991. *Collective Rights*. *Human Rights Quarterly*, 13, 368-386.

⁵. The conceptualization of religion as both individual and communal set out in *R. v. Big M Drug Mart* and *Edwards* was used consistently in religious freedom cases until 2004. Examples of these cases are: *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315; *Lavigne v. Ontario Public service Employees Union*, [1991] 2 SCR 211; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989; *R. v. Marshall*, [1999] 3 SCR 456; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94; and *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31. In a 2004 case, Justice McLachlin stated: "As a general rule, the state refrains from acting in matters relating to religion. It is limited to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship, which is a fundamental, collective aspect of freedom of religion, and to organize their churches or communities" (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, 2004 SCC 48).

⁶. For a discussion of the importance of *R. v. Big M. Drug Mart* in the Canadian Courts' view of religion, see KAY, R. S. 1992-1993. *The Canadian Constitution and the Dangers of Establishment*. *De Paul Law Review*, 42, 361-371., MOON, R. 2002-2003. *Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedom*. *Brandeis Law Journal*, 41, 563-573., and LEPOFSKY, D. M. 1992. *The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster*. *Law and Contemporary Problems*, 55, 167-199.

⁷. For an in-depth discussion of the broad definition of compulsion in *R. v. Big M. Drug Mart* by the Court in the context of freedom from religion, see Moon, MOON, R. 2008. *Government Support for Religious Practice*. In: MOON, R. (ed.) *Law and Religious Pluralism in Canada*. Vancouver: UBC Press.

⁸. The Jamesian conception of religion that the Court adopts in *Amselem* carries its own Christian bias. The identification of an experience as religious "may be a legacy of the theistic background shared by Schleiermacher, Otto, James and other theorists who have contributed to the literature on religious experience... The concept of religion has been shaped by this tradition. It is a product of modern Western, largely Christian, thought of past three centuries" PROUDFOOT, W. 2001. *Religious Experience*. In:

MONAHAN, S. C., MIROLA, W., A. & EMERSON, M. O. (eds.) *Sociology of Religion: A Reader*. Upper Saddle River: Prentice Hall.

⁹. For Durkheim, religion comprises of a system of beliefs and practices which joins the believers into a “single moral community called a Church” DURKHEIM, M. 1965. *The elementary forms of the religious life*, New York, Free Press.

¹⁰. Code G exemptions were offered to those who refused to have their picture taken on religious grounds.

¹¹. See OLSON, C. 2003. *Theory and Method in the Study of Religion: A Selection of Critical Readings*, Belmont, Thomson/Wadsworth., FITZGERALD, T. 2000. *The Ideology of Religious Studies*, New York, Oxford University Press., WIEBE, D. 1999. *The Politics of Religious Studies : The Continuing Conflict with Theology in the Academy*, New York, St. Martin's Press., MCCUTCHEON, R. T. 1997. *Manufacturing Religion: The Discourse on Sui Generis and the Politics of Nostalgia*, New York, Oxford University Press., and PROUDFOOT, W. 1985. *Religious Experience*, Berkeley, University of California Press.

¹². The impression that the Hutterites lead a pre-modern way of life is likely based on the fact that they eschew the comforts of the modern consumer society, in particular private property and ownership. This is more a form of ascetism manifested in a desire to avoid personal attachment to consumer goods. However, their agricultural businesses are run in a very modern way, using the latest machinery, and their operations are computerized. In fact, the Hutterites are often the first to bring in new technology: “Innovative companies with new products often seek out the Hutterites to introduce to them the latest advances in technology” HOFER, S. 1998. *The Hutterites: Lives and Images of a Communal People*, Saskatoon, Hofer Publishers.. For more on the Hutterites’ use of modern technology on their farms see Huntington and Hosteller HUNTINGTON, G. E. & HOSTELLER, J. A. 2002. *The Hutterites in North America*, Belmont, Wadsworth/Thomson Learning. DEETS, L. E. 1975. *The Hutterites: A Study in Social Cohesion*, Philadelphia, Porcupine Press.

¹³. In 2010, Alberta had a population of approximately 3,600,000, including the off-reserve Native population (Government of Alberta, Municipal Services Branch).

¹⁴. From the factum presented by the Canadian Civil Liberties Association in the Case of the Supreme Court of Canada between the Province of Alberta and the Hutterian Brethren of Wilson Colony.

¹⁵. Ogilvy (2010) makes the case that the *Hutterite* decision shows the ineffectiveness of the proportionality test for the purposes of protecting religious freedom and argues that the apparent neutrality of the *Oakes* test allows the Court to advance certain values, which may be in line with the interests of the state, OGILVIE, M. H. 2010. The Failure of Proportionality Test to Project Christian Minorities in Western Democracies. *Ecclesiastical Law Journal*, 12, 208-214. She also considers the impact of the decision on the Muslim community, explaining that in 1974, when Code G exemptions were granted to the Hutterites, the Muslim community was rather small in Canada and had not yet made its presence felt in the Western world. However, the mass migration of Muslims in the West and the post 9/11 geopolitical framework has implications in our consideration of the *Hutterite* decision, particularly as it pertains to litigation by and against Muslim women who choose to wear the *niqab* or *burka* *ibid*.

¹⁶. Beaman’s article was published online before print in November 2010.

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