

# Manifesting Belief in Canadian Law: What is ‘Freedom of Conscience’?

by

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## **Author's Declaration**

I hereby declare that I am the sole author of this thesis.

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## Abstract

Of all the freedoms articulated within the Canadian *Charter*, the least defined continues to be freedom of conscience. Discussions of this freedom within the secondary literature have been relatively superficial, and, to date, no Supreme Court of Canada decision has rested on freedom of conscience. This is not to say that freedom of conscience has been entirely ignored. There has been some discussion of it within the case law, and particularly in relation to freedom of religion. This thesis draws upon those cases that reference freedom of conscience to construct a clearer image of what the scope and meaning of that freedom might be. In particular, the thesis seeks to define freedom of conscience within the context of Canadian law, examine how the courts have operationalized this freedom, and outline the relationship between freedom of conscience and freedom of religion. This thesis will also explore the relationships that have been established by the Supreme Court between freedom of conscience and the rest of the *Charter* – particularly freedom of expression, freedom of association, and the right to life, liberty, and security of the person. These questions are fundamentally important to understanding not only the individual importance of freedom of conscience within the *Charter*, but also to understanding the *Charter* as a whole.

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*To my family*

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## List of Abbreviations

<i>A.C. v. Manitoba (Director of Child and Family Services)</i> (2009)	A.C. v. Manitoba
<i>Alberta v. Hutterian Brethren of Wilson Colony</i> (2009)	Hutterian Brethren
<i>B. (R.) v. Children's Aid Society of Metropolitan Toronto</i> (1995)	Children's Aid Society
<i>Canadian Charter of Rights and Freedoms</i>	Charter
<i>Carter v. Canada (Attorney General)</i> (2015)	Carter
<i>Correctional Services of Canada</i>	CSC
<i>Maurice v. Canada</i> (2002)	Maurice
<i>McAteer v. Canada</i> (2014)	McAteer
<i>Mouvement laïque québécois v. Saguenay (City)</i> (2015)	Mouvement laïque
<i>Reference Re Public Service Employee Relations Act</i> (1987)	Reference RE Public Service
<i>Roach v. Canada</i> (1994)	Roach
<i>R. v. Advance Cutting &amp; Coring Ltd.</i> (2001)	Advance Cutting & Coring
<i>R. v. Big M Drug Mart</i> (1985)	Big M Drug Mart
<i>R. v. Edward Books Ltd.</i> (1986)	Edward Books
<i>R. v. Jones</i> (1986)	Jones
<i>R. v. Morgentaler</i> (1988)	Morgentaler
<i>Supreme Court of Canada</i>	SCC
<i>Syndicat Northcrest v. Amselem</i> (2004)	Amselem

## Chapter 1 Introduction

Of all the fundamental freedoms protected by the Canadian *Charter of Rights and Freedoms* (“*Charter*”), the least defined continues to be freedom of conscience. To date, no Supreme Court of Canada (SCC) decision has rested explicitly on this freedom, and no substantial body of jurisprudence has been produced to define its scope. While freedom of religion has come to be more and more clearly defined within the case law, conscience has remained illusive; it has largely served as an adjunct freedom to religion and has been given little sustained consideration.

This is not to say that conscience has been completely ignored by the courts. Many prominent SCC decisions have made reference to, and provided brief discussions of, conscience; this is particularly true of cases resting on freedom of religion. When taken together, those references form a relatively cohesive, if simplistic, vision of conscience. For example, there is relatively strong agreement amongst the SCC judges that religion protects religious belief, while conscience protects non-religious belief. Furthermore, there is almost unanimous agreement from the judges that conscience and religion represent distinct – although related – freedoms. As Wilson J. succinctly notes in *R v. Morgentaler* (“*Morgentaler*,” 1988), “‘freedom of conscience and religion’ should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality and the terms ‘conscience’ and ‘religion’ should not be treated as tautologous if capable of independent, although related, meaning” (p. 37).

Religion and conscience are treated as being intimately linked because of their association with each other under section 2 of the *Charter*. The two freedoms coexist under section 2(a), which reads:

2. Everyone has the following fundamental freedoms
  - (a) freedom of conscience and religion (*Charter*, 1982).

This bond between freedom of conscience and freedom of religion, however, existed prior to the creation of the *Charter*. As noted by Moon (2014) in his book *Freedom of conscience and religion*, this connection is rooted in historical associations. Moon (2014) states that:

The term ‘freedom of conscience’ was once used interchangeably with freedom of religion to refer to an individual’s freedom to hold beliefs that were spiritual or moral in character...However, freedom of conscience is now viewed as an alternative to religious freedom...Together, then, freedom of conscience and freedom of religion protect the individual’s most fundamental moral beliefs” (p. 188).

In other words, the association between religion and conscience extends beyond an arbitrarily created legal bond. Rather, it has deep historical, cultural, and social roots.

Despite this longstanding affiliation, the association of these two freedoms under section 2(a) has proved problematic for defining the scope of freedom of conscience. This is because the courts do not consistently delineate when conscience can be viewed as an individual freedom, and when it should be understood in its relational role to religion. Moreover, how society understands religion and the role it plays in the lives of citizens has changed. The individualization of religion and the loss of tightly knit, self-contained religious communities has forced society to question not only the definition of religion, but also how manifested belief more generally should be protected (Haigh, 2012; Sullivan, 2002; Hervieu-Léger, 2001). These transformations have affected not only religion as an individual freedom, but have also affected the relational bond between conscience and religion.

The way the SCC judges have approached freedom of conscience has varied markedly over time, and enlarging on those overarching evolutions will be a prominent theme throughout this thesis. Moreover, beyond the broad developmental trends, there are critical disagreements

between individual judges as to how broad the scope freedom of conscience should be. For example, Wilson J. views conscience as being an independent freedom from religion (Bateman, 2015, p. 244). She disagrees with the narrow understanding of conscience that is set out in the earliest section 2(a) cases, and in *Morgentaler* (1988) she challenges the relational bond between religion and conscience. Wilson J. outlines a broad role for conscience within the *Charter*, and promotes moral autonomy as the guiding factor for determining the scope of freedom of conscience. While she does acknowledge that conscience and religion remain related, the thrust of her discussion suggests that conscience can have a completely independent status from religion.

Conversely, in his concurring opinion for *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (“*Children’s Aid Society*,” 1995), Lamer C.J. challenges Wilson J.’s interpretation of conscience, arguing that her reasoning results in the conflation of freedom of conscience with section 7. He draws not only on Wilson J.’s decision in *Morgentaler* (1988), but also references comments she made in *R. v. Jones* (“*Jones*,” 1986). His discussion particularly demonstrates that Wilson J.’s conflation of freedom of conscience with section 7 problematizes the ability of parents to make decisions for their children. Lamer C.J. argues that the redundancies created by Wilson J. between these sections cannot have been the intent of the framers. This issue will be discussed in greater detail in chapter 4; the purpose here is to demonstrate that, while there is some consensus as to the broad strokes of what freedom of conscience means, the finer details remain undefined. Conscience continues to be a nascent freedom, and a full legal understanding of it has yet to be articulated.

Scholars have similarly struggled to define freedom of conscience, and especially how it should relate to freedom of religion. This question in the literature has focused significantly on

the issue of toleration. For example, in their article, “Why tolerate conscience?” (2014), Boucher and Laborde challenge claims made by Leiter in his book *Why tolerate religion?* (2013). In that book, Leiter attempts to establish conscience as the foundation of religion, and argues that there is no “principled reason” to protect religion as a distinct system of beliefs (Boucher & Laborde, 2014). However, in his efforts to distinguish religion from conscience, Leiter fails to adequately define his use of concepts such as “reason,” “faith,” and “evidence” (Boucher & Laborde, 2014). In light of this, Boucher and Laborde (2014) suggest that those same failings that apply to religion can be applied to conscience. They pose the question:

why should secular conscience be tolerated when it exhibits exactly the same features as religion (namely, categoricity, existential consolation and insulation from empirical evidence)? Although he spends much time and effort defining religion, Leiter does not tell us what exactly in conscience, whether it is secular or religious, is worthy of toleration” (Boucher & Laborde, 2014, p. 20).

Ultimately, Leiter (2013) fails to delineate not only the distinctions between conscience and religion, but fails to demonstrate why they are worthy of protection and toleration at all.

Some authors have adopted more historical approaches to the question of defining freedom of conscience. Macklem (1984), for example, examines the development of freedom of conscience and religion within Canada over time. He suggests that freedom of conscience serves, at least in part, a utilitarian purpose. He states that “The extension of the freedom by the *Charter* to include freedom of conscience will... alleviate the pressure otherwise put on a court to define the meaning of religion” (Macklem, 1984, p. 64). Still other authors assume a more theoretically approach. Weinstock (2014), for example, argues that conscience is based on “the deep conceptual connection between democracy on the one hand and a morally alert citizenry on the other” (p. 10), which he believes to be lacking in religion. This understanding of conscience supports the suggestion put forward by Haigh and Bowal (2012) that freedom of conscience

should be viewed as completely independent of religion, and extend as far as protecting morally driven whistleblowers. Haigh and Bowal (2012) define conscience as, “the application of reason, employed about questions of right and wrong, and accompanied by sentiments of approval or condemnation” (p. 23).

Waldron (2013), however, challenges that deep divide between religious and non-religious beliefs, and contests that “Conscience is related to all types of belief systems, both religious and not” (p. 189). Alternatively, Ryder (2005) warns against the tendency to “collapse it [freedom of conscience] into freedom of religion” (p. 192). He states that “The reference to conscience must add something to section 2(a); it must lead to constitutional protection of some non-religious belief systems” (Ryder, 2005, p. 192). Ryder (2005) concludes that conscience “ought to embrace comprehensive non-religious belief systems that have the kinds of significance in the lives of believers analogous to the significance of religion in the lives of the devout” (pp. 193-194).

Finally, a common term used throughout the literature is the notion of a “conviction of conscience” (Courtois, 2011; Maclure & Taylor, 2011; Boucher, 2013; Bouchard & Taylor, 2008). This term, as defined by Courtois (2011), refers to:

the ‘ultimate ethical commitments’...of a person that allow him or her to behave ‘with integrity’...Convictions of conscience are not mere preferences one can renounce at will but ‘strong evaluations’...on which depends the moral integrity of those having such convictions (pp. 36-37).

Maclure and Taylor (2011) offer a similar definition. They state that “Core beliefs and commitments, which we will also call ‘convictions of conscience,’ include both deeply held religious *and* secular beliefs and are distinguished from the legitimate but less fundamental ‘preferences’ we display as individuals” (Maclure & Taylor, 2011, p. 13).

This debate within the literature about what freedom of conscience means, how it should relate to religion, and even what terms should be used to discuss it raises fundamental questions about the nature and scope of that freedom. Specifically, it raises important questions regarding not only the relationship between conscience and religion, but also about how society constructs belief, and what beliefs are accepted as being deeply held and worthy of protection. There is much about freedom of conscience that remains unknown, and these varying approaches indicate that there are significant gaps within both the academic scholarship and the extant SCC cases.

Most noticeably, there has yet to be a systematic study of the SCC cases that addresses freedom of conscience. While scholars often do discuss relevant cases, they usually do so in the context of a primary argument centered on freedom of religion and state neutrality (Ryder, 2005; Steel, 2015; Moon, 2003). These scholars are primarily concerned with how accommodations can be made and religion protected, while still maintaining neutral public spaces that favour neither religion nor secularization. A prime example of this can be seen in Ryder's (2005) article, "State neutrality and freedom of conscience and religion." In this article, Ryder addresses some critical cases for freedom of conscience, including *Maurice v. Canada* ("Maurice," 2002), which will be discussed in chapter 5, and makes significant contributions towards understanding and defining the scope of freedom of conscience. Yet, as within the wider literature, those contributions are of secondary importance to his primary argument regarding pluralism, religion, and state neutrality.

This thesis will attempt to fill that gap within the literature. Specifically, it focuses on three main questions. First, how has freedom of conscience been applied in the courts, and how has the SCC operationalized this freedom? Second, how can we define freedom of conscience within the legal/constitutional field? And finally, how do these two freedoms – conscience and

religion – relate to each other? These are critical questions that will help to clarify the relationship between religion and conscience. Since freedom of religion and freedom of conscience reside together under section 2(a) of the *Charter*, a complete understanding of the breadth of religious freedom cannot be attained until its relationship with conscience is fully articulated, and vice versa.

Notably, this thesis operates at the conceptual and definitional level. Since there have been no freedom of conscience cases decided at the SCC, and only one case at the lower courts, there is little work to be done regarding the substantive effects of freedom of conscience on case law. Instead, this thesis captures elements of the experienced relationship between freedom of conscience, freedom of religion, and certain other sections of the *Charter*. In this sense, this thesis clarifies previously unacknowledged relationships and influences. However, it does not generate a prescriptive solution to the problem of defining freedom of conscience. Moreover, engendering that kind of elegant theory that resolves the tensions between freedom of religion and freedom of conscience is not the point of this thesis. Rather than attempting to partition the substantive content of freedom of religion and freedom of conscience, I instead propose that their connection under section 2(a) lies instead in their power to protect those manifested beliefs that challenge the norms and values of society. Rather than attempting to draw clear lines between non-religious and religious belief, and collective and individual belief, I suggest that the point of connection between conscience and religion is that they protect deeply held beliefs that are fundamental to the identity of the individual, but are counter to the prevailing culture and values of society. Section 2(a) protects those convictions, religious or otherwise, which are sincerely held but seem inaccessible to the general public.

Since both the SCC and scholars are unclear about the scope of freedom of conscience, any future challenge that is brought before the court runs the risk of providing too much or too little breadth to conscience. Particularly as the court begins to take on more contentious moral cases, such as the assisted dying case *Carter v. Canada (Attorney General)* (“*Carter*,” 2015), understanding the breadth of conscience will become increasingly critical. For example, in *Carter* (2015), the SCC and the government would have benefited from a clearer understanding of how far freedom of conscience extends in the protection not only of patients, but also of physicians and institutions (such as religious hospitals or hospices). A number of interveners requested that the SCC “direct the legislature to provide robust protection for those who decline to support or participate in physician-assisted dying for reasons of conscience or religion” (*Carter*, 2015, para. 130). However, the only response given by the SCC was to comment that:

nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying... However, we note — as did Beetz J. in addressing the topic of physician participation in abortion in *Morgentaler* — that a physician’s decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. Rather, we underline that the *Charter* rights of patients and physicians will need to be reconciled (*Carter*, 2015, para. 132).

While this statement lends some recognition to the rights of physicians, the lack of analysis by the court has led some legislation and proposed policies to require physicians to make referrals against their conscience and has denied institutions the opportunity to decline offering a service that is counter to their institutional philosophy (Provincial-territorial expert advisory group on physician-assisted dying, 2015; Special Joint Committee on Physician Assisted Suicide, 2016; *Bill 52*, 2013).

Particularly as Canada becomes increasingly post-secular, pluralist, and multicultural, the question of conscience and what kinds of manifested convictions are deserving of protection will

become increasingly important. Managing these convictions will require the state to re-evaluate what it means to support the beliefs and equality of its citizens, while at the same time remaining neutral in its actions. In this quest for neutrality, it is important that the state understand the scope of protection for freedom of conscience. Whether globally or locally, religion and conscience are coming to play an increasingly significant role in society. The fact that conscience and religion are intimately bound up with one another in the Canadian context means that our understanding of section 2(a) will remain incomplete until the courts begin to unpack how these two components serve and limit each other.

This thesis is an attempt to begin that conversation. It compiles the different perspectives from the scholarly literature and examines their relevance to the actual statements made within the SCC cases regarding freedom of conscience. Doing this will allow me to articulate a clearer vision of what freedom of conscience is, how it relates to freedom of religion, and what purpose it serves within the *Charter*. I hope that this thesis will provide a window of understanding into the Canadian *Charter* and the scope of our individual freedoms. In particular, the relationships between freedom of expression and freedom of association with freedom of conscience, and section 7's right to life, liberty and security of the person with freedom of conscience, require further exploration.

This thesis will be divided into six main chapters following this one. Chapter 2 will examine the main arguments within the scholarly discourse and outline the five main themes that arise from that literature in regards to the relationship between conscience and religion. Chapter 3 will then discuss my methodology, focusing specifically on how I chose my cases, and the parameters for the project. I will then, in chapter 4, turn towards examining what the SCC has said thus far regarding freedom of conscience. This section will analyze the leading SCC cases

that have discussed freedom of conscience, paying special attention to the three main evolutionary sweeps that freedom of conscience has undergone since 1982. Chapter 5 will then analyze two important lower court cases and a relevant example drawn from the literature, in order to assess what specific content might be assigned to freedom of conscience. Chapter 6 turns to the primary question of how freedom of conscience and religion can be both related and distinct, and examines more closely the relationship between conscience and religion. This chapter attempts to synthesize the different perspectives on conscience that have been outlined throughout the thesis in order to come to a deeper understanding of the role of freedom of conscience within the Canadian Constitution. Chapter 7 offers a concluding chapter and final discussion.

Ultimately, the results of this research reveal a complex dynamic between freedom of conscience and freedom of religion, and between what the courts have said about conscience and what scholars would like it to be. While much of the extant literature attempts to offer a firm understanding of the scope and definition of freedom of conscience, this thesis demonstrates that such conviction is misplaced. The SCC has stated that “The state’s duty of religious neutrality results from an *evolving interpretation of freedom of conscience and religion*” (Emphasis mine; *Mouvement laïque québécois v. Saguenay (City)*, 2015, p. 6). Statements such as these suggest that section 2(a) has not only evolved, but that it will continue to evolve in ways that are, as yet, unpredictable. Certain characteristics of conscience are well established. However, acknowledging the broader definitional instability that surrounds those features is necessary to fully grasp how the courts have used conscience over time. While freedom of conscience and freedom of religion contain specific and distinct content, they ultimately remain locked together in a symbiotic relationship.

## Chapter 2 Themes of Conscience within the Literature

Recently, there has been an increased level of interest expressed within the scholarly community in exploring and developing a robust understanding of freedom of conscience. As Canadian society becomes increasingly diverse and complicated, and as Canadians enter what might be termed a ‘post-secular’ society, cultivating a greater understanding of what legal protections exist to safeguard manifested belief is of vital importance.

This has led to a number of suggestions regarding what kinds of non-religious beliefs might be protected under the *Charter*. For example, Haigh and Bowal (2012) suggest that freedom of conscience should be invoked to protect whistleblowers. Moreover, in the wake of the 2002 Federal Court decision in *Maurice*, vegetarianism has become a leading contender for constitutional protection under freedom of conscience. Finally, Sirota (2014) suggests in a recent article that requiring soon-to-be naturalized citizens in the citizenship ceremony to swear an oath of allegiance to the Queen represents a violation of their freedom of conscience. This was an issue that the courts ruled on negatively in *Roach v. Canada* (“*Roach*,” 1994) and *McAteer v. Canada* (“*McAteer*,” 2014). These arguments, which propose new protections and challenge past court decisions, suggest that conscience as a freedom is becoming increasingly relevant. Defining this freedom can only serve to further our understanding of what constitutes fundamental belief beyond the confines of religion.

There have been substantial contributions made within the academic community towards understanding freedom of conscience. Haigh, in particular, has made significant strides in unpacking freedom of conscience. His doctoral thesis on the topic, as well as his work with Bowal (2012) and Kislowicz and Ng (2011), has served as an invaluable resource for this

project. Similarly, Maclure and Taylor have dedicated significant energy to addressing the question of conscience. In particular, their joint contributions in the book *Secularism and freedom of conscience* (2011) represent one of the first sustained discussions on freedom of conscience within the literature.

Despite this, analysis of freedom of conscience within the extant literature focuses heavily on a few choice statements from the big three cases within Canadian freedom of conscience jurisprudence – namely, *R. v. Big M Drug Mart* (“*Big M Drug Mart*,” 1985), *Morgentaler* (1988), and *Syndicat Northcrest v. Amselem* (“*Amselem*,” 2004). This is understandable, since these three cases are the pillars on which Canadian freedom of conscience jurisprudence stands. These cases together offer some of the most substantial statements on conscience, and have marked critical moments in the development of freedom of conscience within the courts. In particular, as will be demonstrated later, the literature considers *Morgentaler* (1988) as transformative to the relationship between freedom of religion and freedom of conscience. However, by limiting itself to these three cases and the statements made therein, the extant literature fails to achieve a full understanding of conscience in the broader context of what the SCC has articulated – and particularly in regards to how that articulation of conscience has changed over time.

Notwithstanding these limitations in the literature and its overall scarcity, there are a number of important themes that can be teased out regarding the relationship between freedom of conscience and freedom of religion. Specifically, there are five main themes upon which scholars build their diverse interpretations of conscience. These themes have achieved a level of acceptance within the literature and have shaped most of the recent discussions on freedom of conscience.

These five themes are as follows. The first suggests that freedom of conscience represents a larger category under which freedom of religion is contained. The second theme posits that freedom of conscience is derived from freedom of religion. The third category states that freedom of conscience represents non-religious beliefs, while religion protects religious beliefs. The fourth theme claims that freedom of conscience protects the communal and institutional aspects of religion, while freedom of conscience protects individual (both religious and non-religious) beliefs. Finally, the last theme presents a more pragmatic understanding of freedom of conscience, and states that freedom of conscience serves the purely utilitarian purpose of protecting the courts from having to define religion.

It is important to recognize that a number of these themes rest on the view that there is no reason to value religion *qua* religion. That is, there is nothing inherently valuable about religion that sets it apart for the special protection it receives. As Leiter (2008) notes:

While the historical reasons for the special ‘pride of place’ accorded religious toleration are familiar...no one has been able to articulate a credible *principled* argument for tolerating religion *qua* religion: that is, an argument that would explain why, as a matter of moral or other principle, we ought to accord special legal and moral treatment to religious practices (pp. 1-2).

Some authors are concerned with determining not only the place of conscience within the *Charter*, but also whether religion is deserving of the distinct status it has been accorded (Boucher & Laborde, 2014; Webber, 2006). There is a concern expressed within the literature that, by protecting religion directly, one risks favouring certain belief systems over others, which would be unconstitutional. The authors do not come to a consensus on this point. As such, each of these five themes, whether directly or indirectly, contends with and attempts to reconcile the special status given to religion within society, and endeavours to create constitutional space for the protection of secular and non-religious convictions within the *Charter*.

The remainder of this chapter will outline, in turn, these five principle themes that have been proposed within the scholarly literature. These themes are not necessarily distinct; a number of authors combine different elements of them into their own personal writing in a variety of ways. However, by dividing up the primary characteristics in this way, I am able to articulate the various building blocks upon which the scholarly literature on freedom of conscience has been founded. I will also, where appropriate, outline some of the primary weaknesses or challenges that prevent us from simply accepting these themes at face value. This analysis will set the stage for assessing whether these theoretical constructions of conscience have been reflected within the actual jurisprudence.

*A. Theme 1 – Religion as a derivative of conscience*

Under this first theme, freedom of conscience represents a primary category or right, beneath which freedom of religion forms a sub-category. By this understanding, “Core beliefs and commitments, which we will also call ‘convictions of conscience,’ include both deeply held religious *and* secular beliefs” (Emphasis original; Maclure & Taylor, 2011, p. 13). This theme fundamentally assumes that there is nothing special or unique about religion, and that it should not be treated as such; religious belief is simply one manifestation conscience. Within the scholarly literature, this first theme has achieved widespread acceptance and is the most common feature of theories of freedom of conscience (Boucher & Laborde, 2014; Kislowicz, Haigh, & Ng, 2011; Macklem, 2000; Maclure & Taylor, 2011; Waldron, 2013).

Intuitively, the notion of conscience as a more encompassing and fundamental freedom than religion is not surprising. Religion by its nature implies exclusivity, and possesses closed borders as to what types of belief are accepted. Conversely, conscience, by its focus on

individual belief and experience, seems capable of being more flexible; it can extend to encompass both religious and secular beliefs.

Based on these assumptions, this first theme is built on three main arguments. First, the principles of statutory interpretation and the need for the consistent use of language throughout a legal document support the necessity of conscience as a primary freedom, and are critical to situating freedom of conscience within the wider context of the *Charter*. This leads into the second argument, which is that the ordering of the words in section 2(a) suggests that freedom of conscience should be considered more fundamental than religion. Finally, because the SCC supports an expansive vision of rights, a broad reading of freedom of conscience is inevitable. These three ideas will be expanded upon below.

In order to demonstrate that conscience is the primary freedom under which religion is subsumed, defenders of this first theme must engage with the principles of statutory interpretation. In particular, they must first establish that religion and conscience are distinct and independent freedoms. In referencing ideas developed by Driedger (Sullivan, 2002), Kislowicz et al. (2011) expand on this notion of the principles of statutory interpretation, noting that the “legislative words should be read in their grammatical and ordinary sense in harmony with their context. Each word in legislation is normally considered important, and uniformity and consistency are valued over stylistic variation and aesthetic appeal” (p. 705). The authors further suggest that, if the intention of freedom of conscience was to simply reiterate and reinforce the importance of religion, there are other words with a closer association to religion that could have been used instead. Examples include, “faith, belief, worship...[or] Creed” (Kislowicz, 2011, p. 706). This means that freedom of conscience’s association with religion cannot limit its scope; while conscience should have some connection with religion, it cannot be synonymous with it.

Advocates for this first theme point to the absence of conscience in section 15(1) of the *Charter* as proof of the distinction between freedom of conscience and freedom of religion (Haigh, 2012, p.144). Section 15(1) states that:

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 (*Charter*, 1982).

Notably, section 15(1) forbids discrimination based on religion, but there is no mention of conscience. While one could potentially read conscience into section 15(1), its absence indicates that religion and conscience should be understood as distinct freedoms with distinct content. If conscience were simply meant as a descriptor for religion, or religion as a descriptor of conscience, one would expect to see the two tied together throughout the *Charter*. The fact they are not is noteworthy. This absence of conscience in section 15 raises the question as to what conscience means external to religion, and sets the foundational base for considering conscience as the broader freedom based on its textual placement ahead of religion.

These principles, therefore, establish religion and conscience as distinct freedoms with distinct content. Detractors of this theme might argue that freedom of conscience and freedom of religion only come to be meaningful by their very association in the *Charter* – that only by considering them together, can section 2(a) be understood in its intended capacity. Kislowicz, et al. (2011) acknowledge this argument, but suggest that such an interpretation is incorrect. Context can inform meaning, but it cannot erase the independent content of each freedom that existed previously. The authors state: “Nor is it correct to rely on the maxim *noscitur a sociis*, which holds that the meaning of a word can be determined by its association with other words, to restrict the interpretation of conscience” (Kislowicz et al, 2011, p. 707). As such, each word used in a legal document must be distinct, purposeful, and must maintain a consistent meaning

throughout the legislative text. No word can be superfluous or included simply as a descriptor (Kislowicz et al, 2011, p. 706).

In close association with the principles of statutory interpretation, some authors argue that the ordering of the words in section 2(a) is significant. These authors focus on the fact that, under section 2(a), conscience is listed ahead of religion. As noted by Waldron (2013):

‘Conscience’ cannot be limited to religious conscience. The wording of s. 2(a) of the Charter makes that clear. Protection is extended to ‘freedom of conscience and religion,’ thus making the protection for conscience primary...the order set out in s. 2(a)...suggests, as I have done, that the protection for freedom of conscience is intended to be the broader category (pp. 195-196).

In other words, because conscience is listed as the very first fundamental freedom, and because the two are joined together in a single clause, conscience must be considered primary and ahead of religion in terms of scope. Religion is simply an offshoot of that broader freedom.

Beyond these theoretical arguments, advocates of this first theme find support for a broader reading of conscience in the court’s more generalized approach to rights and freedoms – namely, that, since the SCC advocates an expansive reading of rights and providing them as much substantive content as possible, a broader understanding of conscience must be accepted (Haigh, 2012, p. 145). This expansive understanding of rights requires that conscience represent a broader and more encompassing freedom that can protect all forms of deeply held moral convictions.

Under this first theme, religion is considered as being the prototypical example of a conviction of conscience, rather than as an independent category of belief in its own right. Boucher and Laborde (2014) suggest that “whatever is respectable about religion is not specific to religion but is rather a manifestation of conscience, which can also take a secular form” (p. 3). In other words, there is very little that is different in nature between conscience based claims and

religious claims when considered in the context of requests for accommodation and toleration from the state.

However, not everyone agrees with that viewpoint. For example, in his article “Why tolerate religion?”, Leiter (2008) outlines what he believes to be distinct about religious belief – namely, that “Religious belief issues in *categorical* demands on action...*and*, religious beliefs do not answer ultimately (or at the limit) to *evidence* and *reasons*, as evidence and reasons are understood in other domains concerned with knowledge of the world” (p. 15). Boucher and Laborde (2014) contradict this argument, and suggest that secular conscientious beliefs suffer from the same limitations as religious beliefs, and therefore there is nothing to distinguish religious and non-religious convictions. While the thrust of their argument is not necessarily to construct a definition of conscience, the results of their argument is that religion simply becomes one aspect of conscience.

Macklem (2000) supports this vision and further suggests that, because religion has arguably become less embedded in society, freedom of religion has taken on a more secular quality. Specifically, Macklem notes that because other rights and freedoms – such as freedom of speech, expression, conscience, association, and assembly – already cover much of the content of religion, there is very little need for religious freedom (Macklem, 2000, p. 8). As such, “all that freedom of religion can claim to cover distinctively today is religiously inspired conduct, or more precisely, religiously inspired conduct that lacks a symbolic character and so would not be protected by freedom of expression” (Macklem, 2000, p. 9). Since, by Macklem’s understanding, freedom of conscience protects the substantive beliefs that underpin religion, religious freedom becomes subsumed as a secondary freedom to conscience.

Important to recognize under this first theme, however, is that even though conscience can be seen as containing a broad spectrum of beliefs, it is not without limits. As noted by Maclure and Taylor (2011), “Core beliefs and commitments, which we will also call ‘convictions of conscience,’ ...are distinguished from the legitimate but less fundamental ‘preferences’ we display as individuals” (p. 13). Freedom of conscience must include certain limitations to avoid becoming overbroad. Notably, those limitations tend to be derived from the restrictions that have conventionally been placed on freedom of religion. This paradox is, in part, what has given rise to the second theme.

#### *B. Theme 2 – Conscience as a derivative of religion*

While the primary theme forwarded within the secondary literature posits freedom of conscience as the broader freedom, this second theme acts as a direct foil to that interpretation. Under this alternative model, religion is viewed as the foremost freedom, while freedom of conscience represents the “derivative” (Webber, 2006, p. 179). Rather than being viewed as a sub-category of religion, however, conscience is presented as being reliant on and indebted to religion for its very existence. Primarily defended by Webber (2006), and to some extent Moon (2014), this theme is also supported by history. The historical narrative suggests that conscience, at least as it is understood within Western culture, is a direct outgrowth of Christian theology; as a concept, conscience is rooted in religious notions of morality and righteousness.

While there is disagreement within the literature as to whether freedom of conscience should legally supersede freedom of religion, and vice versa, there is little disagreement regarding the historical development of conscience as a philosophical idea. The literature generally agrees that, as a concept, conscience is deeply rooted in Christian history (Donlevy,

Gereluk, Patterson, & Brandon, 2013; Haigh, 2012; Haigh & Bowal, 2012; Kislowicz et al, 2011). The notion of conscience seems so engrained in Western thought that it is tempting to consider it as a universally understood facet of the human condition, and that the capacity to fulfill one's conscience is integral to maintaining one's human dignity. By this assumption, any attempt to pin down the origin for conscience or root it in a particular tradition seems somewhat artificial and, in this case, very Christocentric. However, conscience is not a universal concept. To demonstrate, "there are no Sanskrit, Chinese or Japanese words for conscience" (Haigh, 2012, p. 21).

Admittedly, there is some evidence to suggest that conscience had nascent roots in other traditions. Donlevy, et al. (2013) suggest that a pre-Christian understanding of conscience existed – particularly within ancient Greek and Roman societies. However, these authors qualify that suggestion, and, in reference to Costigane (1999), note that "The Greeks... did not distinguish between consciousness and conscience...Although the Greeks were certainly conscious of moral matters, the consciousness did not contain a repository of ethical norms nor an infallible inner oracle offering definitive moral direction" (Donlevy et al, 2013, p. 243). As for the Romans, Donlevy et al. (2013) reference Cicero (1928) to demonstrate that conscience existed for them only as the "feeling of obligation, duty to the external law, tradition, and religion" (Donlevy et al, 2013, p. 243). These conceptions of conscience, while indicating an awareness of duty or obligation to certain external moral norms, do not meet the threshold of inner compulsion that is currently associated with convictions of conscience within Western culture. Certainly, if Haigh and Bowal (2012) are correct that whistleblowing is driven by conscientious convictions, an awareness of external duty or obligation cannot be said to currently be the measure of conscience.

Western understandings of conscience began to take shape under St. Paul (Haigh & Bowal, 2012, p. 22), and later under the Doctors of the Catholic Church – specifically those such as St. Augustine and St. Thomas Aquinas. Haigh and Bowal (2012) note that “The English word ‘conscience’ comes from the Latin term *conscientia*, which means knowledge within oneself, or self-knowledge” (p. 22). In his epistles, St. Paul uses this Latin word for conscience and speaks about it 23 times (Donlevy et al, 2013, p. 244). These are some of the first known references to conscience.

Conscience in Christianity involves the alignment of one’s will with that of God. As the Catechism of the Catholic Church (“Catechism”) states, “A well-formed conscience is upright and truthful. It formulates its judgments according to reason, in conformity with the true good willed by the wisdom of the Creator” (Catechism, 2003). Critically, however, the understanding of conscience between Catholic teaching and Protestantism is very different. This is important because current, Western understandings of conscience are much more rooted in Protestant, rather than Catholic, theology. Under Catholic doctrine, as articulated by St. Aquinas, “*conscientia* is the act that applies the knowledge of the good” (Donlevy et al, 2013, p. 244). In other words, conscience is not just a private belief or internal compulsion: it is the manifestation of that belief in alignment with the doctrine of the Church. In many ways, this understanding of conscience aligns Catholic thinking with Roman and Greek associations of conscience with duty and obligation.<sup>1</sup>

This is in contrast with Protestantism, and particularly with the views expressed by Martin Luther. Luther viewed conscience as being an internal process, “the inner religious voice

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<sup>1</sup> Catholic teaching on morality in Christian ethics is actually more closely aligned with Greek and Roman understandings of morality being based in the search for happiness rather than on obligation and duty (Pinckaers, 1995). However, for our purposes here, it is sufficient to acknowledge that the Catholic Church places more emphasis on how faith is lived out and aligns with revealed doctrine and revelation than do Protestant traditions.

in one's head," that did not require an alignment with external works or law (Haigh, 2012, p. 30). This, in many ways, reflects Protestant religious faith in general, which posits that one can be saved and justified by faith alone. "For them, acting according to one's conscience means acting according to the dictates of the heart, rather than in accordance with the instructions of religious leaders or politicians" (Sapir & Statman, 2005, p. 473).

Contemporary understandings of both conscience and religion are strongly rooted in the views propounded by Luther and those that followed him (Sapir & Statman, 2005, p. 473). For example, Canadian culture tends to value the protection of internal belief, but becomes troubled by the external manifestation of that belief. When discussing issues of toleration and accommodation, the concerns expressed rest on the external manifestation of those beliefs, not on a person's capacity to hold those beliefs. As noted by Leiter (2008), "the limits of tolerance are set by the liberty interests or well-being of others in the community, and these limits have their primary impact not on toleration of *beliefs* but on toleration of the *practices* or *actions* undertaken in accord with those beliefs" (Emphasis original; p. 10).

Moreover, this Protestant understanding of religion and conscience as being primarily rooted in individualism and internal dialogue reflects the "belief-based understanding of religion that predominates in law" (Beaman, 2011, p. 455). To illustrate, cases such as *Amslem* (2004) demonstrate that the SCC does not require religious convictions to necessarily align with the teaching of religious authorities to warrant protection; the sincerity of one's belief and the alignment of that belief with one's conception of the good and the divine are sufficient. While the SCC has not taken the opportunity to rule on freedom of conscience, it is, I think, safe to assume that the same private, belief-based understanding dominates there as well. This is made evident by Dickson C.J.'s statement from *R. v. Edward Books Ltd.* ("*Edward Books*," 1986) "that

freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects” (para. 145). The implication of this statement is that individualism is the compass of conscience claims.

Support for this second theme, however, that conscience should be understood as being rooted in religion, goes beyond this historical narrative. It is based on two primary arguments. First, this theme disagrees with the first theme outlined above, and defends religion as a distinct and unique form of belief that requires special protection. Second, this theme notes that the limits that are proposed for conscience claims are almost always mirrored on those limits that have traditionally been applied to religion. In other words, this means that religion is always acting as the reference point for conscience, rather than conscience informing religious accommodations. Together, these two arguments support the theory that conscience is derived from religion.

Webber, in his article “The irreducibly religious content of freedom of religion” (2006), notes that “There has been a tendency, in recent times, to define freedom of religion in terms that do not attach particular value to religious belief – that are neutral, in other words, between religion and irreligion” (p. 178). This flattening out of religion is largely due to the loss of religious justification as a valid position from which to defend the value of freedom of religion (Smith, 1991). By favouring the secular perspective that religion is simply another worldview, rather than the religious perspective that religious obligations come before all else, the value of religious freedom becomes somewhat anachronistic. As noted by Smith, “quite apart from its historical significance, the religious justification is also the most satisfying, and perhaps the only adequate justification for a special constitutional commitment to religious liberty” (Smith, 1991, p. 149). In other words, only by suspending disbelief and accepting religious arguments regarding the importance of freedom of religion can one reach a satisfactory answer to the

question of what makes religious belief worthy of protection and distinction external to freedom of conscience. However, because the government and courts must be neutral in their dealings with belief, they can no longer rely on religious justification. As such, there are few rationalizations available for defending religious freedom. As noted by Smith (1991), “Our constitutional commitment to religious freedom undermines its own foundation; it cancels itself out by precluding government from recognizing and acting upon principled justification supporting that commitment” (p. 149).

Establishing that distinction between the two freedoms, based on the arguments for religious justification, sets the stage for Webber’s (2006) argument that the religious content of religious freedom cannot be ignored, and frames the argument that religion should be the primary freedom in section 2(a). As Webber (2006) notes:

Freedom of religion cannot be secularized so that it is entirely neutral between belief and unbelief. The interpretation and application of the right necessarily involve acknowledging, contemplating, and seeking to protect distinctively religious commitments ...the state cannot be indifferent to the value of religious commitment without departing substantially from the very idea of protecting religious freedom (p. 178).

Both Smith (1991) and Webber agree, then, that the unique nature of religious belief *to the believers themselves* cannot simply be written over by sectarian legislation cloaked in the language of neutrality. Rather, it is that religious content that makes having a distinct freedom of religion valuable.

Finally, regarding the second argument, Webber (2006) makes the powerful observation that “the notion of conscientious belief derives its content primarily by extrapolation from religious belief. What we take to be the determining features of conscience are precisely those elements that we consider most important about religious belief” (p. 187). He claims that freedom of conscience is usually discussed and judged in relation to religion. One could argue

that this is simply the result of laziness and convenience, since the need to accommodate a diversity of religious views has historically been more prevalent than the need to accommodate a variety of non-religious belief systems. However, the reality is that, whether that comparison is rooted in laziness or not, that pattern of thinking has had a deep impact on how freedom of conscience is and has been conceptualized. Society's very understanding of conscience is based on its understanding of religion, and the innate importance of religious beliefs to those who hold them. Without religion, there would be no understanding of conscience. As such, a primacy must be granted to religion as the cornerstone of conscience.

### *C. Theme 3 – Conscience and religion as independent freedoms*

This third theme, which is most strongly supported by Ryder (2005) and Haigh and Bowal (2012), presents the most straightforward understanding of freedom of conscience. Under this theory, freedom of conscience defends non-religious/secular beliefs, while freedom of religion protects religious beliefs. As Ryder (2005) notes:

Discussions of section 2(a) commonly omit reference to freedom of conscience, using “freedom of religion” as a shorthand way of describing what are in fact two closely related yet distinct fundamental freedoms. This tendency should not lead us to lose sight of the importance of freedom of conscience, or erase it from section 2(a), or collapse it into freedom of religion. The reference to conscience must add something to section 2(a); it must lead to constitutional protection of some non-religious belief systems (p. 192).

Ryder particularly draws on *Maurice* (2002) – a case involving a federal inmate who requested a vegetarian diet based on freedom of conscience – as an important example of the sort of morally driven, non-religious beliefs that might be protected by freedom of conscience. While Ryder (2005) acknowledges the fear that conscience could potentially be used to allow any preference to be protected, he counters that:

the spectre of anarchy should not be invoked to deny protection entirely to practices grounded in non-religious conscience. Freedom of conscience, for the purposes of section 2(a), ought to embrace comprehensive non-religious belief systems that have the kinds of significance in the lives of believers analogous to the significance of religion in the lives of the devout (pp. 193-194).

Haigh and Bowal (2012) similarly support the vision of conscience as a defender of non-religious beliefs. They claim that “Undoubtedly, religion and conscience have much in common both historically and theoretically. But in a legal, constitutional sense they should be treated separately. Freedom of conscience can function as a fully realized, independent freedom, since its meaning is sufficiently distinct from ‘religion’” (Haigh & Bowal, 2012, p. 22).

Haigh and Bowal’s (2012) approach to conscience represents an interesting hybrid of a number of different themes presented in this chapter. However, I have included a discussion of this aspect of their ideas here because they propose a particularly novel idea in relation to the protection of non-religious beliefs under conscience; namely, the authors suggest that whistleblowers should be protected by freedom of conscience. They find support for the protection of whistleblowing under freedom of conscience because, while whistleblowing is not explicitly suppressed by legislation, the threat of backlash haunts those who might otherwise consider reporting or exposing wrongdoing. The authors (2012) state that “It is the spectre and essence of retaliation in any form and degree which most saliently tests the limits of acting upon one’s conscience” (p. 7).

While this complete separation of freedom of conscience and freedom of religion represents the most straightforward approach to section 2(a) within the literature, it also constitutes the most radical theme because it proposes, essentially, a complete break between conscience and religion. Notably, Ryder (2005) does not seem to advocate as broad a divide between conscience and religion as is proposed by Haigh and Bowal (2012). Through his

discussion of *Maurice* (2002), Ryder (2005) focuses his exploration of non-religious belief on vegetarianism. In many ways, the proposal of a freedom of conscience that protects dietary choices based on strongly held convictions is familiar because it is an exemption that is commonly required for religious beliefs. Haigh and Bowal (2012), however, challenge traditional conceptions of conscience and suggest that religion is irrelevant to what convictions should be protected under freedom of conscience. They propose that, as long as there is a connection to morality and evidence of a strong sense of compulsion, any form of non-religious belief should be protected.

One of the primary difficulties with this theme is that it does not account for the construction of the *Charter* and does not seem particularly concerned with the principles of statutory interpretation. For example, the authors do not explain why, if freedom of conscience and religion are independent, they are listed together under section 2(a). Arguably, if these freedoms were independent they would resemble much more closely section 2(c) and (d), for example, which separate “Freedom of peaceful assembly” from “Freedom of association.” Arguably, if freedom of conscience and freedom of religion were completely independent, they would be listed separately in distinct subsections of section 2. Sections 2(c) and 2(d) are given independent meaning by the fact that they are separated into two different clauses. If they had been combined into a single section of “Freedom of peaceful assembly and association,” the content of those freedoms would arguably have changed. As such, freedom of conscience and freedom of religion must gain meaning through their association. Although used in a different context, Kislowicz et al. (2011) provide an excellent summation of how this notion of associational meaning can be understood. Drawing on an example articulated by R.N. Graham (2001), Kislowicz et al. (2011) state that:

the difference between a single word, “chips,” and the phrase “fish and chips” shows how the single word is changed by circumstance - without “fish and,” the word could be taken to mean wood chips or paint chips. Clearly, “conscience” should have some connection to religion (its inclusion in s. 2(a) instead of 2(b), for example, makes this clear), but this does not make it perfectly synonymous with religion in the same way that “fish” is not synonymous with “chips” (p. 707).

I am not convinced that this tertiary theme adequately accounts for the historical and constitutional association between conscience and religion.

I would suggest that section 2(a) is potentially more similar in construction to section 7 than to section 2(c) and (d). Section 7 reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” (*Charter*, 1982). The components of this section are distinct, and yet they are not independent; they operate in a relational capacity. As with the components of section 7, those of section 2(a) have an intersecting relatability that gives the section meaning as a whole and influences how one should understand their individual parts. Arguably, one could suggest that conscience and religion are linked by their implications for manifested belief and moral convictions. However, I am not convinced that that is a sufficient connection to explain their coexistence under section 2(a).

#### *D. Theme 4 – Conscience as the defender of individual convictions*

This fourth theme is closely aligned with the third theme, and has some ties to the first theme as well. This particular approach, however, looks more closely at the structural elements of the *Charter*, how court decisions have been rendered, and how freedom of conscience and freedom of religion are intimately tied together. This theme, which is most strongly supported by Ogilvie (2008) and Haigh (2012), suggests that freedom of conscience represents individual

interests (both religious and non-religious), while freedom of religion protects the institutional and cultural aspects of religion.

In her discussion of the decision in *Amselem* (2004), which favours individual sincerity of belief as the basis for a freedom of religion claim rather than authoritative teachings, Ogilvie (2008) states that “The outcome in *Amselem* is a salutary reminder that, for post-modern courts, religion can be whatever they want it to be, and, indeed, be nothing in particular, which merits protection or not at the whim of these courts” (p. 197). Ogilvie (2008) is highly critical of the majority ruling, which reduced religion to individual belief rather than interpreting freedom of religion as protecting institutional and collective interpretations of faith. Instead, she supports the view set out by the dissenting opinion, which proposes an alternative reading of freedom of religion. The dissent claims that religious freedom should establish “religion as a recognisable set of beliefs of a religious institution to which the complainant sincerely adheres” (Ogilvie, 2008, p. 202). This understanding of religion implies that it is those collective and externally agreed upon features that distinguish religion from conscience, and makes the protection of religious beliefs beyond conscience a necessity.

This argument is supported by a significant number of scholars. As noted by Haigh (2012), “Janet Epp Buckingham, Benjamin Berger, Iain Benson, Richard Moon and David Schneiderman all seek to establish religion’s communal nature as one of its primary characteristics and an important rationale for its continuing status as a constitutionally protected freedom” (p. 181). Haigh (2012) himself supports this vision of freedom of conscience and religion. He states that:

By re-thinking religion and religious freedom as matters of communal sacrament that are important in their own right, we can keep distinct the two aspects of “conscience” and “religion” without doing damage to either. Put differently, religious faiths...could be protected by a strong form of institutional religious

freedom. The individual practices of individual adherents, however, may be better framed, in some cases, as freedoms of conscience (Haigh, 2012, p. 13).

Admittedly, the SCC does not seem to support this vision of freedom of religion as being based in collective identity, as demonstrated by *Amselem* (2004). However, the failure of the SCC to reflect such a vision of freedom of religion in their decisions does not negate that such an interpretation would allow for a clearer delineation between the two freedoms. Moreover, such an interpretation is supported by the absence of freedom of conscience within section 15 of the *Charter*. Since discrimination, by nature, is based on stereotypes and prejudice against groups, there is no room under such a section to protect against the discrimination of individually-held beliefs. Cultural and institutional symbols and forms of identity, however, are regular victims of discrimination. As such, this theme, while not reflected in court decisions, is supported by the construction of the *Charter*.

There are, however, a couple problematic aspects of this theme. First, there is an implication under this theme that one cannot be discriminated against based on non-religious convictions. By limiting freedom of conscience to individual belief and subsequently excluding it from section 15, this theme presupposes that non-religious convictions possess no external signs or symbols by which one could be recognized and discriminated against. However, one could arguably be discriminated against for one's atheism, veganism, or political beliefs, to name a few examples. To demonstrate, during the 2012 student protests in Québec, the red square became the symbol of a political movement against tuition hikes and capitalism. Moreover, accusations were made that the Montreal police were politically profiling those who wore the red square (Montpetit, 2012). While small, this example demonstrates that there is an argument to be made that non-religious convictions can have identifying symbols that are vulnerable to discrimination.

Second, this theme assumes that a clear distinction can be drawn between the collective and individual aspects of religion. However, for such a distinction to exist, one would have to assume that only one official interpretation of a religion existed, and treat all disagreements with that narrative as deviation. However, since this is never the case, there are practical difficulties in attempting to distinguish between individual faith and institutional faith. As such, while this theme is elegant on paper, it suffers from deep difficulties of application.

*E. Theme 5 – Conscience as a utilitarian freedom*

The final, and perhaps most pragmatic, theme that is presented in the literature is proposed by Macklem (1984) in his article, “Freedom of conscience and religion in Canada.” In this article, Macklem sets out the historical context in Canada that led to the inclusion of freedom of conscience within the *Charter*. He notes particularly the increasing importance placed on individual human rights over time, and contrasts the development of freedom of conscience with freedom of religion. He argues that, unlike freedom of religion, freedom of conscience seems to lack a formational history. Rather, when Macklem (1984) begins to discuss the origin of freedom of conscience, he states that “The extension of the freedom by the Charter to include freedom of conscience will...alleviate the pressure otherwise put on a court to define the meaning of religion” (p. 64). In other words, freedom of conscience was included in the *Charter* to serve a utilitarian purpose by providing the courts with some leeway when ruling on matters of religious freedom.

Admittedly, Macklem (1984) notes that the inclusion of conscience in the *Charter* presents “a range of issues in relation to the scope of beliefs protected by freedom of conscience” (Macklem, 1984, p. 64). However, the difficulties conscience may ultimately present do not

refute the primary statement, which is that conscience is largely meant to serve as a pressure valve for freedom of religion, and possesses little intrinsic content of its own.

To some extent, this theme is supported by historical documentation. A commonly accepted method for determining what scope a freedom or right should have is to examine the intentions of the framers of the Constitution. However, such an approach is complicated in the case of section 2(a) because freedom of conscience seems largely to have been assumed as relevant and important, without much discussion as to why. The importance of conscience to the framers seems to have been so innate that little assessment was given as to its implications or potential application. Haigh (2012) states that “In all sixteen federal drafts of the *Charter*, the fundamental freedom of religion was juxtaposed with ‘conscience’ each time” (p. 113). Despite this, conscience is barely mentioned in almost 5,000 pages of text within those drafts; when it is referenced, it is usually in the context of a citation of the full text of section 2(a) (Haigh, 2012, pp. 113-114). As Haigh (2012) notes:

‘Conscience and religion’ became the final form of the provision with little discussion. Other than a few hints and a minor exchange over the preamble, nothing, other than its presence in an entrenched constitutional text, signalled that a conscience-based freedom evinced a newly found desire to protect those without religious beliefs (p. 116).

This lack of discussion regarding conscience and the purpose it was meant to serve within the *Charter* implies that it was given very little thought. The historical record suggests that, to the framers of the Constitution, the relationship between religion and conscience was so intrinsic that it required little explanation. This assumed association supports Macklem’s (1984) suggestion that, while conscience may protect non-religious belief, it was largely included to serve religion. Such an association between conscience and religion allows the court to blur the

lines between collective and individual freedoms, and allows judges to avoid having to become entangled in evaluating the validity of the content of a morally based conviction.

Together, these five themes provide the foundational blocks upon which freedom of conscience within the secondary literature has been built. They do not represent a complete survey of the scope of conscience as it is understood within the literature, nor do they address the important questions raised by many of these authors regarding what is not yet known about freedom of conscience. However, together these themes provide the necessary context from which to begin examining the statements made by the courts regarding freedom of conscience, and analyze those cases that are critical to understanding how the SCC has operationalized this freedom.

### **Chapter 3: Methodology**

The core purpose of this thesis is to examine the relationship between what the prevalent literature has said about freedom of conscience and what the courts have actually stated in the case law. Critically, there has yet to be a systematic study conducted of the SCC's decisions in relation to freedom of conscience. While there are numerous qualitative discussions about individual cases within the literature (Sirota, 2014; Ryder, 2005; Ogilvie, 2008; Manley-Casimir, Manley-Casimir, & Wilkinson, 2013), little systematic work has been done. As such, the focus of this thesis is to conduct a survey of the SCC *Charter* case law that references freedom of conscience, and analyze those cases to see if a more robust jurisprudential understanding of freedom of conscience can be discovered.

Before delving into this analysis and its subsequent results, however, this short chapter will briefly outline the methodology used to retrieve and analyze these cases. This will help to define the parameters of the project, and explain how they were established. Since this project focuses on freedom of conscience in the context of the *Charter*, I only address those cases that reference freedom of conscience post-1982. As noted by Dickson C.J. in *Big M Drug Mart* (1985), “the *Charter* is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*” (Emphasis original; para. 115).

While there is room to suggest that freedom of conscience could be informed by earlier decisions, the SCC decisions have made an analysis of those pre-*Charter* cases unnecessary for the purposes of this project. According to the database used to collect the relevant cases, there is

only one case prior to 1982 that used the phrase “freedom of conscience.” This was a case entitled *Saumur v. City of Quebec*, which was decided in 1953. Admittedly, the SCC does draw quite regularly on *Robertson and Rosetanni v. R.* (1963) in the early *Charter* cases. This is because the case involved a religious freedom claim under the *Canadian Bill of Rights* (1960) that resembled the claims made in *Big M Drug Mart* (1985) and *Edward Books* (1986). In this case, the appellants operated a bowling alley on a Sunday, in contravention of the *Lord’s Day Act* (1952) (*Robertson and Rosetanni v. R.*, 1963). However, even in these similar cases, *Robertson and Rosetanni v. R.* (1963) was deemed to be largely irrelevant. As noted by the majority judges in *Big M Drug Mart* (1985), “*Robertson and Rosetanni*, which considered freedom of religion under s. 1 of the *Canadian Bill of Rights*, is of no assistance since the application and not the constitutionality of the legislation was in issue” (p. 296). Moreover, where it was relevant, it had greater implications for freedom of religion than for freedom of conscience. As such, since there is no significant pre-*Charter* jurisprudence related to freedom of conscience, the project can confidently set aside pre-1982 decisions.

I collected the relevant SCC cases using the Lexum Collection database, which has archived all the decisions of the SCC since its inception in 1875 (Lexum, 2016). I limited my search to those cases that specifically contain the collection of words “freedom of conscience.” I chose this method for two reasons. First, it provides a clear structure to my research. By limiting my search to cases that contain the words specifically from the *Charter*, I can ensure that I have amassed all the relevant cases that significantly reference Section 2(a) of the *Charter*, and specifically discuss its individual components. Secondly, this method ensures that any references to conscience within a given case can be directly tied back to the legal understanding of that term, and immediately referred back to section 2(a). Since colloquial or social convention may

define the term conscience differently than it would or should be understood in the context of section 2(a), limiting my search to the actual *Charter* text allows me to rule out those cases that are not meant to inform a legal understanding of conscience. This narrower approach ensures that I have amassed the relevant data, while preventing against concept stretching.

I have also decided to focus exclusively on the Canadian legal developments of freedom of conscience, and have chosen not to address international and U.S. law. There are two primary reasons for this decision. First, despite the fact that these cases are often referenced within Canadian jurisprudence, there is a danger in extrapolating too much from them; the judges in *Big M Drug Mart* state as much (1985, para. 105). Secondly, since the U.S. Constitution does not contain explicit protection for freedom of conscience, the development of that freedom in the U.S. has inevitably been different than in Canada. While the scholarly literature on freedom of conscience makes frequent reference to U.S. law, and there seems to be significantly more literature produced on the development of American freedom of conscience jurisprudence than Canadian, there is little evidence to suggest that the parallels are of great value to understanding how the SCC has operationalized conscience in the Canadian context. I am also not convinced that that research is particularly useful when attempting to discern the purpose of the inclusion of freedom of conscience within the Canadian *Charter*. As such, I have limited myself for the purposes of this project to what the judges themselves have said regarding the relevance of U.S. and international law.

Beyond the SCC cases I have selected, I have also drawn on two lower court cases. These cases are: *Roach* (1994) and *Maurice* (2002). I have chosen to address these cases because they are referenced within the secondary literature as being significant to understanding the scope of freedom of conscience. Moreover, *Maurice* (2002) represents the only case at any level in

Canada that has rested exclusively on freedom of conscience. This has significant implications for my project. Since freedom of conscience cases don't actually exist as standalone cases with substantive outcomes at the level of the SCC, much of my analysis throughout inevitably focuses on definitional/conceptual work rather than the impact or outcomes of cases.

These two lower court decisions serve as case study examples of potential content for freedom of conscience. Beyond them, I have not examined provincial or lower court cases. Since there have been over 300 cases that reference freedom of conscience in the lower courts, the project would be made untenable by incorporating them. Moreover, because they do not have the same binding nature as decisions handed down from the SCC, the decisions rendered at those lower courts are less significant than those levelled at the SCC.

This method has left me with a total of 63 SCC cases and two from the lower courts, for a combined total of 65 cases. I have included a complete list of the SCC cases used at the end of this thesis in the Appendix. In analyzing the chosen cases I have attempted to be as methodical and systematic as possible. I have constructed a chart on which I track different variables within the cases. For each case I note each reference to freedom of conscience. Those cases with less than four references generally did not provide substantive content to freedom of conscience. As such, they were mostly set aside from any sort of in-depth analysis because they merely referenced, rather than expounded upon, freedom of conscience. This left a total of 15 substantive cases.

Regardless of the number of references to freedom of conscience within a case, however, I analyzed each reference and categorized it based on its content. The first category separates out those statements that are definitional, or provide scope to freedom of conscience. I then assessed whether those references suggest conscience as being distinct from religion, whether the two are

used interchangeably, whether religion is an outgrowth of conscience, or whether conscience is represented as an outgrowth of religion.

Beyond tracking the scope of conscience and its relationship to religion, I also recorded how conscience was directly applied in each case. This required a separate category to document whether the application of conscience to the case came in the form of a reference to another case – and if so, which one. I documented the passages being referenced to see whether there was any particular case or passage that the judges relied upon for precedence. Finally, I left space at the end for any notes that might be pertinent to how the judges applied conscience within the case.

Following this method has allowed me to catalogue every SCC reference made to freedom of conscience over the past three decades. It has enabled me to conceptualize the broad approach the SCC has taken to conscience over time, and has allowed me to see more clearly how the court has operationalized this freedom – both in relation to religion, and in regards to the rest of the *Charter* as well. The following chapter will examine the results of this research, and outline precisely how freedom of conscience has been used within the SCC case law.

## Chapter 4: The SCC Case Law

Rather than being a static freedom, a key theme that will materialize from this discussion of the case law is that the SCC's understanding of freedom of conscience has evolved significantly over time. Charting those changes will help to explain some of the conflicting interpretations of freedom of conscience that have appeared within the secondary literature, and clarify how the courts have operationalized this freedom. In particular, freedom of conscience has come to exist not only in relation to religion, but also in relation to other rights and freedoms within the *Charter*. These relationships, however, between freedom of conscience and other rights and freedoms has remained largely unaddressed by the extant literature. As such, this chapter will move beyond the scope of the literature and turn towards the SCC cases in an attempt to begin to map out the inter-rights relationships of freedom of conscience. This discussion will focus particularly on freedom of association, freedom of expression, and the right to life, liberty, and security of the person. To some extent, it is these other relationships that have provided the greatest depth and substance to freedom of conscience.

Generalized references to freedom of conscience have fluctuated between 1984-2016. More specifically, dividing the cases by five-year increments shows a generally declining trend in references to freedom of conscience. From 1985-1989, there were 18 cases that referenced freedom of conscience. This was followed by 13 cases from 1990-1994, 8 cases from 1995-1999, 11 cases from 2000-2004, 3 cases from 2005-2009, and 5 cases between 2010-2014. Since then there have been four cases, all of which were decided in 2015.

Despite that decline in references, there have been significant changes in how the courts have discussed conscience over the years, and a number of these cases have been highly

influential in helping to develop that freedom. As noted, the scholarly literature has focused on the three big cases – again, *Big M Drug Mart* (1985), *Morgentaler* (1988), and *Amselem* (2004) – which I have termed the pillars of freedom of conscience jurisprudence. However, over the course of this chapter I will demonstrate that there have been other cases that have just as significantly, if not as blatantly, offered insight into freedom of conscience.

When examining the body of cases identified for this project through a large-scale lens, the most striking revelation that emerges is this: freedom of conscience has changed over time, and the way the SCC uses this freedom is a developing project. This is not an unusual observation. In fact, it aligns with the “living tree” doctrine that was established quite early on by the courts – a model of constitutionalism that is very familiar to Canadian constitutional scholars (Huscroft, 2006; Morton & Knopff, 1990; Hogg, 1998, pp. 15.9(f) & 33.7). As noted by Huscroft (2006), “‘Living tree interpretation’ refers to the practice of interpreting bills of rights as organic documents, such that the meaning of the protected rights and freedoms evolves” (p. 4). The living tree model was first introduced in *Edwards v. Canada*, a case decided in 1929 by the Judicial Committee of the Privy Council, which was the highest court of appeal at the time. This decision determined for the first time that the word “persons” referred to both men and women (Center for Constitutional Studies, 2016). “According to Justice Sankey, while constitutional stability and integrity is of the utmost importance, the Constitution ‘also planted in Canada a living tree capable of growth and expansion within its natural limits’” (Center for Constitutional Studies, 2016, citing *Edwards v. Canada*, 1929).

The living tree model remains an integral part of the SCC’s judicial method. For example, in the *Reference RE Same Sex Marriage* (2004), McLachlin C.J. drew on this doctrine to expand the definition of marriage to incorporate the right for same-sex couples to be wed. She

contrasted the living tree model with the idea of “frozen concepts” to demonstrate that the law must be adaptable to modernizing values and contemporary times (Center for Constitutional Studies, 2016). As she notes, “‘frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation, that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life” (*Reference re Same-Sex Marriage*, 2004, para. 22).

These cases demonstrate that an evolving understanding of freedom of conscience is not out of step with what the courts have previously said. However, recognition of this developing nature of conscience is lacking within the literature. According to my research, Haigh (2012) comes the closest to acknowledging this feature of freedom of conscience jurisprudence. In his discussion of the case law, he divides freedom of conscience jurisprudence into three time periods: “pre-*Morgentaler*, the *Morgentaler* case itself, and post-*Morgentaler*” (Haigh, 2012, p. 117). However, Haigh’s reasoning for adopting this model is not to demonstrate an evolving interpretation of conscience, but rather as a “convenient method of organizing ‘conscience-based’ jurisprudence in Canada” (Haigh, 2012, p. 117). He does not use the divide to demonstrate changing conceptions of conscience; he merely uses it to demonstrate that *Morgentaler* (1988) represents the only case within Canadian jurisprudence that offers significant commentary on the scope of conscience. As he notes, “Justice Wilson’s six-paragraph reflection on conscience in *Morgentaler* remains the Supreme Court’s only serious incursion into s. 2(a)’s burlled branch” (Haigh, 2012, p. 129).<sup>2</sup>

My research, however, has revealed three primary observations that can be made regarding conscience, and specifically regarding the development and evolution of the SCC’s

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<sup>2</sup> The reference to a “burlled branch” is a word play on the title of Haigh’s (2012) dissertation, *A burl on the living tree: Freedom of conscience in section 2(a) of the Canadian Charter of Rights and Freedoms*.

understanding of freedom of conscience over time. First, freedom of conscience has developed from protecting “religious non-belief” to protecting “non-religious belief.” In early cases such as *Big M Drug Mart* (1985), the courts seemed to view conscience as protecting the right to not practice or participate in religion. Beyond that, conscience seemed to have little content of its own until *Morgentaler* (1988) was decided and Wilson J. released her “six-paragraph reflection” on freedom of conscience’s independence from freedom of religion (Haigh, 2012, p. 129).

The second development of freedom of conscience also occurred quite early on. Around the same time as *Morgentaler* (1988), a relational nature began to develop between freedom of conscience and other sections of the *Charter*. Conscience is first significantly related to other freedoms in 1987, with the *Reference Re Public Service Employee Relations Act* (“*Reference RE Public Service*”), and these relationships with the other sections of the *Charter* only become stronger over time. In other words, conscience begins to move beyond its exclusive relationship with religion to become more closely linked to other rights and freedoms within the *Charter*.

Finally, beginning in 2004 with *Amselem*, there is a distinct shift in how the SCC discusses religion, which deeply affects the court’s engagement with freedom of conscience. With the development of the sincerity test in *Amselem* (2004) as a means of evaluating religious claims, religion becomes primarily a matter of personal belief. Moreover, in the face of increasing concerns regarding religious differences and diversity within society, freedom of conscience seems to disappear as a point of concern. This is evidenced by the fact that since *Amselem* (2004) there have been no substantive statements made regarding freedom of conscience as an independent freedom, despite the diversity of section 2(a) cases that have come before the court since then. Moreover, while there are a couple key statements made in later cases, the last substantive statements made regarding the scope of freedom of conscience were

made in 2001 in *R. v. Advance Cutting & Coring Ltd.* (“*Advance Cutting & Coring*”). This has left freedom of conscience fragile and undefined.

Important to clarify here is that these three evolutionary features of conscience are seen only in the definitional statements made regarding conscience, as I categorize them in my methodology. This evolution is not reflected in the frequency with which freedom of conscience is mentioned within cases, nor has the direction the SCC has taken in its judgements been obviously affected by these evolving understandings of conscience. Despite this, these definitional statements represent the most critical comments made by the SCC on freedom of conscience. Since every other application of freedom of conscience within the cases is made in the context of references to other cases or to the direct application of conscience to the specific case (such as being listed as part of the relevant governing legislation), it is these definitional statements that provide the most important information about how the courts have operationalized conscience and defined it.

I must at this point also stress that it is next to impossible to determine exactly why these changes have occurred in how the courts have approached conscience. I cannot demonstrate whether or not these changes in focus are tied to court leadership, or to changing societal values, or any other reason. While I expect the changes in approach are the result of a combination of these and other factors, the only definitive statement that can be made is that these changes have occurred. As noted by the majority judges in *Mouvement laïque québécois v. Saguenay (City)* (“*Mouvement laïque*,” 2015), “The state’s duty of religious neutrality results from an *evolving interpretation of freedom of conscience and religion*. The evolution of Canadian society has given rise to a concept of this neutrality according to which the state must not interfere in

religion and beliefs” (Emphasis mine; p. 6). Ultimately, the answer to the question of why these changes have occurred is beyond the scope of this project.

Conscience seems to have experienced something of a boomerang effect; the relationship between conscience and religion, and eventually conscience and the rest of the *Charter*, for a time was slowly expanding and developing. However, in the last decade or so there has been a subsequent shrinking of the freedom. The following three sections will delve more deeply into the three branches of evolution that freedom of conscience has undergone. I will conclude this chapter with a summary of the main points about freedom of conscience that have been definitively revealed by the SCC cases, and discuss how the SCC has used precedence. This discussion will help to clarify what features of conscience the court has maintained over time, and demonstrate where the scholarly literature has diverged from the SCC in interpreting freedom of conscience.

#### *A. Conscience – from “religious non-belief” to “non-religious belief”*

As noted above, the early *Charter* cases largely discuss conscience in its traditional relationship to religion. In these cases, conscience is used to defend religious non-belief. This is especially reflected in *Big M Drug Mart* (1985) and *Edward Books* (1986). For example, in *Big M Drug Mart* (1985), the majority judges note that:

Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of *religious non-belief and refusals to participate in religious practice*. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not

coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose (Emphasis mine; Para. 123).

The judges later suggest that “a definition of freedom of conscience and religion incorporating freedom from compulsory religious observance is not only in accord with the purposes and traditions underlying the *Charter*; it is also in line with the definition of that concept as found in the Canadian jurisprudence” (*Big M Drug Mart*, 1985, para. 128). These statements suggest that the judges recognize that freedom of conscience may possess more substantial content, but that the only definitive conviction it can be said to protect is the right to not be forced into religious practices or hold religious beliefs. The judges do not affirm that non-religious beliefs are protected.

Moreover, this understanding of conscience as protecting religious non-belief is not limited to statements made in *Big M Drug Mart* (1985). In *Edward Books* (1986), the judges quote Tarnopolsky J.A. as stating that:

While freedom of conscience *necessarily includes the right not to have a religious basis for one's conduct*, it does not follow that one can rely upon the Charter protection of freedom of conscience to object to an enforced holiday simply because it happens to coincide with someone else's Sabbath (Emphasis mine; Para. 99).

While this statement does not explicitly use the words religious non-belief, the implication and assumption behind the statement is that freedom of conscience most fundamentally ensures the right to be free from religious coercion. Moreover, while Tarnopolsky J.A. does not close the door on a more expansive interpretation of freedom of conscience, his statement implies that the main definitive feature of freedom of conscience is that it includes freedom *from* religion. This understanding of conscience is very much in line with the interpretation outlined in *Big M Drug Mart* (1985).

The proposal that freedom of conscience essentially equated to a freedom *from* religion in the early court decisions is supported by further comments made by Dickson C.J. in his statement for the majority ruling in *Edward Books* (1986). Critically, he suggested that “In this context, I [Dickson C.J.] note that freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects” (*Edward Books*, 1986, para. 145). While it is not entirely clear what exactly Dickson C.J. means by this statement, or what he understands by the terms “collective” and “individual,” I take it to suggest that conscience cannot exist as a form of collective identity in the way that religion does. That is, freedom of conscience does not protect those convictions that are accompanied by, for example, strong organizational structures, meeting places, cultural histories, or some form of objective philosophy. Conceivably, such claims would be protected by freedom of association under section 2(d). The implication, then, is that organized non-religious belief – such as political identities or activist organizations – cannot be incorporated under the scope of freedom of conscience. As such, this statement by Dickson C.J. supports the idea that freedom of conscience protects only the right not to be personally coerced into religious acts. Arguably, freedom of conscience could also protect the right not to be individually coerced into non-religious acts. However, in the context of these early cases and the association of conscience with religious non-belief, I would suggest that such an argument would not have been a consideration. The very use of the phrase religious non-belief suggests that conscience existed only as the absence of faith. Substantive content for freedom of conscience was not a concern.

This understanding of conscience, however, undergoes a transformation in *Morgentaler* (1988). The application of conscience in *Morgentaler* (1988), a case that contained no religious content, challenged the earlier vision of conscience, and undermined the notion that freedom of

conscience and religion represent a “single integrated concept.” This was an idea proposed in *Big M Drug Mart* (1985) by Dickson C.J. in his statement for the majority ruling. He noted that:

Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our *Charter*, the *single integrated concept of ‘freedom of conscience and religion’* (Emphasis mine; *Big M Drug Mart*, 1985, para. 120).

By extending conscience to protect non-religious belief, Wilson J. revolutionized the scope of freedom of conscience in her concurring opinion in *Morgentaler* (1988). She states that “Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(a)” (*Morgentaler*, 1988, p. 178). Wilson J. acknowledges the previous statement made in *Big M Drug Mart* (1985) regarding freedom of conscience and religion as a single integrated concept. However, she rejects that interpretation – at least in part – and begins to fracture freedom of conscience and freedom of religion into two separate freedoms.

Rather than limiting conscience as had been done previously, Wilson J. attempts to demonstrate that conscience should have a more expansive role in the *Charter*. She argues that freedom of conscience is a fundamental principle to democracy, noting that “the role of the state in a democracy is to establish the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life” (*Morgentaler*, 1988, p. 178). This pursuit of the ethical values that lead to a good life requires the protection of both religious and non-religious beliefs, so that people can be free to manifest their deeply held convictions without being limited or oppressed by the state. Wilson J. sums up this argument in one of the most quoted passages within the secondary literature regarding the scope of freedom of conscience. She states that:

in a free and democratic society ‘freedom of conscience and religion’ should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, ‘conscience’ and ‘religion’ should not be treated as tautologous if capable of independent, although related, meaning (*Morgentaler*, 1988, p. 179).

While Wilson J. does acknowledge that religion and conscience are in some way still “related” (p. 179), she does not elaborate on this point. Rather, she focuses on the budding independence of the two freedoms, which is the necessary feature she must prove if the application of freedom of conscience to *Morgentaler* (1988) is to be considered valid.

As noted previously, Haigh (2012) considers *Morgentaler* (1988) to be of such significance that he organizes his discussion of the development of conscience-based jurisprudence in Canada around that case. While I hesitate to assign such an unmitigated place of importance to the case, I do agree that *Morgentaler* (1988) represented an important break from how the early court discussed freedom of conscience and its relationship with freedom of religion. Under *Morgentaler* (1988), freedom of conscience began to be given equal status to religion as a source of protection for morally based actions and beliefs. This helped facilitate the development of the relationship between freedom of conscience and the rest of the *Charter*.

#### *B. Conscience - the development of inter-rights relations*

Beginning quite early on, discussions within the case law surrounding freedom of conscience began to move beyond assessing its exclusive relationship with religion, and turned towards extrapolating on its connection and integration with other rights and freedoms within the *Charter*. In particular, freedom of conscience has, over the years, developed strong ties to freedom of association, freedom of expression, and the right to life, liberty and security of the person. This latter relationship has become particularly important in relation to the protection of

parental rights. The development of these inter-rights relations between conscience and the rest of the *Charter* is closely tied to its development as an independent and distinct freedom.

Nascent development of inter-rights relations began quite early on – in fact, the first case to mention these relationships occurred prior to *Morgentaler* (1988). This case, *Reference Re Public Service*, was a reference case decided in 1987 under Dickson C.J. It was a section 2(d) case determining whether there existed a right to strike, and dealt heavily with the role of freedom of association and its relationship to other fundamental freedoms protected under section 2 of the *Charter*. While the majority judges held that the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* of Alberta did not violate the Constitution (*Reference Re Public Service*, 1987, p. 314), some discussion regarding the relationship between section 2(a) and freedom of association resulted. In particular, the majority judges note that “Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association” (p. 315).

If freedom of association is truly significant to the operation of section 2(a), then Dickson C.J.’s statement in *Edward Books* (1986) that freedom of conscience cannot protect collective, non-religious identities (para. 145) requires further elaboration. Specifically, if freedom of conscience does not protect collective identities, and yet section 2(a) is tied intimately to freedom of association, does that imply a division between freedom of religion and conscience? Or does it imply that freedom of association also protects the association of individuals, not just the formation of organized groups? Answering these questions would require delving into the jurisprudence on section 2(d), which is beyond the scope of this paper. However, the point I wish

to make here is that freedom of conscience has implications for freedom of association, and vice versa, that have yet to be completely realized.

The important need to clarify this relationship between conscience and association is demonstrated by its reappearance in a subsequent case from 2001. In *Advance Cutting & Coring* (2001), the appellants hired workers who were lacking the appropriate certification, as required by “s. 119.1 of the *Quebec Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry*...The appellants asserted that workers could not obtain the proper competency certificates without becoming members of one of the union groups listed in s. 28 of the *Construction Act*” (*Advance Cutting & Coring*, 2001, p. 210). The appellants argued that this requirement violated their right *not* to associate, “which, in their opinion, was a component of the guarantee of freedom of association in s. 2(d),” and was therefore unconstitutional (*Advance Cutting & Coring*, 2001, p. 210).

This case, which makes mention of the *Reference Re Public Service* (1987), elaborates on the relationship between freedom of conscience, freedom of expression, and freedom of association. In particular, the dissenting judges suggest that freedom of conscience supports freedom *from* association, which they claim to be integral to section 2(d). The dissenting judges state that:

It is not necessary to have more independent evidence of the ideological views of the specific unions involved in this case. It is in fact sufficient that adherence is required to a scheme advocating state-imposed compulsory membership which affects freedom of conscience and expression, as well as liberty and mobility interests, for it to have a negative impact on the right to work, because such adherence itself is a form of ideological coercion. Ideological constraint exists in particular where membership numbers are used to promote ideological agendas and this is so even where there is no evidence that the union is coercing its members to believe in what it promotes (*Advance Cutting & Coring*, 2001, p. 217).

In this statement, conscience seems to play a similar role to that it initially held with regards to religion – namely, as protecting the right to exit certain other “imposed” freedoms. The implication is that freedom from association is not so much protected by section 2(d), but is rather protected by the effects such a forced association would have on other rights and freedoms – namely, conscience and expression. In this case, then, freedom of conscience acts as the negative right on the traditionally perceived positive right of association. While freedom of conscience has come to hold substantive content of its own, the SCC still seems to perceive it as maintaining its original operationalization as a negative freedom to the more positive rights and freedoms outlined in the *Charter* – that is, it provides freedom *from* religion, and freedom *from* association.

Critically, *Advance Cutting & Coring* (2001) also represents one of the few significant cases within Canadian jurisprudence that discusses freedom of conscience without reference to religion (the other case being *Morgentaler*, 1988). Yet, this case has been ignored by the scholarly literature. Despite this, I suggest that *Advance Cutting & Coring* (2001) offers significant insight into the scope of conscience as an independent freedom from religion. While most of the discussion relating to freedom of conscience in *Advance Cutting & Coring* (2001) is forwarded by the dissenting opinion, their use of conscience is quite distinct from previous case law and should be highlighted.

This case assumes not only a significant bond between freedom of association and freedom of conscience, but also suggests a strong relationship between freedom of conscience and freedom of expression. Within this case, there are a total of seven references to freedom of conscience. Of those, five refer to “freedom of conscience and expression” in the form of a single-integrated concept. That is, the judges do not divide freedom of conscience and freedom

of expression, but rather refer to them as extensions of each other in a way that resembles the original construction of section 2(a). Of the two remaining references, one sets out the exact *Charter* text for all of section 2, and the last refers to freedom of conscience and freedom of expression among a longer list of rights that must be protected in the workplace (*Advance Cutting & Coring*, 2001, para. 9).

The relationship between these freedoms – conscience, expression, and association – has developed tentatively over time, and this case seems to represent a fulfillment of that relationship, which was first hinted at in *Reference Re Public Service* (1987). While there is not enough evidence within the freedom of conscience jurisprudence to definitively track the incremental development of this relationship, these two cases, at the very least, allow scholars to observe the imbedded assumption within the SCC rulings that freedom of conscience has as equally strong implications for freedom of expression and freedom of association as it does for religion.

Moreover, this association between conscience and expression is not limited to *Advance Cutting & Coring* (2001). For example, in *Canada (Human Rights Commission) v. Taylor* (1990), which was a case related to the spreading of hateful and anti-Semitic propaganda, Dickson, C.J. speaking for the majority, stated that:

I am open to the view that justifications for abrogating the freedom of expression are less easily envisioned where expressive activity is not intended to be public, in large part because the harms which might arise from the dissemination of meaning are usually minimized when communication takes place in private, but perhaps also because the freedoms of conscience, thought and belief are particularly engaged in a private setting (pp. 936-937).

This statement suggests a more complicated relationship between freedom of conscience and freedom of expression than that which is outlined in *Advance Cutting & Coring* (2001). In particular, Dickson C.J.’s use of the words “particularly engaged” is important. Those words do

not imply that conscience is more free or subject to fewer limitations at the private level. Rather, the expression “particularly engaged” suggests that freedom of conscience is accessed most immediately, like thought and belief, at the interior or private level. Arguably, Dickson C. J. may be suggesting that those limitations on conscience occur in the context of section 1, rather than at the definitional level. However, I suggest that that is a misreading of the context. The element of section 1, in this context, is limited to freedom of expression. Instead, it is freedom of conscience, thought, and belief that protect freedom of expression from further encroachment by section 1 at the private level. This means that freedom of conscience is protected first at the level of conviction, and significantly less at the level of manifestation. The role it serves is to provide a clearer line of how far the courts can appropriately limit freedom of expression.

Similarly, *Young v. Young* (1993) elaborates on the relationship between freedom of conscience and freedom of expression. This was a case examining whether a father should have the right to educate his children in his faith as a Jehovah’s Witness in the context of a custody battle. In her concurrence to the majority decision, McLachlin J. states that “The ambit of freedom of expression is broader than that of freedom of conscience and religion because even harmful expression may be protected” (*Young v. Young*, 1993, p. 13). In both this statement and that from *Canada (Human Rights Commission) v. Taylor* (1990), then, it is evident that freedom of conscience supports freedom of expression, but does not have the same scope for manifestation within a public context. Freedom of conscience, like religion, tends to be favoured when lived as a private nexus of identity.

Beyond those associations developed between freedom of conscience and the other fundamental freedoms, freedom of conscience has also nurtured a relationship with section 7. To reiterate, section 7 reads that “Everyone has the right to life, liberty and security of the person

and the right not to be deprived thereof except in accordance with the principles of fundamental justice” (*Charter*, 1982).

The relationship between section 7 and section 2(a) is first prominently discussed in *Morgentaler* (1988). In her concurring opinion, Wilson J. sets out an analysis that hints at a direct relational symbiosis between freedom of conscience and section 7. She first states that “The deprivation of the s.7 right in this case offends freedom of conscience guaranteed in s. 2(a) of the *Charter*” (*Morgentaler*, 1988, p. 37). She then later claims that “Legislation which violates freedom of conscience in this manner [by limiting access to abortion] cannot, in my view, be in accordance with the principles of fundamental justice within the meaning of s. 7” (p. 180). Simply stated: an infringement on freedom of conscience can cause a section 7 violation, and a section 7 infringement can cause a violation of freedom of conscience. Therefore, these statements imply a symbiotic relationship between freedom of conscience and section 7. Unfortunately, however, Wilson J does not elaborate on this relationship beyond these few statements.

This symbiotic relationship between section 7 and freedom of conscience is extremely problematic, and becomes especially apparent when addressing the issue of parental rights. This is a difficulty noted by Lamer C.J. in his concurring decision rendered in *Children’s Aid Society* (1995). In this case, Sheena B. was born prematurely, and required significant medical treatment. Sheena’s parents, who were Jehovah’s witnesses, consented to these treatments, with the exception of any blood transfusions. However, “When S.B. was a month old, her haemoglobin level had dropped to such an extent that the attending physicians believed that her life was in danger and that she might require a blood transfusion to treat potentially life-threatening congestive heart failure” (*Children’s Aid Society*, 1995, p. 316). The Children’s Aid Society was

granted a 72-hour wardship by the Provincial Court (Family Division). The doctors were then subsequently granted a 21-day wardship, so that they could conduct exploratory surgery for suspected infantile glaucoma, at which time Sheena was given a transfusion (*Children's Aid Society*, 1995, p. 316). The case went through several levels of appeal before reaching the SCC.

The case largely focuses on section 7 parental rights, and particularly their right to make important medical decisions regarding their children. The case also hinges on whether violating the parents' freedom of religion is acceptable. In addressing the arguments made by the appellants, Lamer C.J. claims that:

I would be much more receptive to the appellants' argument and my colleague's reasons concerning the constitutional protection of parental rights if it had been argued that this right, or the freedom to make choices for our children, was protected by the freedom of conscience guaranteed by s. 2(a) of the *Charter*. As Dickson J. stated so aptly, at p. 346 of *Big M Drug Mart Ltd.*, it is precisely the rights associated with freedom of individual conscience that are central 'both to basic beliefs about human worth and dignity and to a free and democratic political system...' (*Children's Aid Society*, 1995, pp. 350-351).

Lamer C.J. offers little elaboration on why he would prefer to see parental rights protected exclusively by freedom of conscience. This proposition, however, challenges the redundancies of protection outlined by Wilson J in her discussion of freedom of conscience in *Morgentaler* (1988). In particular, Lamer J. suggests that Wilson's analysis in *Morgentaler* (1988) runs the risk of conflating section 7 and section 2(a). While the quotes are somewhat extensive, it is worth transcribing large portions of Lamer C.J.'s criticisms. He notes that:

I am unable to believe that the framers would have limited the types of fundamental freedoms to which they intended to extend constitutional protection in such explicit terms, in s. 2, and then, in s. 7, conferred "general" protection by using a generic expression which would, unless its meaning were limited, include the freedoms already protected by ss. 2 and 6, as well as all freedoms that were not listed. This approach is clearly contrary to the principles of legislative drafting that require that a general provision be placed before the provisions for its specific application. Moreover, if s. 7 were to include any type of freedom whatever, provided that it could be described as fundamental, we might seriously question

the need for and purpose of s. 2. Either it is redundant, or s. 7 should then be considered to be a residual provision so that we can make up for anything that Parliament may have left out (*Children's Aid Society*, 1995, pp. 343).

Lamer C.J. then goes on to question the reasoning displayed by Wilson J. in her judgements rendered in both *Morgentaler* (1988) and *R. v. Jones* (“*Jones*,” 1986) – a case that involved the right to home school children for religious reasons. Although not related to health, *Jones* (1986) does address the concern of parental rights in regards to educating children. Lamer C.J. suggests that Wilson J.’s comments in these cases:

clearly show...the practical difficulty that arises from this interpretation [that s. 7 can encompass the fundamental freedoms outlined in s. 2(a)]. In any situation that could potentially fall within the ambit of s. 2, that same freedom would also be covered by s. 7. For example, we may ask what the legal solution would have been if, in *Jones*, the appellant had argued that the impugned legislative provisions violated his freedom of conscience, which is protected by s. 2(a), and his parental liberty, which is protected by s. 7. This situation would mean not only that the legislative foundation would be duplicated, but also that two distinct levels of analysis would have to be applied to assess the justification for the restriction that would render the impugned legislation valid. I do not believe that this could have been Parliament's intention when it enacted ss. 2 and 7. (*Children's Aid Society*, 1995, pp. 344-345).

Lamer C.J. later confirms that:

...it is difficult not to conclude that the subject matter of s. 2 and of s. 7, as reflected in the different dimensions of ‘liberty’ that each is designed to protect, is quite obviously different. Moreover, since the fundamental freedoms set out in s. 2 are formulated in terms that refer to sufficiently broad concepts, it is reasonable to think that the framers of the *Charter* did not intend to make the right to liberty in s. 7 a residual right that could include any component of the fundamental freedoms set out in s. 2.

...

I am still convinced that s. 7 is not a tautology, particularly because it adds two distinct rights that are not set out anywhere else in the *Charter* and that are not in any way connected with what are called fundamental freedoms. In my view, the nature of the other rights set out in s. 7 is another element of interpretation that militates in favour of a distinction between the scope of the words “freedom” and “liberty” as they are used in ss. 2 and 7. (*Children's Aid Society*, 1995, pp. 346).

This discussion by Lamer C.J. is critical because there is a tendency within the secondary literature to think of Wilson J.'s comments in *Morgentaler* (1988) regarding conscience as being the SCC's most substantial and most important commentary on freedom of conscience; the literature tends to treat Wilson J.'s six paragraphs on freedom of conscience as the final word on conscience (Haigh, 2012, p. 129). However the discussion provided here suggests that Wilson's interpretation of conscience is not the only one that has been forwarded by the SCC. Moreover, her interpretation of freedom of conscience is not without flaws, and this is particularly true with regards to how she understands the relationship between freedom of conscience and the right to life, liberty, and security of the person.

Freedom of conscience has a longstanding relationship with the other freedoms outlined in section 2 of the *Charter*, and particularly with freedom of expression and freedom of association. Moreover, there is evidence to suggest that section 7 and section 2(a) have a critical relationship that must be more clearly defined – particularly when attempting to draw a distinction between the fundamental “freedoms” of section 2, and “liberty” as it is protected under section 7 (*Children's Aid Society*, 1995, p. 350). Understanding where the distinctions lie between these two terms will have critical consequences for issues such as parental rights, and where the protection of personal autonomy lies within the *Charter*. This seemingly inherent relationship between section 2(a) and section 7 is one that needs closer examination.

Finally, one of the most challenging features of section 2(a) is the fact that freedom of religion and freedom of conscience can be in conflict. While there is an acknowledgement that they cannot negate each other (*Children's Aid Society*, 1995, p. 322), they can limit each other. Moreover, there is an implication within *Children's Aid Society* (1995) that conscience exists prior to religion. This is evidenced by Lamer C.J.'s statement: “Since S.B. [Sheena] has never

expressed any agreement with the Jehovah's Witness faith or any religion, there is an impingement on her freedom of conscience, which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief" (*Children's Aid Society*, 1995, p. 322).

A similar case to this occurred in 2009 in *A.C. v. Manitoba (Director of Child and Family Services)* ("*A.C. v. Manitoba*"). In this case, C. was a 14 year old admitted to hospital for lower gastrointestinal bleeding. "She is a devout Jehovah's Witness and, some months before, had signed an advance medical directive containing her written instructions not to be given blood under any circumstances" (*A.C. v. Manitoba*, 2009, p. 183). Despite this, however, the child was taken under the *Manitoba Child and Family Services Act* and a blood transfusion was ordered. The family appealed the decision, but the SCC upheld the Court of Appeal's decision. In this case, the SCC determined that this particular 14 year-old did not have the capacity or understanding to make that decision for herself based on her religious convictions. In other words, she did not meet the threshold of a "mature minor," and therefore the state had the authority to intervene to preserve her future freedom of conscience until she was mature enough to make an informed decision. If this case and *Children's Aid Society* (1995) are read in concert with each other, there is one problematic feature that both cases contain. Ultimately, in both of these cases, freedom of conscience equates to being whatever the state determines to be in the best interests of a child.

That capacity for conscience and religion to conflict with and limit each other, whether at the conceptual level or in the application of those concepts, poses serious problems for understanding section 2(a) as a single integrated concept. If conscience and religion can be in dispute, does that imply that a case could arise in which section 2(a) is pitted against section 2(a),

with conscience and religion divided along conflicting lines? These are issues that cannot fully be answered yet. However, they imply a deep divide between religion and conscience, even as stronger associations between conscience and the rest of the *Charter* are being formed.

### *C. Conscience as a shrinking freedom*

Unfortunately, many of these questions regarding the relationship of conscience to the rest of the *Charter* remain unanswered, and much of the earlier development of freedom of conscience has come to be undermined by current trends within the SCC. As Canada becomes increasingly self-conscious of the diversity of views held by its citizens, section 2(a) jurisprudence has reached something of a crisis. The most striking evidence of this is that there have been no definitional statements made regarding the scope of conscience as an individual freedom since 2004. The cases following *Amselem* (2004) provide little substantive content to freedom of conscience; instead, conscience seems to disappear in the face of increasing tensions regarding religious differences.

*Amselem* (2004) marks an important shift in how the SCC addresses religious concerns. This decision, which determined whether the building of individual Jewish Sukkahs on the balcony of an apartment building was constitutional, led to two significant developments regarding the scope of freedom of religion. First, this case provides the SCC's first attempt to define religion – a topic I will return to in chapter 6. Second, and the issue to which I will turn here, is that the case sets out what has been called the “sincerity test” to determine what types of religious claims are protected by the *Charter*.

This test, which was proposed by the majority judges in *Amselem* (2004) to gauge freedom of religion, is most succinctly summed up in the recent case *Mouvement laïque* (2015).

The judges in this case state that:

In *Syndicat Northcrest v. Amselem*...at paras. 56-59, the Court developed a test for determining whether freedom of conscience and religion has been infringed. To conclude that an infringement has occurred, the court or tribunal must (1) be satisfied that the complainant's belief is sincere, and (2) find that the complainant's ability to act in accordance with his or her beliefs has been interfered with in a manner that is more than trivial or insubstantial...Such an infringement, where it arises from a distinction based on religion, impairs the right to full and equal exercise of freedom of conscience and religion (*Mouvement laïque*, 2015, para. 86).

Importantly, the sincerity test seems to have been designed without consideration or mention of freedom of conscience. As noted in the majority judgement of *Amselem* (2004):

Freedom of religion under the Quebec *Charter of Human Rights and Freedoms* (and the *Canadian Charter of Rights and Freedoms*) consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely *undertaking in order to connect with the divine or as a function of his or her spiritual faith*, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. As such, a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection (Emphasis mine; p. 553).

By adding the statement that there must be an attempt to “connect with the divine” to engage the test, the majority judges attach the sincerity test to religion specifically. This effectively excludes freedom of conscience from the conversation.

Arguably, one could suggest that the court is simply articulating the freedom of religion component of the sincerity test. In other words, only one-half of the test is being presented; there may be a parallel sincerity test for freedom of conscience that is not related to the divine or

spiritual faith. This is an argument raised by Haigh (2012), who elaborates on the sincerity test by proposing a fully fleshed out version of the test that could be applied to conscience. In particular, he lays out three steps, which I have replicated below:

- (1) he or she has a belief of a moral nature...or a belief governing his or her perception of his- or herself, humankind, or nature, which either calls for a particular line of conduct that is subjectively obligatory or is a demonstrably fundamental decision that goes to the heart of who he or she is (in other words, is comparable with religious belief);
- (2) he or she is sincere in his or her belief; and
- (3) the impugned provision (or conduct), in purpose or effect, interferes with his or her ability to act in accordance with his or her belief in a manner that is not trivial or insubstantial (Haigh, 2012, p. 260).

While I can see the value in establishing such a test for freedom of conscience, I am hesitant to assume its existence. The SCC makes no mention or implication for such a test; there is an absence of evidence. Certainly, the proposal is elegant. However, the SCC provides no indication that they perceive the religiously based sincerity test to contain an equally formed counterpart for freedom of conscience. Moreover, if such a distinct test exists for conscience, it implies increasingly that the two freedoms are independent. The notion of section 2(a) as a single integrated concept seems to fall away.

This concern for maintaining the integration of freedom of conscience and religion is, in part, what inspires Bastarache J.'s dissent in *Amselem* (2004). In that dissent, Bastarache J. attempts to challenge the sincerity test and the majority's subjective approach towards religion. He states that:

[The] Court has interpreted freedom of religion as protecting both religious beliefs, which are considered to be highly personal and private in nature, and consequent religious practices. However, a religion is a system of beliefs and practices based on certain religious precepts...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. The approach I have adopted here requires not only a personal belief or the adoption of a religious practice that is supported by a personal belief, but also a genuine connection between the belief and the person's religion. In my view, the only way the trial judge can establish that a person has a sincere belief, or has sincerely adopted a religious practice that is genuinely connected with the religion he or she claims to follow, is by applying an objective test (*Amselem*, 2004, para. 135).

This statement by Bastarache J. points to the problems that will be encountered by the courts should they develop a subjective test for religious claims, and, in some ways, demonstrates the difficulty of separating conscience from religion. If the court accepts a subjective reading of religion, then the problem of defining religion becomes even more intractable, and the lines between freedom of conscience, freedom of religion, and simply preferences, becomes increasingly blurred.

However, while Bastarache J. is correct that the subjective approach to religion tends to elide the distinctions between conscience and religion, there are valid reasons to adopt such an approach. The majority judges advocate for a subjective and limited interpretation of freedom of religion because they recognize that plurality exists not only between traditions, but also within traditions – including within religious communities. To use an objective test would force the courts to become religious arbiters. As noted by the judges:

the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, “obligation”, precept, “commandment”, custom or ritual” (*Amselem*, 2004, para. 50).

This breakdown in agreement amongst the judges regarding the scope of conscience and religion and how they are defined is not limited to *Amselem*, but is rather part of a wider trend. For example, a similar conflict emerges between the judges in *Alberta v. Hutterian Brethren of*

*Wilson Colony* (“*Hutterian Brethren*,” 2009). In this decision, that majority judges determined that it was reasonable to deny a Hutterian colony photo-less driver’s licenses, because to allow the licenses would undermine the intent of Alberta’s policy to lower identity theft. Lebel J., in his dissent, however, warns against being so dismissive of the community’s beliefs, and argues that to denying their claim threatens the capacity of the community to function. He states that:

The constitutional guarantee of freedom of religion has triggered a substantial amount of litigation since the coming into force of the *Charter*. The present appeal illustrates enduring difficulties in respect of its interpretation and application. Perhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of religion for the purposes of the *Charter*. One might have thought that the guarantee of freedom of opinion, freedom of conscience, freedom of expression and freedom of association could very well have been sufficient to protect freedom of religion. But the framers of the *Charter* thought fit to incorporate into the *Charter* an express guarantee of freedom of religion, which must be given meaning and effect (*Hutterian Brethren*, 2009, para. 180).

This passage is curious in that it seems to suggest that religious freedom can be considered as a subset of freedom of conscience (and other freedoms), which was the first theme outlined in chapter 2. It implies that the important aspects of religion – such as expression, association, and conscience – are already covered by the other subsections of section 2. Despite this, the passage concludes that it is the inclusion of freedom of religion in the *Charter* that supports the notion of two distinct rights of conscience and religion. That conclusion suggests a much more symbiotic and equal relationship than is proposed by the second theme. It suggests that religion is more than the sum of its parts, and that it is more than a patchwork of the various rights and freedoms that Liberal democracies defend.

Both *Amselem* (2004) and *Hutterian Brethren* (2009) demonstrate a recognition, especially by the minority dissenting judges, that the SCC has an inadequate understanding of the scope and definition of freedom of conscience and religion. Part of the issue is that section

2(a) is an evolving landscape. As the majority judges in *Mouvement laïque* (2015) freely acknowledge, “The state’s duty of religious neutrality results from an evolving interpretation of freedom of conscience and religion. The evolution of Canadian society has given rise to a concept of this neutrality according to which the state must not interfere in religion and beliefs” (p. 6). The majority further declares that “The express provisions of the *Canadian Charter* and of the *Quebec Charter*, such as those regarding freedom of conscience and religion, must be given a generous and expansive interpretation. This is necessary to ensure that those to whom these charters apply enjoy the full benefit of the rights and freedoms, and that the purpose of the charters is attained” (*Mouvement laïque*, 2015, pp. 8-9). These statements demonstrate that there is no single meaning to freedom of conscience and religion, but rather the meaning of section 2(a) continues to shift as societal values change and are recreated. This makes the construction of a definitive interpretation challenging.

The SCC has previously recognized that rights and freedoms are evolving. In the cases examined for this project, the earliest example of this can be seen in *Manitoba (A.G.) v. Metropolitan Stores Ltd* (1987). As stated by Beetz J. for the majority ruling, “the setting out of certain rights and freedoms in the *Charter* has not frozen their content. The meaning of those rights and freedoms has in many cases evolved, and, given the nature of the *Charter*, must remain susceptible to evolve in the future” (*Manitoba (A.G.) v. Metropolitan Stores Ltd.*, 1987, para. 21). These statements support the argument that I have proposed in this chapter, which is that subscribing to a single vision of freedom of conscience and religion is an exercise in futility. Such an approach fails to appreciate the full richness of variety with which the courts have approached section 2(a).

There is much more conflict and disagreement between the judges regarding the scope of freedom of conscience and religion in the cases after 2004. These decisions demonstrate a growing concern between dissenting and majority judges about the direction that freedom of conscience should take, and particularly in relation to freedom of religion. That dissention could potentially foreshadow a growing problem regarding the future capacity of the SCC to maintain consistency in their rulings on section 2(a).

#### *D. Summary and conclusion*

As noted above, the SCC's interpretation of freedom of religion and conscience has changed significantly over time. From the early cases of simply representing a balancing right for religion, conscience has come to have a broad and expansive scope. These substantive changes raise the questions: What can we know about conscience? Is there anything, from what the courts have said, that can help to provide a silhouette to the amorphous realm of conscience? The answer to these questions is yes. There are some attributes of conscience that can be affirmed – not only about its scope, but also about its relationship with religion and the rest of the *Charter*. Specifically, there are five main features of conscience that can be culled from the SCC decisions, which I will outline below.

First, freedom of conscience and freedom of religion represent distinct – though related – freedoms. What remains unclear, however, is whether that distinction between freedom of conscience and religion extends as far as complete independence. While the courts have, to some extent, treated religion as independent from conscience, they have equally continued to rely on the language of the single integrated concept. Moreover, there are some individual judges, such as Bastarache J., who seem to go so far as to view freedom of conscience and freedom of religion

as synonymous (*Amselem*, 2004, para. 135). This diversity of approaches complicates the task of establishing a defined scope for each freedom.

This confusion regarding how conscience and religion should relate to each other is compounded by the fact that the SCC tends to elide and omit the differences between the Québec and Canadian *Charters*. That is, within the case law, and especially in *Amselem* (2004), the judges make the assumption that the scope of freedom of conscience and religion should be the same under both the Canadian and the Québec *Charters*. Ogilvie (2008) notes this tendency to assimilate the *Charter*, especially in *Amselem* (2004). She states that “There was agreement that ‘freedom of religion’ is subject to the same analysis under each *Charter* and this reflects a wide consensus on the matter in Canada” (Ogilvie, 2008, p. 198). Moreover, the judges in *Amselem* (2004) acknowledge this assimilation, and seem to view it as being unproblematic. They state that:

Freedom of conscience and religion is guaranteed by s. 3 of the Quebec *Charter* and s. 2 (a) of the Canadian *Charter*. Although most...of this Court’s decisions relating to freedom of religion have interpreted s. 2 (a) of the Canadian *Charter*, it is appropriate to refer to them in interpreting s. 3 of the Quebec *Charter*, given the similarity in the wording of the two provisions (*Amselem*, 2004, para. 132).

While in a general sense this statement by the judges is true, and the similarities between the two *Charters* are undeniable, it is problematic to flatten out the difference between them. To make that assumption is to reject the very principles of statutory interpretation. Although the assimilation of the two *Charters* does not seem to have had an effect on the outcome of *Amselem* (2004), it nevertheless sends the message that the integration of freedom of conscience and freedom of religion under section 2(a) in the Canadian *Charter* is meaningless.

Notably, the argument that interpretations of the Canadian *Charter* should influence the Québec *Charter*, but not the other way around, warrants some acknowledgement. The former is a

constitutional document, while the latter has only quasi-constitutional status. Since the courts have acknowledged a level of distinction between conscience and religion in section 2(a) of the Canadian *Charter*, this arguably makes the construction of the Québec *Charter*'s section 3 irrelevant. However, while it may be acceptable to allow the Canadian *Charter* to influence the Québec *Charter*, the courts must be careful not to reverse the direction of influence. The point does not need to be belaboured here, especially since the SCC has acknowledged that they are applying the section 2(a) jurisprudence to section 3 of the Québec *Charter* (*Amselem*, 2004, para. 132), rather than the other way around. Despite this, the distinctions between the two *Charters* and their construction cannot be ignored when examining the jurisprudence on freedom of conscience. While the court is right to suggest that the Québec *Charter* can be interpreted in light of the Canadian one, they are on tenuous ground to ignore the distinctions.

The second definitive statement that can be made about freedom of conscience is that it is meant to protect, in some capacity, those beliefs that are non-religious in nature. However, the extent of that protection is less clear. To demonstrate: does freedom of conscience protect non-religious worldviews (such as atheism or agnosticism), which would align closely with the conceptualization of freedom of conscience as protecting religious non-belief? This question largely rises from the use of the expression “religious non-belief” in *Big M Drug Mart* (1985). A similar expression – “religious unbelief” – is used in *Chamberlain v. Surrey School District No. 36* (2002). These expressions suggest that freedom of conscience protects nothing more than the absence of religious belief. Moreover, this understanding of freedom of conscience is hinted at in *Hutterian Brethren* (2009). In her commentary for the majority opinion, McLachlin C.J. notes that the interests of “atheists, agnostics, sceptics and the unconcerned” are “equally protected by s. 2(a)” (*Hutterian Brethren*, 2009, para. 90). Alternatively, does freedom of conscience protect

individual convictions (such as abortion, vegetarianism, or whistleblowing), which is more in line with the understanding of a broader freedom of conscience that protects non-religious belief? Can it protect both? Does freedom of conscience represent anything more than freedom *from* religion? The use of freedom of conscience in *Advance Cutting & Coring* (2001), and particularly its association with freedom of expression and freedom of association, further problematizes the question as to whether freedom of conscience has its own substantive content, or whether it simply represents the right to exit from any unintended coercion created by the enforcement of other fundamental freedoms.

Third, there is some suggestion that freedom of conscience cannot have collective aspects. This is articulated specifically in *Edwards Books* (1986). While this is the only direct mention of this limit on the scope of conscience as an individual freedom, this understanding of conscience implies that the SCC has, to some extent, accepted the notion of conscience as being an internal and deeply felt personal call that cannot involve institutionalized or dogmatized beliefs. This reflects very much the historical development and Protestant underpinnings of conscience.

Fourth, freedom of religion cannot be given such a scope that it negates freedom of conscience. This is laid out in *Children's Aid Society* (1995). In this case, the concurring judges state that “‘Freedom of religion’ should not encompass activity that so categorically negates the ‘freedom of conscience’ of another” (*Children's Aid Society*, 1995, p. 437). However, the very fact that freedom of conscience and freedom of religion can be in conflict with each other means that section 2(a) is self-limiting. This is a conclusion that requires much greater attention than can be given here.

Finally, freedom of conscience and religion cannot be limited to pre-*Charter* interpretations. While there are some references to early cases, such as *Robertson and Rosetanni v. R.* (1963), these references are minimal and offer little insight into how current jurisprudence on freedom of conscience has evolved. When looking at how the SCC has used precedence, the most commonly relied upon case by the SCC for freedom of conscience is *Big M Drug Mart* (1985). This case is cited in 30 percent of the cases examined for this project, while other cases are cited, as most, a handful of times. To demonstrate, the next highest cited case after *Big M Drug Mart* (1985) – *Reference re Public Service* (1987) – is cited in only six percent of cases in direct relation to freedom of conscience. As such, it seems that the courts have relied on *Big M Drug Mart* (1985) as the primary, precedent setting case.

This is in contrast to some of the perspectives of the secondary literature, which cite the importance of cases such as *Amelem* (2004) or *Morgentaler* (1988). As noted previously, Haigh (2012), in particular, views *Morgentaler* (1988) as being the watershed case for freedom of conscience jurisprudence. The courts, however, according to my counting, only drew on *Morgentaler* (1988) once in the 63 cases examined; *Amelem* (2004) is similarly only cited once.<sup>3</sup> Moreover, the reference to *Morgentaler* (1988) occurred in the context of *Children's Aid Society* (1995). As noted above, this case did not use Wilson J.'s comments in a positive light; rather, Lamer C.J. used the case to demonstrate that Wilson J.'s reading of freedom of conscience ultimately leads to an inappropriate assimilation of section 7 and section 2(a). This lack of significance of *Morgentaler* (1988) within the case law itself undermines the importance placed on the case by authors such as Haigh (2012). The SCC has largely relied on statements

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<sup>3</sup> Cases such as *Morgentaler* and *Amelem* are actually raised fairly frequently within the cases. However, they are raised in the context of the wider relevance of the case. These statistics here refer only to those passages that are used that reference freedom of conscience explicitly.

made in *Big M Drug Mart* (1985), and has given little careful consideration to defining conscience beyond that case.

This chapter has attempted to address the SCC's most important comments on freedom of conscience. Admittedly, the results of that research have tended to raise more questions than they answer. Moreover, the conclusions that can be drawn, as has been outlined in this final section, must be qualified. However, while the empirical information offered in this chapter may not facilitate a prescriptive reading of conscience nor offer an elegant definition of the freedom, it does provide a deeper perspective on the current landscape of freedom of conscience jurisprudence in Canada. That contextualization can help scholars to refine how freedom of conscience is discussed within the literature and understand how conscience has been transformed over time.

Establishing that foundational material will help to frame the question of what kinds of beliefs can be protected by freedom of conscience. This question will inform the following chapter, which turns to examining the relevant decisions that have been rendered at the lower courts, as well as analyzing the case example of whistleblowing that is presented within the scholarly literature (Haigh & Bowal, 2012; Haigh, 2012). In light of what the SCC has said regarding the scope of freedom of conscience, this next chapter will attempt to determine whether those case examples truly provide substantive content to freedom of conscience

## **Chapter 5: The Lower Court Cases and Whistleblowing**

The SCC is not the only court within the Canadian context that has had to grapple with freedom of conscience. Arguably, the lower courts have had to face this issue even more frequently. This is evidenced by the fact that there have been over 300 cases that reference freedom of conscience at the lower courts. Of those, there are two cases that stand out as being particularly significant: *Maurice* (2002) and *Roach* (1994). *Maurice* (2002), in particular, is an intriguing case, since it is the only case in Canadian jurisprudence at any level to rest exclusively on freedom of conscience. These two cases offer a glimpse into specific content that freedom of conscience might protect. While other lower court cases, such as *Zylberberg v. Sudbury Board of Education (Director)* (1988) and *Ontario (Attorney-General) v. Dieleman* (1994), have made important contributions to the scope of conscience, I will not address those cases (for the reasons outlined in chapter 3).

This chapter will draw on *Maurice* (2002) and *Roach* (1994) as specific examples of what kinds of behaviour and beliefs might be protected under freedom of conscience. Since these cases act not only as case law but as direct examples of what kind of content might be given to freedom of conscience, I conclude this chapter with a discussion of Haigh and Bowal's (2012) suggestion that whistleblowing should be protected under freedom of conscience. This is not an issue that has yet come before the courts. Despite this, its inclusion is consistent with the intent of this chapter; whistleblowing offers a third sphere of influence in which the potential relevance of freedom of conscience can be discussed.

*A. Maurice v. Canada*

*Maurice* (2002), which was a case decided by the Federal Court, is, to date, the only case in Canada that has rested exclusively on freedom of conscience. This case involved a federal inmate who, when identifying as a follower of Hare Krishna, was provided a vegetarian diet by the Correctional Services of Canada (CSC). However, when he renounced his faith he was no longer permitted to have a vegetarian meal. The appellant argued that such a distinction of accommodation between a religiously motivated and a non-religiously motivated diet violated his freedom of conscience under section 2(a) of the *Charter*. The Court agreed with him, and stated that his request for a vegetarian meal should be granted. Campbell J. noted that:

while the CSC has recognized its legal duty to facilitate the religious freedoms outlined in the *Charter*, freedom of conscience has effectively been ignored...In my opinion the CSC's approach is inconsistent. The CSC cannot incorporate s. 2(a) of the *Charter* in a piecemeal manner; both freedoms are to be recognized” (*Maurice*, 2002).

Campbell J. concluded with the broad statement that “just as the entitlement for a religious diet may be found in s. 2(a) of the *Charter*, a similar entitlement for a vegetarian diet exists based on the right to freedom of conscience” (*Maurice*, 2002).

Vegetarianism and veganism represent two of the most recognizable candidates for freedom of conscience protection. This is because, although individual reasons for subscribing to these dietary choices differ, those reasons are generally grounded in morally held beliefs (Manley-Casimir et al, 2013, p. 203). As noted by Campbell J., “Vegetarianism is a dietary choice, which is founded in a belief that consumption of animal products is morally wrong. Motivation for practising vegetarianism may vary, but, in my opinion, its underlying belief system may fall under an expression of ‘conscience’” (*Maurice*, 2002). By suggesting that vegetarianism, due to its foundation in morality, qualifies as a conviction of conscience,

Campbell J. aligns the decision in *Maurice* (2002) with the attitudes expressed by Wilson J. in *Morgentaler* (1988) (Manley-Casimir et al, 2013).

*Maurice* (2002) raises the important issue as to what kinds of non-religious beliefs can or should be protected by freedom of conscience. In other words, freedom of conscience cannot simply be a licence to behave entirely as one wishes; it should not be used as an excuse to protect preferences. As Ryder (2005) notes, “Not all beliefs or opinions can qualify as matters of conscience; otherwise, freedom of conscience would become the freedom to disregard all laws with which we disagree” (p. 193). In *Maurice* (2002), the crux of the issue revolves around whether vegetarianism meets the necessary threshold to warrant protection.

Generally, vegetarianism is considered within the literature as being an easy example of freedom of conscience; it is arguably a prototypical example. However, using it as such is complicated because dietary restrictions are also very closely tied to religious accommodations.

As noted by Campbell J:

It is important to note that, in the context of special diets available to inmates, religious diets and vegetarian diets are closely related. The CSC Religious Diets General Guidelines indicate that, in practice, many religious diets include some form of a vegetarian menu. As a result, accommodating a vegetarian's conscientiously held beliefs imposes no greater burden on an institution than that already in place for the provision of religious diets (*Maurice*, 2002, para. 13).

While this comment is made in the context of demonstrating that providing a vegetarian meal to Maurice would not impose undue hardship on the CSC, the close tie between religious dietary exemptions and vegetarianism begs that question: are dietary choices accepted as a matter of conscience because they are truly integral to the identity of an individual and deeply tied to his or her moral integrity, or do we accept those choices as integral because dietary exemptions are already familiar to and accepted by society from religiously based requests?

In this case, the issue is especially complicated by the fact that Maurice's vegetarianism arises out of his previously held religious beliefs. As noted in the case, Maurice's vegetarianism did not arise from secular origins, or secular arguments based on animal cruelty or personal health; rather, they arose initially in the context of religious beliefs. "The Applicant does not eat meat, fish, eggs, poultry, onions, mushrooms and garlic because of his conscientiously held belief that eating those food items is 'morally reprehensible and poisonous to society as a whole'" (*Maurice*, 2002). This specificity, and particularly the inclusion of certain food items that are not grounded in the rejection of eating animal foodstuff, resembles much more closely a religious understanding of dietary concerns, rather than a purely secular, moral conviction.

Considering dietary restrictions as an assumed form of conscientious belief runs very close to the criticism made by Webber (2006), which was outlined in chapter 2 – namely, the acceptance of these dietary exemptions and accommodations seem acceptable precisely because they are familiar from religion. Admittedly, this is not necessarily problematic. Since freedom of conscience and religion are tied together under section 2(a), a conviction that is closely tied to traditionally religious practices in many ways gains more support for an exemption under section 2(a). However, that association still leaves open the question as to whether conscience can truly protect completely secular moral convictions that do not have a nexus with religious belief. It is to this question that *Roach* (1994) can be applied.

#### *B. Roach v. Canada*

*Roach* (1994) was decided by the Federal Court of Appeal almost a decade before *Maurice* (2002). Although this case touches significantly upon conscience, it did not rest exclusively on freedom of conscience in the way that *Maurice* (2002) did. In this case, Charles

Roach was a permanent citizen of Canada who wanted to apply for citizenship. However, he objected to swearing an oath to the Queen based on his republican views, and, as such, sought an exemption from having to declare that oath. “He argued that being required to take an oath of allegiance to the Queen breached his fundamental freedoms of conscience and religion, expression, assembly, and association, as well his right not to be subject to cruel and unusual treatment, and his equality rights” (Sirota, 2014, p. 140). The court ruled that there was no violation of the appellant’s rights, and dismissed the case.

This has not been the only case that has raised concerns regarding the citizenship oath and its requirement to swear allegiance to the Queen. Another case, *McAteer*, was recently decided in 2014. In *McAteer* (2014), “The appellants complain that their right to freedom of religion is violated by the requirement that they swear an oath of allegiance to the Queen of Canada. They further argue that the requirement that the Queen be Anglican makes the oath supportive of one religion to the exclusion of all others” (para. 103). However, like *Roach* (1994), this case was ultimately dismissed.

Together, these two cases provide a case study in which a secular moral conviction can be assessed in relation to freedom of conscience without reference to religion. The citizenship oath does not request access to previously accepted religious exemptions, but instead forwards the idea that political ideology can represent a viable root to conscientious objection. While the courts dismissed both cases, it is worth examining the implications of the citizenship oath for freedom of conscience, and ask whether the courts were correct in their decisions.

Since the judges in *Roach* (1994) analyzed the case based on a number of different fundamental freedoms, the majority decision does not provide extensive commentary on freedom of conscience. Rather, MacGuigan J.A. sums up the position of the majority judges in a single

statement. He claims that “In my [MacGuigan J.A.] opinion the oath of allegiance could not be even a trivial or insubstantial interference with the appellant's exercise of those freedoms” (Roach, 1994).

Linden J.’s dissent offers a more substantive discussion of freedom of conscience. In his statements on that freedom, Linden J. relies heavily on Wilson J.’s concurring reasoning from *Morgentaler* (1988). Drawing on that reasoning, Linden J. states that:

It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience. Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under paragraph 2(a) of the *Charter*. For example, a secular conscientious objection to service in the military might well fall within the ambit of freedom of conscience, though not religion. However, as Madam Justice Wilson indicated, ‘conscience’ and ‘religion’ have related meanings in that they both describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by paragraph 2(b) (Roach, 1994).

This statement not only provides substantive content to freedom of conscience; it also offers an example of how the precedence of previous statements regarding freedom of conscience have affected the lower courts in their assessment and understanding of section 2(a). In this case, Wilson J.’s belief in an independent freedom of conscience has influenced Linden J.’s analysis of the relationship between conscience and religion.

Both *Roach* (1994) and *McAteer* (2014) focus on freedom of expression, rather than freedom of conscience in their decisions (Sirota, 2014, p. 146). However, examining the cases more closely from the perspective of conscience gives rise to a number of reasons for questioning the decisions reached in these two cases. This is the argument made by Sirota (2014) in his article, “True allegiance: The citizenship oath and the *Charter*.” As Sirota (2014) notes,

“The disagreement between majority and dissent, then, is largely about the import of the oath” (2014, p. 141). Sirota (2014) suggests that:

an oath – any oath – is ‘a method of binding’ or ‘getting a hold on [the] conscience’ of the person who takes it...Canadian law no longer associates the concept of the oath with the ‘belief in divine retribution’ for oath-breakers which originally underpinned it. Yet it still regards an oath as having a special importance” (p. 151).

This is a critical point, and one that Linden J. himself acknowledges in *Roach* (1994). He states that “Through an oath or affirmation, a person attests that he or she is bound in conscience to perform an act or to hold to an ideal faithfully and truly. An oath ‘relies on the individual’s inner sense of personal worth and what is right’. It engages the ‘will and conscience of the taker of the oath’” (*Roach*, 1994). As such, whether the court agrees with the appellant’s interpretation of the oath or not is irrelevant. The fact that the appellant feels his conscience is engaged, and there is a general understanding that the purpose of oaths is to engage conscience, then that is sufficient to raise reasonable doubt about the constitutionality of forcing someone to take the oath. As Sirota (2014) notes, “Freedom of conscience ought to be understood as an immunity not only against being coerced into acting contrary to one’s moral principles, but also, at a most basic level, against the state’s attempts to conscript individual conscience in the service of the state’s own purposes” (p. 154).

As such, there is some evidence to suggest that the citizenship oath could represent the first truly individual conscience claim that provides individual content to conscience. It does not rely on references to religion or on familiar religious exemptions, but is based instead in strongly held convictions of political ideology. However, despite the convincing arguments proposed by Sirota (2014) regarding the impact of the oath on the conscience of potential citizens, there are two problems that must be addressed. First, according to *Edward Books* (1986), freedom of

conscience does not exist at the collective level. This implies that political ideologies, which are labels by which large groups of people identify, cannot be covered by freedom of conscience.

Second, freedom of conscience requires the alignment of one's actions with one's beliefs. In other words, conscience contains both internal and external manifestations. While conscience may exist most immediately at the internal level, it requires that compulsion for external manifestation to be distinct from thought or belief. The primary point of concern in both *McAteer* (2014) and *Roach* (1994) is that the claimants are republican and do not want to swear an oath to the Queen. As such, one might pose the question as to whether they would be willing to swear an oath if it referenced "Canada" rather than the "Queen." Surely a deep conviction in republicanism would not allow one to become a citizen and swear an oath to a country that is not a republic. As such, whether the word used in the oath is Queen or Canada, the potential citizen is still intending to join a country that fundamentally opposes their core convictions of conscience. In other words, one could argue that the words of the oath are immaterial – the claimants are, by virtue of their desire to become citizens of Canada, betraying their conscientious belief in republicanism.

While these two cases provide a useful example against which to assess freedom of conscience, they cannot be said to provide clear content to freedom of conscience. The remaining case, as noted above, is drawn from the literature rather than the jurisprudence, and attempts to provide a final example of a secularly based freedom of conscience claim that could support conscience as an independent freedom from religion.

### *C. Freedom of conscience and whistleblowing.*

As noted above, within the lower courts there have only been two cases that offer potential content to freedom of conscience. This final suggestion, however, is drawn from the literature. It is proposed by one of the leading scholars on freedom of conscience, and suggests that whistleblowing offers potential content that might be protected by freedom of conscience (Haigh, 2012; Haigh & Bowal, 2012). I have chosen to address this suggestion here, not because it has any reflection in the case law thus far, but because it provides a second example regarding conscience that does not have a nexus with religion. As noted by Haigh & Bowal (2012), “Whistleblowing is an activity that seems to have some connection to conscience but not necessarily religion” (p. 2). Moreover, whistleblowing avoids the trap of simply attempting to create a sort of parallelism between freedom of conscience and freedom of religion, in which conscience is always measured in relation to religious exemptions (Webber, 2006). This makes it an important and informative test for the scope of freedom of conscience.

Like jurisprudence on conscience, very little legal theory exists regarding whistleblowing. As Haigh and Bowal (2012) note:

Whistleblowing is an emerging *sui generis* field of law which integrates disparate elements of the law of privacy, labour and employment, civil procedure, contracts, ethics, defamation, the constitutional rights of expression and conscience, professional responsibility and administrative law, crimes, confidential information and privilege, business organizations and corporate governance, Codes of Conduct, dispute resolution and various regulatory instruments. Most of these legal elements are adapted to fit and serve *de facto* whistleblowing scenarios” (pp. 3-4).

In many ways, this makes for an informative case study regarding conscience. Since both freedom of conscience and whistleblowing have such tentative relationships with their respective legal structures, it is perhaps beneficial to examine and strengthen their relationship with each

other. They can inform not only each other but also the legal and political fields that support them.

Notably, Haigh and Bowal (2012) struggle to define whistleblowing. They state that whistleblowing is “the reporting of any wrongdoing to anyone inside or outside one’s organization where any form of retaliation may be expected” (Haigh & Bowal, 2012, p. 7).

Despite that rather succinct definition of whistleblowing, however, the authors stress that:

it may be easier to define whistleblowing by its negative. As whistleblowing is anchored in verifiable wrongdoing, neither criticism nor outspoken dissent from the employer’s policies is whistleblowing, although these may be protected forms of speech under the *Charter* or at common law. Likewise, generally poor management decisions or styles and even persistent managerial incompetence would not qualify as reportable “wrongdoing” under traditional legislative and corporate policy frameworks regulating whistleblowing (Haigh & Bowal, 2012, p. 8).

The core of the argument forwarded by these authors is that whistleblowing represents a sufficiently important service to society that it warrants *Charter* protection. They suggest that “It is the spectre and essence of retaliation in any form and degree which most saliently tests the limits of acting upon one’s conscience” (Haigh & Bowal, 2012, p. 7). The authors further claim that “The whistleblower faces many of the same obstacles and difficulties as do women who choose to abort, or those who decline to eat meat for moral reasons” (Haigh & Bowal, 2012, p. 43). The choice to whistleblow is rooted in a person’s conception of what is “good” and “just,” and in deep moral convictions – particularly “in the face of a strong potential for retaliation, in any form and degree” (Haigh & Bowal, 2012, p. 43). As such, the protection of whistleblowers by freedom of conscience is consistent with Wilson’s comments in *Morgentaler* (1988), as well as the decision rendered in *Maurice* (2002).

Furthermore, freedom of conscience offers a tool by which the courts could gauge the motivations behind the whistleblower’s actions – that is, whether they were motivated by

integrity or malice (Haigh & Bowal, 2012, p. 44). Haigh and Bowal (2012) suggest that the sincerity test outlined in *Amselem* (2004) is particularly useful in this respect. If the requirement to connect to the divine is omitted, as noted in chapter 4, the core thrust of the sincerity test can be extended to apply to freedom of conscience. Doing so would mean that, in order to make a successful conscience claim, the claimant must demonstrate that the belief is sincerely held and that the infringement is more than trivial. Such a test would help to determine whether a whistleblower's motivations warranted protection.

There is little to find fault with in the suggestion that whistleblowing should be protected by freedom of conscience. The biggest challenge to the suggestion, as with the case of the citizenship oath, is that the authors do not sufficiently demonstrate how such a suggestion can be reconciled with the presence of freedom of religion in section 2(a). While the search for independent content for freedom of conscience can help frame the scope and definition of this freedom, that association with religion cannot be entirely dismissed. While I will ultimately suggest in the following chapter that whistleblowing can be reconciled with religion and the notion of section 2(a) as a single integrated concept, this is not a point that the authors themselves adequately address.

The following chapter will turn towards this issue of how conscience and religion can both be related and yet distinct. This chapter suggests that, rather than focusing on the content of claims, and whether religion or conscience is the derivative, the important connection that joins freedom of conscience and religion as a single integrated concept is that they both protect the manifestation of those beliefs that are external to the mores and norms of society. This chapter turns on the question of whether religion should be subsumed into conscience as the broader

freedom – as is supported the majority of the secondary literature – or whether there is a way to establish them as equal freedoms.

## **Chapter 6: Defining Conscience and Religion**

The relationship between conscience and religion in the case law is clearly complicated. This is most immediately made apparent through the relational way in which the courts discuss freedom of religion and freedom of conscience. In the 63 SCC cases examined for this project, there are a total of 323 references to freedom of conscience. Of those references, 254 use “freedom of conscience and religion” as a single integrated concept, 19 refer to freedom of religion and freedom of conscience as distinct freedoms, and 33 reference freedom of conscience with no mention of religion. The remaining 17 references are used in relation to the *Québec Charter*.

While many of these references are not necessarily meaningful, in that many of them are simply citing the text of section 2(a) rather than offering real definitional or conceptual content to freedom of conscience, they nevertheless tell the story that the discussion of freedom of conscience and freedom of religion within the case law is far from consistent. This can especially be seen if the cases are divided based on the ruling Chief Justice. For example, there has been a marked increase under McLachlin C.J. in the use freedom of conscience and religion in a disintegrated form. Under McLachlin (2000-present) there have been ten cases that reference conscience either on its own, or as independent from religion. In comparison, under Lamer (1990-99) there were only six cases, and only three cases under Dickson (1984-90) referred to freedom of conscience as either distinct or separate from freedom of religion. Although McLachlin has been Chief Justice longer than both Lamer and Dickson, in terms of quantity the judges have ruled on approximately the same number of cases. McLachlin has seen 22 cases that reference conscience, Lamer saw 21 cases, and Dickson oversaw 19 cases. This increased

disintegration of freedom of conscience and religion in the last decade or so reflects the growing confusion surrounding the scope of these fundamental freedoms.

Two qualifications to this trend, however, must be acknowledged. First, the justices generally do not use freedom of conscience and religion consistently throughout a case. That is, they will, within the same case, refer to freedom of conscience and freedom of religion as a single integrated concept, as independent of each other, and without reference to each other. To demonstrate, in *Bruker v. Marcovitz* (2007), there are a total of ten references to freedom of conscience. Of those, three refer to the single integrated concept, three refer to freedom of conscience as distinct from freedom of religion, two refer to freedom of conscience with no reference to religion, and one reference is in relation to the Québec *Charter*. Therefore, when examining the disintegration of section 2(a), it is important to keep in mind that in some cases that disintegration may just be a rhetorical device with little significance for how conscience should be understood. Second, I have counted every use of the phrase “freedom of conscience and religion” as an example of the use of the single-integrated concept, including those that are simply citing the *Charter* text. This allows me to avoid imposing my own interpretations on the text. However, it must be acknowledged that doing so complicates the data.

Understanding the relationship between religion and conscience, and how they can be both simultaneously distinct and integrated, is the most important question to answer if the scope of these freedoms is ever to be fully understood by the courts. While fleshing out the relationships between conscience and the rest of the *Charter* is important and relevant, those inter-rights relations cannot be developed until section 2(a) as a whole becomes coherent. As such, this last substantive chapter turns to the question of definition, and attempts to offer some

final clarity on how, in light of the secondary literature and the evidence provided by the courts, freedom of conscience and religion might best be understood.

Part of the problem with understanding the scope of freedom of conscience and its relationship to religion stems from the difficulty in defining religion. One would have expected that, when ruling on section 2(a), the first step for the court would have been to define their concepts. Theoretically, this is a critical first step. However, the SCC seems to have taken a more inductive approach to section 2(a), and did not offer a definition of religion until 2004 (Ryder, 2005, p. 195). Iacobucci J. presented the court's definition in *Amselem* (2004). It reads:

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

Despite offering this definition, Iacobucci J. acknowledges that "it is perhaps not possible to define religion precisely" (*Amselem*, 2004, para 39). As such, he recognizes that any definition of religion must be used with caution.

The fact that the courts waited until 2004 to offer a definition of religion highlights a critical problem: there is no generalized, working, legal definition of religion (Haigh, 2012, p. 147). As Haigh (2012) notes:

Legal religious freedom is trapped. A narrow definition of religion would mean that clearly religiously-minded people, like the... 'rebel outcast' Jews wanting personal succahs in *Syndicat Northcrest v. Amselem*... would be left unprotected. If the definition of religion is expanded to include any self-described 'religiously motivated' behaviour, then all persons would theoretically have the power to determine whether a particular law comports with their religion, as they define it. They would be privileged over those who would or could not so describe their motivation (p. 147).

This definitional crisis is further problematized by the changing nature of religious belief. That is, religion is no longer the monolithic, collective form of identity it once was. As can be seen in the SCC decisions presented in this thesis, the expansion of secularism and liberalism has promoted individual autonomy over collective identity. “This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom” (*Amselem*, 2004, para. 40). This recognition of the important influence that autonomy and free choice have on section 2(a) goes back to *Big M Drug Mart* (1985), where the judges noted that:

the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own (Emphasis original; para. 161).

It is this belief in the importance of individual choice and autonomy that encouraged Wilson J. to separate freedom of conscience and freedom of religion in *Morgentaler* (1988) in order to protect those personal choices not based in religious motivation, and also led to the subjective and individualized interpretation of religion that became manifest in *Amselem* (2004).

The fracturing of traditionally self-contained faith communities has fuelled this breakdown in religion as a form of collective identity. More people are marrying outside their faith tradition and this has led to an increased mixing of religious identities. Such a blending of traditions cannot help but have the effect of watering down the distinctions between different faith communities, leading to a more personalized, localized interpretation of religion. This reality is reflected in the work of Hervieu-Léger (2001), “which recognizes, in many modern religions, the important shift in focus from a centralized religious authority to local, transient, or “ground-up” religions based significantly on individual experience” (Haigh, 2012, p. 148). This

individualization of religion has transformed how people view religion, how they understand its purpose in the life of the individual, and how they understand the nature of God. Those changing perceptions have radical implications for how religion can and should be defined not only culturally and socially, but also legally.

Similarly, the notion of secularism and what it entails has been increasingly problematic for the courts. As noted by Benson (2007), the courts did not “consider the meaning of the term ‘secular’” until *Chamberlain v. Surrey School District No. 36* – a case decided by the SCC in 2002 (p. 139). In that case, the judges concluded that secularism was required to be religiously inclusive – at least in the context of parental involvement in children’s education (Benson, 2007, p. 139). Such an understanding of secularism further blurs the lines between where religious belief ends and secular conviction begins. Like religion, secularism appears to be a moving target with nebulous borders that makes constructing a clear, permanent, legal definition a challenge. As such, if both secularism and religion remain only qualitatively defined, it is no wonder that freedom of conscience remains such an unknown. Freedom of conscience seems largely to have been conceived of in relational terms, and if the terms it is being related to are themselves undefined, the lack of a precise legal definition of conscience should come as no surprise.

In an attempt to reconcile this problem, a prominent theme within the extant literature is to suggest that religion is simply a sub-category of conscience, and is not itself inherently special or worthy of external protection. In other words, if religion is subsumed into conscience, then solving that definitional quandary becomes less relevant. Haigh (2012) forcefully promotes this view. In his PhD dissertation on freedom of conscience, he proposes that religion could be replaced by conscience. He suggests that “If we think of freedom of religion as simply the way we have historically defined the notion of freedom of conscience, then, by definition,

‘conscience’ in s. 2(a) will be wider in scope than ‘religion’” (Haigh, 2012, p. 232). The implication of such an interpretation of freedom of religion and conscience is that religion as a distinct form of identity is no longer relevant; it is an anachronism. Haigh (2012) attempts to demonstrate this point by choosing certain sections from the case law, and replacing the word “religion” with “conscience.” For example, he provides the following comparison:

***Amselem – Original Text***

existence [sic.] of religious obligation. Once that is done, it is a serious error in law for court to tell a practicing individual that his/her conception of his/her religious obligation is incorrect.

Para. 41: Religious beliefs which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

***Amselem – Replaced and Revised Text***

the existence of a **conscience-based** obligation. Once that is done, it is a serious error in law for court to tell an individual that his/her conception of **such** obligation is incorrect.

Para. 41: **Conscience-based** beliefs which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law  
(Emphasis original; Haigh, 2012, p. 212)

Haigh suggests that by using conscience, rather than religion, some of the tension could be diffused in conflicting claims. He notes that “religion is sometimes a common flash point simply as a result of its current privileged constitutional status” (Haigh, 2012, p. 220). As such, using conscience as an all-purpose word avoids the intense emotions that the word “religion” can stir up, while still respecting a plurality of different views.

The result of this, however, is to misunderstand the nature of religion and religiously based convictions. Conscience, as generally understood in the extant literature and by Haigh (2012) himself, is based exclusively on one’s moral conception of right and wrong. While that is a huge component of religion, it is not everything. As Webber (2006) notes:

...a definition of conscience focused on morality would not be sufficient to subsume freedom of religion, at least not without severely distorting the latter. Moral injunctions are a dimension of many religions, but religion includes elements that are not contained within morality, such as prayer, methods of worship, communal institutions, and what to a believer is knowledge of the divine” (p. 188).

As such, Haigh’s (2012) simple replacement of “religion” with “conscience” within the case law does not do justice to the nature of what religion is to those who practice it. Amalgamating conscience and religion poses a serious risk to the integrity of both freedoms.

Similarly, some of the themes outlined in the extant literature claim that the principles of statutory interpretation render it necessary that freedom of religion be viewed as a subset of freedom of conscience, and should be regarded as an example of conscience. I respectfully disagree. If religion were simply a category of conscience, then section 2(a) would resemble section 15, which offers a list of potential areas of discrimination. By including the words “in particular,” section 15 leaves itself open to absorb other areas of discrimination – as it has come to with the inclusion of the notion of “analogous grounds”. If religion is merely a subset or example of freedom of conscience, then section 2(a) should read something more like the following:

2. Everyone has the following fundamental freedoms:
  - a) freedom of conscience, particularly freedom of religion.”

The fact, however, that conscience and religion are presented in section 2(a) as equal freedoms, suggests that they should be treated as such.

This insistence within the literature that freedom of conscience is the broader freedom is highly problematic. It comes at the expense of freedom of religion, but it also threatens the capacity of the state to govern in a neutral fashion. This is because, if conscience is viewed as protecting “the individual’s most fundamental moral beliefs” (Moon, 2014, p. 188), then the

“state cannot practically remain neutral toward all such beliefs...Indeed, if the state were precluded from supporting or impeding any basic values or practices, meaningful public action would be impossible” (Moon, 2014, p. 188).

Up until recently, Canadian society has viewed secular beliefs as being neutral ground. That is, a secular and non-religious basis for social policy and government action has allowed for the flourishing of a diversity of religious beliefs. However, if non-religious belief is now uncategorically protected under freedom of conscience, then no neutral ground remains upon which the state can legislate (Moon, 2014, p. 188). As Moon (2014) notes, “‘secular’ values and practices provide the neutral ground or baseline that enables the courts to determine whether the state has treated religious groups unequally or has imposed religious practices or values on others” (p. 188). Any substantive policy enforced by Government with moral content would become unconstitutional, saved only by the reasonability test of section 1.

Therefore, a narrower understanding of what freedom of conscience entails must be proscribed. Moon (2014) seems to subscribe to the vision of conscience outlined by Webber (2006), which views religion as the primary freedom, and conscience as the derivative. I respectfully disagree. Assigning a hierarchy to these freedoms implies that one has achieved more legitimacy than the other. Moreover, if freedom of conscience is dependent on religion for its existence, then that goes against some of the rulings the courts have given – particularly *Children's Aid Society* (1995) – which suggest that conscience can actually limit freedom of religion.

Nonetheless, I agree with the definition for conscience laid out by Moon (2014), in which he suggests that “‘freedom of conscience’ may extend only to conscientious beliefs that appear to stand outside ordinary political debate – that are at odds with the most basic and widely held

moral assumptions of the general community” (p. 190). In other words, “deeply held” means more than just a conviction fundamental to the individual (Moon, 2014, p. 190). Rather, it refers to those beliefs that are “fundamental in significance, specific in content, peremptory in force, and perceived by non-believers as inaccessible or unconventional” (Moon, 2014, p. 190). This interpretation of conscience aligns with the individualized and personalized understanding of conscience outlined in *Edward Books* (1986). Similarly, it also supports the decision rendered in *Maurice* (2002). Since conscientious vegetarianism was counter to the prevailing norms of the prison environment, the judges were correct in their ruling in this case (Moon, 2014, p. 192). Moreover, the fact that Maurice’s particular beliefs were not consistent with mainstream vegetarianism only served to support the idea that his beliefs met the necessary threshold to be protected under freedom of conscience.

Such a vision of freedom of conscience suggests that religion and conscience are equal freedoms that are distinct in content, but related by their role in protecting those convictions that do not align with the conventional mores and norms of society. Admittedly, it also suggests a very narrow scope of potential complaints that might succeed under freedom of conscience. However, the absence of conscience claims within the jurisprudence supports this narrow reading of conscience. While the courts require the rights and freedoms within the *Charter* to be given a broad and expansive meaning, in this case to do so would be to undermine the very neutrality that the state is meant to support. This is because if freedom of conscience is structured to protect any deeply held, secular belief, then there would no longer exist any neutral ground on which legislatures could structure policy; neutrality and secularism would become tautologous. As such, freedom of conscience can only protect those non-religious beliefs that are, like

religion, external to the mainstream cultural values of society and “inaccessible” to the language of public discourse.

Notably, while such a narrow vision of freedom of conscience might seem to imply that it possesses limited power, there are actually a number of activities that could, I think, fall under the protection of freedom of conscience. As noted in chapter 5, vegetarianism could be one of those protected ground. Similarly, whistleblowing (Haigh & Bowal, 2012) represents another such example. This is because such an action goes against the environment and norm of compliance that has been established within a community. There is room under freedom of conscience for the protection of those who are morally driven to expose wrongdoing at their own risk. This protection of whistleblowing aligns with Weinstock’s (2014) understanding that a parallel between conscience and the values of democracy – particularly in relation to an individual acting in their role as citizen – can be drawn. As he states:

The first, most naturally identified with talk of ‘conscience’, refers to the citizen as a moral being capable of reflecting upon the difficult moral questions that she must face in the different roles she occupies, including that of ‘citizen’. This capacity is evinced in part by her ability to reflect upon moral issues and controversies that arise in her community or elsewhere and arrive at judgments about what the right thing to do is in such controversies (Weinstock, 2014, p. 9).

As another example, and one that has not come up yet in this thesis, there is some room for suggesting that freedom of conscience could protect non-conventional relationships. For example, while the current marriage structures in Canada have come to increasingly protect the rights of LGBTQ couples, they still rely on a dichotomous understanding of romantic relationships. This particularly affects polyamorous communities. While the B.C. Supreme court upheld the ban on polygamy in 2011 (*Reference re: Section 293 of the Criminal Code of Canada*), I would suggest that healthy polyamorous relationships could not be dismissed on the same grounds. For example, polyamorous communities tend to be non-religious, and support the

equality rights of men and women. As such, the harm concerns raised in the polygamy ruling would not apply. Moreover, freedom of conscience, properly applied, could impact the 2011 ruling on polygamy. Since much of that ruling suffers from significant generalizations that seek to entrench rather than challenge the prevailing societal norms (Mathen, 2012, p. 368), much of that decision is arguably open to significant reinterpretation. Since the question of marriage extends beyond religion and is, in essence, a personal decision that deeply impacts one's sense of identity, freedom of conscience could provide a new vantage from which to examine the issue.

Conversely, freedom of conscience cannot be used to protect mainstream political ideologies. A small community of scholars within the extant literature supports a vision of freedom of conscience that protects political beliefs; this has already been seen in *Roach* (1994). However, there are other examples in the literature. To demonstrate, in an article examining the potential protection of veganism under the Ontario Human Rights tribunal, and potentially even under the *Charter*, Berger poses the question: "Is a deeply held political belief different in character than religion?" (*National Post*, 2016). Similarly, in his discussion of liberalism, Galston (2015) compares liberalism to a "tradition." He comes very close to equating it with an all-encompassing system of conscientiously held beliefs in the way that religions are often perceived to enforce a totalizing doctrine. While Galston does not use the term freedom of conscience or define liberalism as being protected under such a banner, his discussion mirrors those sentiments expressed by Berger that political ideologies are equivalent – or at least comparable – to religious commitments and beliefs.

However, these comparisons between deeply held religious convictions and political beliefs are misplaced. They focus on the content of these beliefs, rather than on whether those beliefs are accepted by the public discourse or Canadian parliamentary structures. While

mainstream political beliefs may be deeply held, they also receive widespread recognition and support within society; parliamentary democracy ensures that different political platforms have a voice from which to be heard. This accessibility of different political beliefs and platforms is part of the reasoning why a freedom of conscience claim on republicanism, as seen in *Roach* (1994), could not succeed. These types of deeply held beliefs are sufficiently entrenched in the public discourse that they do not meet the threshold of a conscience claim.

Finally, there remains the question as to whether a right to abortion could be created under freedom of conscience exclusively, without reference to section 7. This is particularly important in light of the significance given to *Morgentaler* (1988) within the secondary literature. I am not convinced such a right can be created under section 2(a). In examining that issue, I have come to disagree with Wilson J. in her dissent in *Morgentaler* (1988). She states that “The decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society the conscience of the individual must be paramount to that of the state. Indeed, s. 2(a) makes it clear that this freedom belongs to each of us individually” (*Morgentaler*, 1988, p. 37). Notably, this statement creates an association between morality and freedom of conscience, which aligns with what other court decisions and the literature have said about the scope of freedom of conscience. I agree with that association. However, I disagree that abortion can legally be considered a moral issue. While having an abortion can arguably be considered a moral *personal decision*, I counter that it can only be considered as a moral issue in a legal context if one is debating the question of whether a foetus qualifies as a person or not. The morality of the issue lies in deciding whether an abortion amounts to murder. However, since the SCC does not recognize the legal status of the foetus, the question is transformed from one about morality into one about personal autonomy; it becomes an issue of women having the

liberty to control their bodies. As noted by Wilson J. in *Morgentaler* (1988), “The right to “liberty” contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life” (pp. 36-37). As such, since having an abortion must legally be understood as an issue of personal autonomy, and not one of morality, the debate over such a right properly belongs in a discussion of section 7.

This discussion of what kinds of convictions can be protected by freedom of conscience demonstrates that our intuitive understanding of conscience as a concept cannot be the guide for a legal construction of that term. While vegetarianism, whistleblowing, and alternative relationships may be able to find relief under freedom of conscience, political beliefs and abortion cannot. These are fine and difficult lines that must be drawn if the *Charter* is to remain both relevant and coherent. While a narrow reading of conscience may prevent it from protecting those beliefs and practices that the majority might want to see protected, it continues to serve and shield minority, individual convictions. It protects those voices that might get lost in the so-called tyranny of the majority. As such, freedom of conscience plays an important role in preventing those who cannot identify with major religious groups or political organizations or any other large institution or group from falling through the cracks. Arguably, freedom of conscience, in its own unassuming way, offers the greatest minority protection.

## Chapter 7: Conclusion

Freedom of conscience and religion continues to be an evolving freedom within the Canadian context. While many of the themes and theories within the extant literature reflect features of conscience, they do not provide a sufficiently accurate representation of the realities of section 2(a) jurisprudence. The reliance in the literature on a few select cases limits the scope of conscience almost exclusively to its relationship with religion. This misses a significant amount of information that has been produced on freedom of conscience in relation to the rest of the *Charter*, and does not adequately reveal how freedom of conscience has developed over the past three decades.

Moreover, a deeper analysis of the SCC freedom of conscience jurisprudence reveals significant flaws and gaps in the court's understanding of that freedom. This gap in the case law is particularly apparent in the interactions between freedom of conscience and other rights and freedoms within the *Charter*. Freedom of conscience seems to have strong relationships with freedom of expression and freedom of association, as is demonstrated in cases such as the *Reference RE Public Service* (1987) and *Advance Cutting & Coring* (2001). Similarly, Lamer C.J.'s critique of Wilson J.'s linking of section 7 with freedom of conscience in cases such as *Morgentaler* (1988) and *Jones* (1986) reveals that the distinctions the court makes between "liberty" and "freedom" are insufficiently defined. Clarifying this relationship between freedom of religion and freedom of conscience is critical for understanding issues such as parental rights, abortion, and where the primary protection of personal autonomy lies within the *Charter*.

While these broader questions are important for understanding the "central place of freedom of conscience in the operation of our institutions" (*Rodriguez v. British Columbia*, 1993, p. 553), and particularly in understanding the *Charter* as a whole, the heart of the issue is still to

ascertain the precise relationship between freedom of conscience and freedom of religion. Considering freedom of conscience as completely independent from freedom of religion is problematic, both historically and in regards to the construction of the Constitution's language. Similarly, to amalgamate them is to lose the individual character that defines each subcomponent; it threatens the unique character of religious belief, and to give conscience too much breadth would destroy the state's capacity to legislate neutral policy on morally charged issues. Ultimately, freedom of conscience must protect secular beliefs, but only those individual beliefs that are in opposition to mainstream cultural values and norms. Those conscientiously held convictions must have a critical nexus with a person's sense of identity in a consistent and pressing fashion, and be regarded as inaccessible by mainstream culture.

The growing independence of freedom of conscience within court decisions, to the point that it can contradict and limit freedom of religion, threatens the integrity of section 2(a) as a "single-integrated concept." If conscience and religion can be in opposition with each other, than this means that section 2(a) can be self-limiting, and potentially self-eliminating. In the case of Sheena B., her conscience – or rather, the assumed conscience she will one day possess – comes into direct conflict with the religious values and parental rights of her parents (*Children's Aid Society*, 1995). Moreover, that case, in concert with *A.C. v. Manitoba* (2009), equates freedom of conscience to that which the state feels is in the best interest of the child. These are issues that challenge the fundamental core of what section 2(a) is meant to protect.

Freedom of conscience has a long road ahead of it upon which to evolve. The SCC's understanding of conscience has changed over time, and will continue to do so. It is difficult to ascertain what the courts will do with this freedom in the future. Freedom of religion has been given pride of place both within the literature and within the relevant jurisprudence. This is not

necessarily a detraction from conscience, since religion is a much more obvious source of friction in society, and is more likely to represent deviation from the moral norms of secular society. However, a greater understanding of conscience is critical to developing a deeper understanding of the *Charter* as a complete entity.

The increasingly globalized, multicultural, and pluralist nature of Canadian society requires that freedom of conscience be allowed to develop. Conscience will have a significant role to play in the coming years. Controversy over issues such as assisted dying, abortion, and marriage will continue to be points of contention for people, and their personal choices regarding diet, morality, and lifestyle are becoming increasingly diversified. Knowing where the boundaries are for freedom of conscience is critical to maintaining a coherent understanding of the *Charter*, and for preserving the integrity of the Court and the reliability of her decisions. This thesis has demonstrated that, left untended, freedom of conscience has already begun to sprout unintended shoots that must be nurtured and groomed before they become untenable.

Knowing the limits and breadth freedom of conscience can only help the state to navigate its obligation to neutrality. Many authors within the secondary literature assume an independent status and broad scope for freedom of conscience. They envision conscience as distinct from religion, or as fully encompassing religion. I have attempted to challenge that vision. Instead, a limited scope for freedom of conscience allows the courts to continue to use secular values as a neutral basis from which to judge deviations, while still protecting those beliefs that lie beyond the scope of normalized behaviour and belief. Moreover, I suggest that the notion of a “single-integrated concept” is fundamental to understanding the relationship between freedom of religion and freedom of conscience. Freedom of conscience must be considered equal to religion in status, engaging in more of a symbiotic relationship rather than a derivative one. I have

suggested that, while both freedoms have a distinct sphere of operation and individual content, they remain related through their protection of those manifested convictions that swim upstream against the currents of society.

Much remains to be seen regarding where the courts will take freedom of conscience. By categorizing the major themes in the extant literature and engaging in a survey of the relevant case law, this thesis has attempted to fill a significant gap within the literature. I have sought to demonstrate that conscience has changed significantly over time and has begun to carve out a significant place for itself within the *Charter*. Conscience has an important role to play in both policy and law, and has significant implications for how religious belief interacts with non-religious belief. While detailed discussions of this freedom have remained largely absent from much of the discourse regarding manifested belief, it is at the heart of the debate. Freedom of conscience remains undefined and un-discussed; and yet, it informs and shapes not only freedom of religion, but also the *Charter*, our democratic institutions, and, ultimately, our interactions with each other.

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- Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54
- B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315
- Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892
- Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86
- Edwards v. Canada* [1930] AC 124, [1929] UKPC 86<sup>4</sup>
- Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110
- Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3
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- Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79
- Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519
- R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70
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- R. v. Jones*, [1986] 2 S.C.R. 284
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- Maurice v. Canada (Attorney General)*, 2002 FCT 69 (CanLII)
- McAteer v. Canada (Attorney General)*, 2014 ONCA 578 (CanLII)
- Ontario (Attorney-General) v. Dieleman*, 1994 CanLII 7509 (ON SC)

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<sup>4</sup> While this case was technically decided by the Judicial Committee of the Privy Council, I have included it under the SCC heading since the Privy Council was the highest court of appeal at the time.

*Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (CanLII)*  
*Roach v. Canada (Minister of State for Multiculturalism and Citizenship), [1994] 2 FCR 406,*  
*1994 CanLII 3453 (FCA)*  
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**Appendix:  
Complete List of SCC Cases Examined**

- *Mouvement laïque québécois v. Saguenay (City)* [2015]
- *Loyola High School v. Quebec (Attorney General)* [2015]
- *Carter v. Canada (Attorney General)* [2015]
- *Mounted Police Association of Ontario v. Canada (Attorney General)* [2015]
- *Saskatchewan (Human Rights Commission) v. Whatcott* [2013]
- *R. v. N.S.* [2012]
- *R. v. Khawaja* [2012]
- *S.L. v. Commission scolaire des Chênes* [2012]
- *Globe and Mail v. Canada (Attorney General)* [2010]
- *Alberta v. Hutterian Brethren of Wilson Colony* [2009]
- *A.C. v. Manitoba (Director of Child and Family Services)* [2009]
- *Bruker v. Marcovitz* [2007]
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- *Rodriguez v. British Columbia (Attorney General)* [1993]
- *Reference re Education Act (Que.)* [1993]
- *R. v. Gruenke* [1991]
- *Lavigne v. Ontario Public Service Employees Union* [1991]
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- *Canada (human Rights Commission) v. Taylor* [1990]
- *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)* [1990]
- *R. v. Skinner* [1990]
- *Tremblay v. Daigle* [1989]
- *Slaight Communications Inc. v. Davidson* [1989]
- *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989]
- *Greater Montreal Protestant School Board v. Quebec (Attorney General)* [1989]
- *Andrews v. Law Society of British Columbia* [1989]
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