Religious Accommodation & Exemption

The policy of the Canadian Secular Alliance

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Overall recommendation

The Canadian government and judiciary should not grant religious exemptions to individuals from neutral, generally applicable laws or policies. The only logical alternative is that such exemptions should be granted to accommodate all deeply held human commitments (including religion, culture, secular conscience, and deeply held political / philosophical / ethical / moral / metaphysical beliefs). Since there is no coherent rationale for differentiating between these deeply held human convictions, they should be treated with equal respect under the law.

Executive Summary

In Canada, exemptions from generally applicable laws and policies are granted to accommodate beliefs that are rooted in religion, but not other sources. Although this policy of “religious accommodation” or “religious exemptions” is deeply entrenched in our laws and public discourse, the Canadian Secular Alliance (CSA) believes that a major re-think is required — as a society, we need to critically re-examine this policy from first principles, and ask ourselves if it is compatible with our commitment to liberal-democratic principles of fairness and equality.

The CSA believes the Canadian government and judiciary should adopt one of two coherent positions on this issue: (1) preferably, exemptions from the law should not be granted, irrespective of whether they are based on religion or not; or (2) barring that, such exemptions should be granted to accommodate all deeply held human commitments (including religion, culture, secular conscience, and deeply held political / philosophical / ethical / moral / metaphysical beliefs). Either way, the CSA believes that the status quo — of legally privileging religious beliefs over all other kinds of beliefs — is untenable. This is not to trivialize religious beliefs, but rather to recognize that government has a duty to treat the deeply held commitments of religious and non-religious Canadians with equal respect.

The very idea of the rule of law implies universality — one law for all and no exceptions. Nevertheless, when a law that is neutral on its face — that is applied equally to all people — has a different impact on people in a religious group, many argue that “equality” and “fairness” require that special accommodations or exemptions be offered. However, on a fundamental level, it is unclear how a system of uniform laws can be unequal or unfair. Differential impact of a law does not automatically imply that it is unfair — in fact, every general law will have a different impact on different people (speed limits differentially impact those who like to drive fast, laws against drunk driving differentially impact alcoholics, anti-tobacco laws differentially impact smokers, and so on). This is a trivial and completely general observation. A set of uniform laws is fair because it provides for equal opportunities — for identical choice sets, from which people are free to choose depending on their preferences. In contrast, having different laws for different people in the same society is plainly unfair and unequal.

The “rule-and-exemption” approach, although widely practiced, faces two serious logical problems. First, the rule-and-exemption approach theoretically requires a set of very precise conditions: it must be important to have a general law, but not so important as to rule out exemptions. In most cases, either the rationale for the law is strong enough to rule out exemptions, or the rationale for exemptions is strong enough to suggest that no law should exist in the first place. Many claims for religious exemptions pertain to paternalistic laws — for instance, laws requiring the wearing of a safety helmet. Importantly, if one can mount a persuasive argument that objectors to the paternalistic law should be free to decide what level of risk to accept, this implies that the law should be repealed — not that it should be retained with an exemption for religious believers. If the libertarian argument is valid, it implies that the same privilege to assume self-imposed risk should be available to all, making religion an irrelevant factor.

Second, assuming that the precise conditions for the rule-and-exemption approach outlined above exist, the question then becomes how to distribute the available room for exemptions among the total population of objectors in a fair manner. A critical question that is almost never addressed is the following: how can we justify giving the limited room for exemptions to religious believers as opposed to anyone else in society? Importantly, there is no particular reason to presume that religious beliefs are the only beliefs that merit consideration for exemption claims. Religion is certainly one possible

basis for exemption, but so too are culture, deeply held non-religious convictions, and strong preferences. Religious beliefs cannot be shown to be “special” in a way that justifies their exclusive right to exemptions. In short, there is no intellectually coherent rationale for privileging religious claims for exemption over non-religious claims.

In fact, it is unclear how granting exemptions exclusively to religious claimants can be reconciled with the equality rights guaranteed in section 15(1) of the Canadian Charter of Rights and Freedoms, which states: “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 ... based on ... religion ...”. In this instance, religious and non-religious Canadians clearly receive unequal treatment. Moreover, the intentional inequality created by religious exemptions is arguably worse than the supposed “inequality” caused by uniform laws that the exemptions allegedly rectify. The courts have recognized that the deliberate government endorsement of inequality sends a clear message of “second-class status” to non-preferred citizens. As a result, the explicit inequality created by religious exemptions is far more harmful than the unintentional de facto “inequality” caused by a system of uniform laws.

It is also unclear how granting exemptions exclusively to religious claimants can be reconciled with section 2(a) of the Canadian Charter of Rights and Freedoms, which guarantees “freedom of conscience and religion” in the same phrase. Given that the courts have recognized that “conscience” in this context refers to moral views that do not originate in religious belief, the law should accommodate non-theists’ deeply held conscientious objections to the same extent that it accommodates those of theists. If section 2(a) of the Charter is to serve as a basis for exemptions from the law, it is unclear how the Canadian government and judiciary can justify selectively honouring the theistic “religion” half of the clause while ignoring the secular “conscience” half.

Fairness and equality do not require that our society grant religious believers immunity from laws and policies with which they disagree — in fact, this defeats our commitment to fairness and equality. There is no coherent rationale for the notion that religious beliefs somehow trigger the right to exemption from the law, while other deeply held human commitments — like culture, secular conscience, and profound political, philosophical, ethical, moral, and metaphysical beliefs — do not. Again, this is not to trivialize religious beliefs. Rather, it is merely to recognize that a liberal-democratic state has a fundamental obligation to treat the deeply held commitments of its citizens equally.

1. Introduction.

1.1. In Canada, exemptions from generally applicable laws and policies are granted to accommodate religious beliefs.

In seeking to address legitimate secular interests, Canadian law can often conflict with religious practices. As law professor Richard Moon has noted, “[l]aws dealing with a range of issues such as child care and discipline, civil marriage, possession of weapons, drug use, treatment of animals, and job safety may have an impact on religious practice, either supporting or impeding particular practices” [Moon, R, 2008]. Moon goes on to note that “[t]he general view, in Canada at least, is that even when a law advances a legitimate public purpose, such as the prevention of drug use or cruelty to animals or violence in the schoolyard, some accommodation should be made for religious practices that are impeded or restricted” [Moon, R, 2008]. Law professor Bruce Ryder echoes this view, observing that “at the heart of the Canadian conception of equal religious citizenship” is a requirement “that generally applicable neutral rules ... be adjusted, within reasonable bounds, to accommodate religious practices” — because without this accommodation “persons of faith cannot participate equally in social and economic life” [Ryder, B, 2008]. This notion is deeply entrenched in Canadian law and public discourse, and is reflected in decades of religious accommodation jurisprudence (reviewed in [Sossin, L, 2009], [Queen's University Human Rights Office, 2005], [Queen's University Human Rights Office, 2006], [Joanis, S, 2001], [Brown, DM, 2000], [Day, S & Brodsky, G, 1996]).

1.2. The law does not grant exemptions to accommodate non-religious beliefs.

In contrast, exemptions to generally applicable laws and policies are normally not granted in response to non-religious objections. As law professor Richard Moon has observed, “[i]n a democratic community, individuals are often subject to laws with which they disagree. The values, preferences, and practices of some citizens will sometimes prevail over those of others. ... While the state should protect the individual’s liberty to think and act as he chooses, it is not required to compromise legitimate policy to accommodate his political views or values or personal practices. If the state is pursuing a legitimate public purpose, the detrimental impact of its actions on the (non-religious) views and practices of an individual is viewed as simply a cost that she must bear as a member of a democratic community. The obligation of the state (or the general community) to treat citizens with equal respect is satisfied as long as each person is able to participate in democratic debate and decision making, whether or not her views are adopted or her chosen practices are permitted” [Moon, R, 2008].

1.3. The position of the Canadian Secular Alliance.

Although this policy of “religious accommodation” or “religious exemptions” is deeply entrenched in Canada’s laws and public discourse, the Canadian Secular Alliance (CSA) believes that a major re-think is required — as a society, we need to critically re-examine this policy from first principles, and ask ourselves if it is compatible with our commitment to fairness and equality. The CSA believes that our government and judiciary should adopt one of two logically consistent positions with respect to granting individuals an exemption from a neutral, generally applicable law or policy: (1) preferably, such exemptions should not be granted, irrespective of whether they are based on religion or not; or (2) failing that, such exemptions should be granted to accommodate all deeply held human commitments (including religion, culture, secular conscience, and deeply held political / philosophical / ethical / moral / metaphysical beliefs).

In taking a stance on this issue that differs from the entrenched common wisdom, the Canadian Secular Alliance will necessarily be advancing a minority position — however, it is a position that we believe is firmly grounded in liberal-democratic principles of fairness and equality. This paper will critically examine two questions from first principles: (1) whether the rule of law should make exceptions for individual citizens who have an intense desire not to comply; and (2) if so, whether deeply held religious beliefs are the only type of deeply held belief that should be eligible for accommodation.

2. Inherent in the idea of "the rule of law" is a uniform standard that applies to everyone.

The "rule of law" is one of the principles upon which Canada is founded, and is essential to maintaining order in society. At a fundamental level, the very idea of the rule of law implies universality. Law professor Jeremy Waldron has noted that "[o]ur belief in the rule of law commits us to the principle that the law should be the same for everyone: one law for all and no exceptions. It would be quite repugnant if there were one law for the rich and another for the poor, one law for black[s] ... and another for whites. Formally at last we repudiate all such classifications, and to the extent they still exist in our law or in the way the legal system is administered, we believe they disfigure, or at least pose grave difficulties for, our commitment to the rule of law ideal" [Waldron, J, 2002].

3. There is no reason to presume that our commitment to "religious freedom" requires exempting religious believers from neutral laws.

A basic question about religious freedom that is rarely asked is the following: what must religion be "free" from in order to be "free"? Law professors Christopher Eisgruber and Lawrence Sager provide several possible answers:

"(1) 'The exercise of religion is free so long as it is free from deliberate political persecution; hence, a law prohibits the free exercise of religion if and only if it specifically singles out religious practice for unfavorable treatment';
(2) 'The exercise of religion is free so long as it is free from burdens greater than those government places upon other, comparable activities; hence, a law prohibits the free exercise of religion if and only if it treats religion badly compared to other activities';
(3) 'The exercise of religion is free only if it is free from all burdens except those justified by a state interest of the highest order; hence, a law prohibits the free exercise of religion if and only if religious practices are exempt from most laws of general application';
(4) 'The exercise of religion is free only if it is free from any cost at all; hence, a law prohibits the free exercise of religion if it imposes any costs upon religious practice (and, perhaps, if it impedes religion from defraying its costs)'" [Eisgruber, CL & Sager, LG, 1997].

Where on the spectrum our society should "draw the line" is a matter of debate. Eisgruber and Sager suggest that "[w]hat is needed is a fresh start. We need to abandon the idea that it is the unique value of religious practices that sometimes entitles them to constitutional attention. What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination,

not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns" [Eisgruber, CL & Sager, LG, 1994]. They go on to suggest that "[e]qual regard requires simply that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally" [Eisgruber, CL & Sager, LG, 1994]. As law professor Richard Moon has noted, "[e]ven if we attach particular significance or value to the spiritual nature of human beings, it does not follow that the actual beliefs (the particular values and practices) of individuals or spiritual communities should be granted special protection in law. All that may follow from a recognition of the individual's spiritual need and capacity is that she should be free to seek spiritual truth and live according to her understanding of that truth, subject to laws in the public interest" [Moon, R, 2008].

4. Granting religious believers immunity from laws with which they disagree is ultimately unsustainable.

Legal scholars have noted that the policy of granting religious exemptions from society's laws is ultimately unsustainable in the long term. Political science professor Ellis West has pointed out that "even if 'religion' were narrowly defined, the range of activities that genuinely religious persons or groups might consider to be religiously significant is still virtually unlimited. There is almost no activity taxed or regulated by the government for which some person or group somewhere might not want an exemption because that activity is sincerely considered to be religious in nature" [West, E, 1989]. Law Professor William Marshall echoes this view, noting that "any activity could be potentially characterized as religious" and "there are no appropriate ways to distinguish legitimate from illegitimate religious assertions" [Marshall, WP, 1990].

It is hard to overstate the magnitude of this problem. As law professors Christopher Eisgruber and Lawrence Sager have noted, "[r]eligious belief need not be founded in reason, guided by reason, or governed in any way by the reasonable. Accordingly, the demands that religions place on the faithful, and the demands that the faithful can in turn place on society ... are potentially extravagant. Religious belief can direct parents to withhold medical assistance from their children, or adults to withhold such assistance from one another or to refuse such assistance for themselves. It can direct believers to maintain great caches of weapons against Armageddon; to give over their underage children for the sexual gratification of their religious leaders in the meantime; to spend all their waking hours in arcane study, eschewing all other occupations; to follow dietary regimes that call for refined and expensive foods; or to digest substances plausibly regarded by secular society as radically poisonous, dangerous, and habituating. Religion can demand sacrifices that range from vows of abject poverty, to the regular undertaking of expensive pilgrimages, to the ritual slaughter of species protected on grounds of civility or threatened extinction. It can underwrite employment practices that secular judgment would regard as grossly exploitative and dictate the subordination of women, persons in particular racial or ethnic groups, or homosexuals. To be at peace with their religious consciences, the faithful may require that public streets be closed to vehicular traffic on the Sabbath; that particular sites be preserved and freely accessible for their holy worship; and even that the basic institutions of their society be pervasively arranged in conformity with their religious precepts" [Eisgruber, CL & Sager, LG, 1994]

5. The U.S. Supreme Court has repudiated the idea of constitutionally required religious exemptions.

The critical question is whether our society can afford to maintain a system in which, in the words of law professors Christopher Eisgruber and Lawrence Sager, “persons motivated by their deep religious beliefs enjoy a presumptive constitutional right to disregard otherwise valid laws of general application” [Eisgruber, CL & Sager, LG, 1997]. In a landmark case more than a century ago, the U.S. Supreme Court was faced with the claim of the Mormons to a constitutional right to practice polygamy according to their religious beliefs. In rejecting this claim, the Court made a straightforward point that remains valid today: “Can a man excuse his [disobedience to law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances” [*Reynolds v. United States*, 1898] (quoted in [West, E, 1989]).

More recently, in the landmark 1990 case of *Employment Division, Department of Human Resources of Oregon v. Smith*, the U.S. Supreme Court found that the American constitution does not require the granting of religious exemptions from neutral, generally applicable laws, even if the government cannot show a “compelling interest” of the highest order. Justice Scalia’s comments in this case are equally informative in the Canadian context: “Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference ... and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order” [*Employment Division, Department of Human Resources of Oregon v. Smith*, 1990] (quoted in [Waldron, J, 2002]). Thus, the U.S. Supreme Court has clearly rejected a legal system in which, to quote law professors Christopher Eisgruber and Lawrence Sager, “the faithful are invited to replace the collective self-rule of democracy with individual self-rule whenever their religious consciences direct them to do so ... ” [Eisgruber, CL & Sager, LG, 1994].

6. Differential impact of a law does not automatically imply that it is unfair.

In discussing the question of religious exemptions and accommodation, the distinction between direct discrimination and indirect (or “adverse-effect”) discrimination is an important one. Direct discrimination occurs when a law or policy is discriminatory on its face — it intentionally targets a group for negative treatment. There is wide consensus — and the CSA vigorously agrees — that such a law or policy is unjust. In contrast, indirect or adverse-effect discrimination occurs when a law or policy that is neutral on its face — i.e., applied equally to all people — nevertheless has a different impact on people in a certain group. In the latter situation, many argue that justice requires that special exemptions or accommodations be offered to members of the affected group, because failure to do so would be unequal and unfair.

However, viewed from the perspective of egalitarian liberalism, it is unclear how a system of uniform laws can lead to inequality and unfairness. As political philosophy professor Brian Barry has noted, “[t]here can be no question that any given general law will have a different impact on different people. But is there anything inherently unfair about this? ... The point is a completely general one. If we consider virtually any law, we shall find that it is much more burdensome to some people than to others. Speed limits inhibit only those who like to drive fast. Laws prohibiting drunk driving have no impact on teetotalers. Only smokers are stopped by prohibitions on smoking in public places. Only those who want to own a handgun are affected by a ban on them, and so on *ad infinitum*. This is

simply how things are. ... This is not, of course, to deny that the unequal impact of a law may in some cases be an indication of its unfairness. It is simply to say that the charge will have to be substantiated in each case by showing exactly how the law is unfair. It is never enough to show no more than that it has a different impact on different people" [Barry, B, 2002].

A set of uniform laws is fair because it provides for equal opportunities. Barry also points out that "from an egalitarian liberal standpoint, what matters are equal opportunities. If uniform rules create identical choice sets, then opportunities are equal. We may expect that different people will make different choices from these identical choice sets, depending on their preferences for outcomes and their beliefs about the relation of actions to the satisfaction of their preferences. Some of these preferences and beliefs will be derived from aspects of a shared culture with others; some will be idiosyncratic. But this has no significance: either way it is irrelevant to any claims based on justice, since justice is guaranteed by equal opportunities" [Barry, B, 2002].

7. The rule-and-exemption approach requires a set of very precise conditions that are rarely satisfied.

Although widespread, the practice of upholding a law for the general population while simultaneously allowing exemptions for a certain group — the so-called "rule-and-exemption" approach — actually requires a very specific set of conditions in order to make sense. Political philosophy professor Brian Barry has noted that in most cases, "either the case for the law (or some version of it) is strong enough to rule out exemptions, or the case that can be made for exemptions is strong enough to suggest that there should be no law anyway" [Barry, B, 2002].

Barry develops this argument by pointing out that "if we are too highly impressed by the point that those who choose to avail themselves of the exemption are not harming others but merely undertaking a self-imposed risk, we are liable to conclude that the same privilege should be available to all ... Religion appears to play no essential part in what is in essence a simple argument to the effect that people should be free to decide for themselves what risks of injury to accept ... [I]f it is valid, the argument implies that the restrictive law should be repealed, not that it should be retained and some people allowed an exemption" [Barry, B, 2002]. Taking the example of religious exemptions to crash helmets for motorcyclists, Barry observes: "Suppose we accept that it is a valid objective of public policy to reduce the number of head injuries to motorcyclists, and that this overrides the counter-argument from libertarian premises. Then it is hard to see how the objective evaporates in the case of Sikhs and makes room for an exemption from the law requiring crash helmets" [Barry, B, 2002]. As law professor Jeremy Waldron has noted, many of the laws in question "are laws about health, safety, hygiene, diet, and education, or laws promoting some general goal like the defense of the environment, for which ordinary citizens have greater or lesser enthusiasm. Many of these laws are paternalistic, and many cultural challenges to them amount in effect to anti-paternalistic critiques ..." [Waldron, J, 2002].

To take a second example, consider the case of exemption from humane animal slaughter laws for Jewish and Islamic "ritual slaughter" practices for kosher and halal meat. (Instead of being stunned prior to being killed, animals are bled to death while conscious). Either (1) there is a legitimate, collective public interest in having minimal standards of animals welfare, or (2) following a libertarian argument, whether or not animals are slaughtered in a humane fashion should be left to the conscience of the consumer (meat should just be labeled correctly with its method of slaughter and individuals should make an informed choice when purchasing) [Barry, B, 2002]. Either way, it is unclear how to make an intellectually consistent argument for the rule-and-exemption approach.

This is not to say that when formulating laws we cannot consider especially severe effects on certain groups of people. However, equality concerns would have us modify the law in question for everyone. As political philosophy professor Brian Barry points out, if “the law bears particularly harshly on some people, that is at the very least a reason for examining it to see if it might be modified so as to accommodate those who are affected by it in some special way. Prudence or generosity might support such a move. ... It does not follow, though, that the best approach is to keep the general rule unchanged and simply add an exemption for the members of some specific group. The alternative is to work out some less restrictive alternative form of the law that would adequately meet the objectives of the original one while offering the members of the religious or cultural minority whatever is most important to them. This avoids the invidiousness of having different rules for different people in the same society” [Barry, B, 2002].

8. If exemptions from a law are feasible, they must be distributed among objectors in a fair manner.

As noted above, the rule-and-exemption approach only makes sense in very specific situations. As political philosophy professor Brian Barry has observed, “it requires a combination of very precise conditions that are rarely satisfied all together. It must be important to have a rule generally prohibiting conduct of a certain kind because, if this is not so, the way in which to accommodate minorities is simply not to have a rule at all. At the same time, though, having a rule must not be so important as to preclude allowing exemptions to it. We are left with cases in which uniformity is a value but not great enough one to override the case for exemptions” [Barry, B, 2002]. Nevertheless, one can envision circumstances in which exemptions from the law can be feasible. Some laws — for instance, a law against hunting deer out of season — are a matter of degree rather than an all-or-nothing issue. One animal more or less is unlikely to significantly affect the overall population, so some room for exemptions is theoretically available. In contrast, some laws — for instance, a law against carrying weapons on a commercial plane flight — are premised on a “zero tolerance” rationale. The objective is not to decrease the number of weapons by 90%, but to prevent *even one* weapon from being present on the aircraft — thus, no exemptions are permissible. In examining whether it is feasible to grant exemptions to a particular law, law professor Richard Moon observes that “[r]elevant considerations may include the importance of the public interest advanced by the law or the seriousness of the harm that the law seeks to prevent ...whether recognition of an exception to the law will compromise its purpose in a significant way, and whether anyone, other than the individual seeking the exemption, will suffer direct harm if the exemption is recognized” [Moon, R, 2008].

Assuming that exemptions from a law are feasible, the question then becomes how they will be distributed among the population of objectors. As law professor Jeremy Waldron has noted, “claims for exemption may be met by rule-of-law based resistance on two fronts: (A) Is there room for exemption, given the generality of the law’s aim? (B) If there is room for exemption, is it fair to give the benefit of that room to the members of this cultural or religious group as opposed to other people in society?” [Waldron, J, 2002].

To illustrate the second point, Waldron discusses the trivial example of a law enacted by the state to prevent the destruction of lawns around public monuments — essentially a “no walking on the grass” law. He asks us to consider the hypothetical case of a man arrested for walking on a public lawn, who argues to the court that “the survival of the lawns does not depend on literally *everyone* keeping off the grass; it will be enough if the overwhelming majority keep off. One or two stray lawn-walkers will actually do no damage whatsoever. Because records show that nobody has walked on these lawns for months, the defendant seeks to have his summons dismissed as a harmless de minimis

offense. ... But even if the prosecutor accepts that there is room for an exemption, he may insist on confronting a second issue: why should the defendant, alone among all the citizens, take it upon himself to award himself the benefit of this exemption? Isn't that unfair? If there is room for some, but not all, to walk on the grass without defeating the goal of beautiful lawns, then surely we should take care that the valuable opportunity is fairly distributed. Fairness is not necessarily served by dishing it up by way of de minimis exemption to the first resourceful person who thought of it. The matter may seem trivial in the lawn case. But it is not trivial in other cases ... Fairness requires some procedure — such as a lottery — or some criterion — such as greater need, for example — to determine who should get the special privilege of [the exemption]" [Waldron, J, 2002].

In fact, the ideal mechanism for granting exemptions is a self-selection system. Such a system is simpler and less costly than an exemption apparatus that requires claimants to plead their individual cases. As law professor Kent Greenawalt has noted, "[t]he sorting of claims into qualifying and non-qualifying can be avoided by a system of self-selection ... a workable system of self-selection is actually preferable to having officials decide whether someone qualifies for an exemption. Self-selection is feasible only when those who want an exemption badly pay for it or make some other sacrifice that most other people would not be willing to make to receive the same privilege" [Greenawalt, K, 2008]. As an example, a state might allow motorcyclists to ride without a helmet if they paid for a special permit. To avoid privileging the rich, the cost could be made proportional to wealth, or some non-monetary form of community service could be required [Greenawalt, K, 2008]. However, self-selection is not feasible if the number of objectors to the law is large, and many are willing to make the sacrifice required for exemption.

Barring a system of self-selection, we are left with the question of how to apportion the available room for exemptions among the population of objectors. However, it by no means follows that religious objectors should be given the privilege of the exemption over any other type of objector. As law professor Jeremy Waldron has argued, "[i]f a given provision is opposed by 30% of those to whom it applies, there is surely something invidious about granting the benefit of the space for, say, a 5% exemption-rate to those whose opposition happens to be religious, while dismissing the claims of the other members of the 30% who might have felt equally strongly" [Waldron, J, 2002]. Waldron notes that "[a]ssuming, in the crash helmet case, that the state has an interest in reducing the number of head injuries from motorcycle accidents, it is plain that reducing the number is a matter of degree, so there is evidently room for exemptions. The question is: Given the existing room for exemption, why should the benefit of that room go to Sikhs and not to Hell's Angels, given that members of both groups have a strong desire for non-canonical headgear? ... Why is it fair to give benefit of the exemption to the group claiming it on cultural or religious grounds? I am not sure that there ever has been a satisfactory answer to this question" [Waldron, J, 2002].

9. There is no intellectually coherent rationale for privileging religious claims for exemption over other types of equally compelling claims.

As noted above, exemptions to generally applicable laws and policies are currently granted in response to religious objections, but not granted in response to non-religious objections. Law professor Richard Moon has observed that "even when the state is pursuing an otherwise legitimate public purpose ... it may be required to compromise this purpose and accommodate incompatible religious practices. There is no similar state obligation to accommodate nonreligious beliefs and practices. ... Freedom of religion, on this account, is not simply part of a more general right to individual liberty. The special protection granted to the individual's *religious* beliefs and practices

must rest on a belief or assumption that the individual is committed, or connected, to his religious values and practices in a way that is fundamental, and different from his commitment to other views or values" [Moon, R, 2008]. But, as law professors Christopher Eisgruber and Lawrence Sager have pointed out, "[i]n a liberal democracy, the claim that one particular set of practices or one particular set of commitments ought to be privileged ... bears a substantial burden of justification" [Eisgruber, CL & Sager, LG, 1994].

However, there is no particular reason to presume that religious beliefs are the only beliefs that merit consideration for exemption claims. As law professor Kent Greenawalt has noted, "[r]eligious claims indisputably form one basis for various exemptions. Claims based on culture, personal non-religious convictions, and strong preferences are other possible bases" [Greenawalt, K, 2008]. In fact, political philosophy professor Brian Barry has argued that reasons of conscience, religion, and culture are not objectively distinguishable from strong preferences [Barry, B, 2002]. Neither beliefs nor preferences are voluntarily adopted — we do not "choose" our beliefs, but nor do we "choose" our preferences. Barry notes that "beliefs and preferences are in the same boat: we cannot change our beliefs by an act of will but the same can be said equally well of our preferences. It is false that the changeability of preferences is what makes it not unfair for them to give rise to unequal impact. It is therefore not true that unchangeability of beliefs makes it unfair for them to give rise to unequal impacts" [Barry, B, 2002].

Barry also points out that "[w]e all constantly impose restrictions on ourselves in choosing among the options that are legally available to us according to our beliefs about what is right, polite, decent, prudent, professionally appropriate, and so on. Atheists are entitled to feel offended at the idea that the only restraints on self-gratification derive from religious belief" [Barry, B, 2002]. Law professor William Marshall has noted that granting only religious exemptions "sets forth a false dichotomy between secular and religious belief systems and ignores the similarity of their functions and effects in the political and social environment. By preferring religious belief systems over all others, including philosophical, moral, and political belief systems, this [religious] exemption offends the equality-of-ideas notion that is at the core of constitutional law" [Marshall, WP, 1990].

10. Religious beliefs cannot be shown to be "special" in a way that justifies their exclusive right to exemptions.

Law professor Kent Greenawalt has noted that "courts should recognize a principle of prima facie equality between religious and non-religious beliefs and activities, such that the government cannot treat religious activities more favorably than otherwise similar non-religious ones, *unless* it has a substantial reason to do so *other than* a theological premise or popular opinion that religious beliefs and actions are more deserving than non-religious views" [Greenawalt, K, 2008]. Accordingly, many commentators have attempted to justify religious exemptions by citing reasons why religion is supposedly "special" compared to other deeply held human commitments (see [Choper, JH, 1982], [McConnell, MW, 1985], [Pepper, S, 1986], [Garvey, JH, 1986], [McConnell, MW, 1990], [Laycock, D, 1990b], [Horwitz, P, 1996]). However, as political science professor Ellis West has noted, "the arguments are either too broad (i.e. they justify giving exemptions to a category of recipients that includes more than just religious persons or groups) or too narrow (i.e. the proposed category fails to include all religious persons and groups), and some are both" [West, E, 1989]. Law professor William Marshall has pointed out that "religious belief cannot be qualitatively distinguished from other belief systems in a way that justifies special constitutional consideration" [Marshall, WP, 1991]. Law professor Suzanna Sherry echoes this view, noting that "no attempt to distinguish religious from non-religious beliefs has successfully justified granting exemptions to religious objectors but not secular

objectors" [Sherry, S, 1992]. Below, the arguments for religious belief's special status are systematically examined and refuted.

10.1. Does religious belief merit accommodation because believers experience a special type of mental anguish when state laws force them to disobey religious tenets?

This argument is too broad, because there is no reason to assume that religious believers experience more psychic harm than other people when forced to obey laws to which they object. As law professors Christopher Eisgruber and Lawrence Sager have noted, "religious conscience is just one of the many very strong motivations in human life, and there is no particular reason to suppose that it is likely to matter more in the run of religious lives generally than will other very powerful forces in the lives of both the non-religious and the religious. This is not to trivialize religious interests. ... Of course, burdens upon religious practice differ from burdens upon tastes in fashion and recreation. Do they also differ from the considerably more weighty burdens imposed by secular commitments to one's family, or by secular moral obligations ...?" [Eisgruber, CL & Sager, LG, 1994]. Law professor William Marshall echoes this view, pointing out that "[t]he conclusion that there is a special suffering associated with the violation of a religious tenet is ... overbroad at best. Not all religious beliefs are held with equal fervor by the religious adherent, nor are religious beliefs necessarily more deeply felt than secular beliefs. A person who has a secular, moral objection to killing in war and a religious objection to working on the Sabbath might well suffer a greater psychic harm in being forced to kill than in being forced to work" [Marshall, WP, 1990]. Political science professor Ellis West also notes that "there are many truly religious activities whose abandonment, though seen as undesirable, would not cause 'pangs of conscience'. Also ... [this argument] would protect only individuals and not churches, because churches (institutions) do not have emotions, and their members do not share the same beliefs or emotions" [West, E, 1989].

10.2. Does religious belief merit accommodation because religious believers perceive that they are commanded to disobey secular laws by a transcendent power (God), whose authority supercedes that of the state?

This argument is too narrow, because not all religions recognize the existence of a god. As law professor William Marshall has noted, "not all religions are theistic — Buddhism and Taoism are but two examples" [Marshall, WP, 1991]. Furthermore, many religious practices are better described as "rituals" rather than direct commands from god. As Marshall notes, "some religious exercise is based upon religious custom rather than divine obligation" [Marshall, WP, 1991].

10.3. Does religious belief merit accommodation because believers fear life-after-death consequences if they disobey religious tenets?

This argument is too narrow, because not all religions recognize the existence of an afterlife with positive or negative consequences based on an individual's earthly conduct. As law professors Christopher Eisgruber and Lawrence Sager have noted, this argument "asks us to treat all religions as having the structure of eternal reward/punishment because some do, or to parse among religions on this peculiar ground" [Eisgruber, CL & Sager, LG, 1994].

10.4. Does religious belief merit accommodation because believers are motivated by a profound sense of morals, ethics, or conscience?

This argument is too broad, because people can be motivated by morals, ethics, and a profound sense of conscience in the absence of religious beliefs. In addition, as pointed out by law professors Christopher Eisgruber and Lawrence Sager, "it by no means follows ... that we should be optimistic that conscientious impulses will lead persons to do good things. Both good and evil can emanate from conscience; the feeding of the poor, perhaps, but also the purification of the Caucasian race. ...

Perhaps the claim is essentially one of deep sympathy for the person caught between the demands of her conscience and the demands of her state. But we must still justify constitutionalizing sympathy for the strong pull of conscience over the pulls of love, passionately demanding life projects, and the infinitely creative demands of strong psychological compulsion" [Eisgruber, CL & Sager, LG, 1994].

10.5. Does religious belief merit accommodation because religious believers are responding to deep compulsions that transcend their own narrow self-interest?

This argument is too broad, because many deeply held ethical and political commitments cause individuals to seek meaning in forces beyond themselves. In addition, law professors Christopher Eisgruber and Lawrence Sager have noted that, "while religion sponsors the highest forms of community, compassion, love, and sacrifice, one need only look around the world, or probe our own history, to recognize that it also sponsors discord, hate, intolerance, and violence. ... Religious commandments can be understood as inspired by beneficent forces that are beyond human comprehension or verification, or by the result of the spite, play, accident, or caprice of entities or forces that do not necessarily hold human welfare paramount. ... [W]hile the commitment to forces outside and above ourselves seems an attractive human capacity and impulse, the substance of the commitment matters, and there is no warranty on the laudability of religious commitments" [Eisgruber, CL & Sager, LG, 1994].

10.6. Does religious belief merit accommodation because it is central to an individual's self-identity?

This argument is too broad, because many deep-seated commitments can be said to contribute to self-identity. As law professor William Marshall has noted, "bonds of ethnicity, interpersonal relationships, and social and political relationships as well as religion may be, and are, integral to an individual's self-identity" [Marshall, WP, 1991].

10.7. Does religious belief merit accommodation because religious organizations foster pluralism, the diversity of ideas, and voluntary associations that shelter the individual from state authority?

This argument is too broad, because many voluntary associations in a liberal democracy's civil society perform these functions. As law professor William Marshall has noted, "both non-religious and religious groups further the values of pluralism by fostering diversity within society and forming 'intermediate communities' that shield the individual from the state" [Marshall, WP, 1991].

10.8. Does religious belief merit accommodation because failure to do so would constitute religious minority group repression by the majority?

This argument is too broad, because society is composed of countless minorities based on race, national or ethnic origin, age, sexual orientation, etc. As political science professor Ellis West has noted, "[i]f ... all 'repressed minorities' do not have a right to be excused from obeying laws to which [they] object, then the question remains why religious objectors, and they alone, should have such a right" [West, E, 1989].

10.9. Does religious belief merit accommodation because religious believers are extremely committed in their objection, and would thus flatly refuse to comply with the laws to which they object?

There is no particular reason to presume that religious believers are any more predisposed to lawlessness than the general population. As political science professor Ellis West has noted, "there is no reason to think that religious persons or groups would be more likely to disobey laws or to

engage in acts of violence than would other persons and groups upset with the government and its laws" [West, E, 1989].

10.10. Does religious belief merit accommodation because it is analogous to a physical disability?

Canadian human rights laws treat religious beliefs and physical disabilities identically for the purposes of accommodation. However, this analogy is fundamentally in error. As political philosophy professor Brian Barry has noted, "beliefs are not an encumbrance in anything like the way in which a physical disability is an encumbrance. ... A disability — for example, a lack of physical mobility due to injury or disease — supports a strong prima facie claim to compensation because it limits the opportunity to engage in activities that others are able to engage in. In contrast, the effect of some distinctive belief or preference is to bring about a certain pattern of choices from among the set of opportunities that are available to all who are similarly placed physically or financially. The position of somebody who is unable to drive a car as a result of some physical disability is totally different from that of somebody who is unable to drive a car because doing so would be against the tenets of his or her religion. To suggest that they are similarly situated is in fact offensive to both parties" [Barry, B, 2002].

10.11. Does religious belief merit accommodation because believers are bound by an alternative source of socially and community-enforced laws?

Some commentators have argued that religious objectors can be differentiated from secular objectors because the former's request for exemption is not based on a desire for individual liberty. Religious believers, the argument goes, are not making a libertarian argument — they must answer to an alternative set of religious laws that are socially enforced within their community. Law professor Jeremy Waldron has argued that "[a] requirement of state law may be irksome and burdensome to many, but it has a particular sort of impact on somebody whose life in the area to which the law applies has been organized on the basis of quite a different scheme of regulation. Such a person may well feel *torn* if the state law is applied to him — torn between a requirement imposed by the state and another imposed by his church or community. ... Others claiming an exemption simply as a matter of liberty or personal conscience might not be under any burden comparable to that" [Waldron, J, 2002].

There are two refutations of this argument. The first answer is that this argument is too broad — it applies equally well to cultural beliefs and practices, for example. (In fact, Waldron makes the above point in the context of both religious and cultural claims.) Indeed, as law professor Kent Greenawalt has noted, religion and culture are often extremely hard to differentiate: "Often these will be interwoven, and that is especially true within societies that draw no sharp distinction between religion and other aspects of culture" [Greenawalt, K, 2008]. Granting exemptions based on religious beliefs but not cultural beliefs is hard to justify, particularly given that the Canadian Charter of Rights and Freedoms explicitly acknowledges the importance of culture, stating in section 27 that: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" [Canadian Charter of Rights and Freedoms, 1982].

The second answer is that this argument is fatally undermined by Canadian law's conception of religious freedom as private, personal, individually defined, and independent of group belief. In the landmark 2004 case of *Syndicat Northcrest v. Amselem*, the Supreme Court of Canada — for the first time — provided a legal definition of religion: "Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith" [*Syndicat*

Northcrest v. Amselem, 2004]. The Court further ruled that "[f]reedom of religion under the Quebec (and the Canadian) Charter 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" [*Syndicat Northcrest v. Amselem*, 2004].

Thus, Canadian law considers religious beliefs to be defined by the individual believer, independent of the orthodox views of any religious community. As law professor Benjamin Berger has noted, “Canadian constitutional law’s image of religion is best understood as comprising 3 elements, each of which lead into and mutually support the others. The result is a cohesive and particular theory of religion. The elements of this conception are (a) religion as essentially individual, (b) religion as centrally addressed to autonomy and choice, and (c) religion as private” [Berger BL, 2007]. Berger notes that the *Syndicat Northcrest v. Amselem* decision makes it clear that the Supreme Court believes that “[r]eligion is a personal, not a social, phenomenon and is located in the individual, not group-based” [Berger, BL, 2007].

11. The conscientious objections of non-theists should be given equal respect to those of theists.

11.1. Atheism can be considered to be a “religion” for constitutional purposes.

Many legal scholars who reject the idea that exemptions should be granted for all types of deeply held personal commitments nevertheless concede that exemptions should be granted to accommodate the conscientious objections of atheists and agnostics that are analogous to those of theists. According to one line of reasoning, this can be done purely within our existing commitment to freedom of religion, by recognizing that — for constitutional purposes — atheism must be considered a “religion”. Consider when the *Charter* guarantees “freedom of religion”, what does the word “religion” refer to? As law professor Douglas Laycock has argued in the American context, “[t]o avoid incoherence the answer must be that ‘religion’ is any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists. ... ‘What is the nature of God and what does He/She want for us?’ is the fundamental religious question, and any answer to that question is inherently a religious proposition. ‘No God exists and this imaginary construct wants nothing from us’ is a belief about religion. ... [I]t is an affirmation of belief, capable of generating commitment and even lifelong activism on behalf of the cause” [Laycock, D, 1996]. Laycock goes on to observe that “[i]f atheism were just a secular idea, government would be free to promote atheism to the same extent that it has ever promoted any other secular idea — say the war effort in World War II, or civil rights ... Government could teach atheism in the schools, promote atheism in the mass media, subsidize American Atheists and a network of local chapters, and ridicule God as the opiate of the masses” [Laycock, D, 1996]. Since this is obviously not the case, “[t]he law should recognize non-theistic answers to religious questions as religion for constitutional purposes ... [T]he law should provide parallel protections for theistic and non-theistic beliefs about religion for as far as the parallels can be reasonable extended" [Laycock, D, 1996].

Assuming one accepts the proposition that atheism is equivalent to a “religion” for constitutional purposes, Laycock further argues that “essential to the pursuit of religious neutrality, the law should

protect non-theists' deeply held conscientious objection to compliance with civil law to the same extent that it protects the theistically motivated conscientious objection of traditional believers ... The non-theist's belief in transcendent moral obligations — in obligations that transcend his self-interest and his personal preferences and which he experiences as so strong that he has no choice but to comply — is analogous to the transcendent moral obligations that are part of the cluster of theistic beliefs that we recognize as religious ... [T]hese beliefs and the sources from which the non-theist derived them are serving the same functions in his life as the equivalent moral beliefs and sources of derivations serve for theists. ... An individual's religious beliefs may evolve from theism to deism to modernism to resymbolized Christianity to humanism to agnosticism to atheism. This evolution is itself an exercise of religion; it is a series of religious choices or of shifting religious commitments. The state should not draw a line across this evolutionary path; it should not decree that anyone who crosses the line forfeits his right to conscientious objection and loses protection for this deepest moral commitments. Such a line would not be consistent with either liberty or neutrality" [Laycock, D, 1996].

11.2. Section 2(a) of the Canadian Charter of Rights and Freedoms protects both freedom of (theistic) "religion" and (secular) "conscience".

However, even without accepting the premise that atheism need be considered a "religion" for constitutional purposes, the fact remains that section 2(a) of the Canadian Charter of Rights and Freedoms guarantees "freedom of conscience and religion" in the same phrase [Canadian Charter of Rights and Freedoms, 1982]. What does conscience refer to in this context? Law professor Richard Moon has noted that "[freedom of conscience] now seems to refer to an alternative, or a supplement, to religious freedom — that is, the freedom to hold moral views that do not rest on religious commitment" [Moon, R, 2002]. Even so, Moon also notes that "[w]hile the courts have said that freedom of religion and conscience protects non-religious beliefs, there are almost no cases in which the courts have found that a non-religious belief or practice has been restricted by the state contrary to s. 2(a). In one of the few Canadian cases to consider a non-religious belief and practice under s. 2(a), *Maurice v. AG Canada* (2002), 210 D.L.R. (4th) 186, a federal prison inmate asked to be given vegetarian meals. The judge found that the prison authorities had a duty to accommodate Mr. Maurice's vegetarianism" [Moon, R, 2008]. Given that the courts have recognized that "conscience" refers to moral views that do not originate in religious belief, the law should accommodate non-theists' deeply held conscientious objections to the same extent that it accommodates those of theists. If section 2(a) of the Charter is to serve as a basis for exemptions from the law, it is unclear how the Canadian government and judiciary can justify selectively honouring the theistic "religion" half of the clause while ignoring the secular "conscience" half. As law professor Suzanna Sherry has argued, "[a]n atheist might reasonably believe that the government is forcing or promoting deism (or religion in general) when it accommodates those whose objection to obeying the law stems from religion but not those whose objection stems from secular beliefs ..." [Sherry, S, 1992].

11.3. Granting exemptions exclusively to religious objectors is a violation of equality rights guaranteed in section 15(1) of the Canadian Charter of Rights and Freedoms.

On the face of it, it is unclear how granting exemptions exclusively to religious claimants can be reconciled with the equality rights guaranteed in section 15(1) of the Canadian Charter of Rights and Freedoms, which states: "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 ... based on ... religion ..." [Canadian Charter of Rights and Freedoms, 1982]. In this instance, religious and non-religious Canadians clearly receive unequal treatment. Writing in the U.S. context, law professor William Marshall has argued that "granting exemptions only to religious claimants promotes its own form of inequality: a constitutional preference for religious over non-religious belief systems. Case law readily illustrates this problem. In *Wisconsin v. Yoder*, the [U.S. Supreme] Court explicitly stated that constitutional exemption from compulsory education requirements was available only to the Amish

on religious grounds and would not be available to a non-religious group seeking exemption because of adherence to, for example, the philosophical precepts of Henry David Thoreau. Similarly, in *Thomas v. Review Board,* the Court held that exemption from unemployment insurance requirements would be available to an individual whose religious tenets prevent him from working in an armaments factory, but would not be available to one whose claim was based upon 'personal philosophical choice'. ... Special treatment of religion connotes sponsorship and endorsement ... In fact, the type of discrimination created by the free exercise [of religion] exemption is arguably worse than the de facto inequality purportedly redressed by the exemption analysis because it is intentional ... As the [U.S. Supreme] Court has noted, explicit endorsement of inequality is particularly egregious because it sends a clear message of second-class status. Thus, the explicit inequality required by the free exercise [of religion] exemption analysis more directly and powerfully harms equality interests than does the inadvertent de facto discrimination caused by generally applicable laws" [Marshall, WP, 1991].

12. The government's policy towards religion should be one of "formal neutrality" (neutrality of treatment) rather than "substantive neutrality" (neutrality of impact).

12.1. "Formal" versus "substantive" neutrality towards religion.

Underlying the question of religious exemptions is a fundamental disagreement between two competing concepts of neutrality. Although it is widely accepted that the government should remain "neutral" with respect to religious belief, there are two profoundly different formulations of religious neutrality: (1) "formal neutrality" (neutrality of treatment), and (2) "substantive neutrality" (neutrality of impact) [Laycock, D, 1990]. Under "formal neutrality", fairness is achieved by uniform laws that do not single out religion for special treatment, either positive or negative, relative to other important personal commitments. In contrast, under "substantive neutrality" (also known in the legal literature as "incentive neutrality" [McConnell, MW & Posner, RA, 1989] and "unimpaired flourishing" [Eisgruber, CL & Sager, LG, 1994]), fairness is achieved by the government not creating any incentives or disincentives for people to change their religious beliefs or behaviours. Law professor Douglas Laycock describes substantive neutrality as requiring "government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or non-practice, observance or non-observance. ... [R]eligion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible" [Laycock, D, 1990]. Laycock points out that "[g]overnment routinely encourages and discourages all sorts of private behaviour. Under substantive neutrality, these encouragements and discouragements are not to be applied to religion. Thus, a standard of minimizing both encouragement and discouragement will often require that religion be singled out for special treatment" [Laycock, D, 1990]. But is "substantive neutrality" consistent with liberal democratic conceptions of equality?

12.2. The policy of substantive neutrality towards religion is not neutral — in fact, it accords religion special privilege.

Although appealing on its face, substantive neutrality towards religion is actually at odds with the classical formulation of equality in a liberal democracy. As law professors Christopher Eisgruber and Lawrence Sager note, substantive neutrality "is sometimes offered as principle of equity, as though it functions merely to make those who respond to the strong demands of their religious beliefs no worse off than others. But ... [it] is different than that: it privileges religious commitments over other deep commitments that persons have. Members of our political community are not generally entitled

to governmental arrangements that enable them to honor their important commitments without being placed at a substantial disadvantage. If somebody — say, Vincent — is above all committed to his art, and consumes his waking hours in devoted concentration to creating art, he is behaving in a manner that many would approve. Vincent is not, however, entitled in principle to arrangements that spare him the diverse costs of this behavior: Vincent is not entitled to an economic structure that permits him to prosper; Vincent is not entitled to collect unemployment insurance if he is by virtue of his passion unavailable for work; Vincent is not entitled to consume [the hallucinogen] peyote even if, like Coleridge, he does his best work in an altered state of consciousness; Vincent is not entitled to bring toxic paints vital to the full realization of his artistic vision into his locality in the face of local environment laws prohibiting their possession and use" [Eisgruber, CL & Sager, LG, 1994]. Eisgruber and Sager note that substantive neutrality and its variations "are emphatically not neutral with regard to religion, but rather, thinly disguised preferences for religion in the form of a cloak of functional immunity from the reach of state laws which the rest of us are fully obliged to obey" [Eisgruber, CL & Sager, LG, 1997].

12.3. Substantive neutrality has no baseline from which to measure encouragement / discouragement of religion.

Aside from its inequity, substantive neutrality suffers from some fatal underlying conceptual problems. Douglas Laycock, himself a proponent of substantive neutrality, concedes that "substantive neutrality requires a baseline from which to measure encouragement and discouragement. What state of affairs is the background norm from which to judge whether religion has been encouraged or discouraged?" [Laycock, D, 1990]. This detail is actually quite problematical. As law professors Christopher Eisgruber and Lawrence Sager have noted, substantive neutrality "protect[s] a status quo that existed before government enacted some policy which has now become the subject of a constitutional challenge. What constitutional reason is there to privilege the status quo? After all, that status quo is itself constituted by a multitude of other laws, most of which exert influence upon religious choices, and none of which can claim, merely because they came first, to have some special relation to religious freedom" [Eisgruber, CL & Sager, LG, 1997].

As noted above, substantive neutrality supposedly ensures that individuals' religious choices proceed unaffected by government. However, closer analysis shows that this concept is completely unworkable in a practical sense. As law professors Christopher Eisgruber and Lawrence Sager have noted, "[i]t is all but impossible to imagine a world in which religious choice is 'unaffected by government'" [Eisgruber, CL & Sager, LG, 1997]. To illustrate the point, they use the example of the landmark 1990 case of *Employment Division, Department of Human Resources of Oregon v. Smith.* In this case, employees of an Oregon drug rehabilitation agency were fired because they used the illegal hallucinogen peyote as part of their Native American religious practice. When their subsequent applications for unemployment benefits were denied because they had been dismissed for work-related misconduct, they alleged infringement of their religious freedom. The case eventually came before the U.S. Supreme Court, which subsequently rejected their claim. To demonstrate the impossibility of insulating religious choices from government action, Eisgruber and Sager ask us to consider the following thought experiment: "Consider the facts of *Smith*: what choices about religion would Alfred Smith and Galen Black — the men who challenged Oregon's peyote law — have made in the absence of government? ... Certainly Smith and Black would not have to worry about criminal prosecution — without government, there are no crimes and no police. But Smith and Black did not file their case because they had been prosecuted; they complained because they had been fired from their jobs (as drug counselors) and denied unemployment benefits. In the absence of government, unemployment insurance schemes would either not exist or would be privately run; it is hard to speculate about their terms. In any event, Smith and Black might still lose their jobs by engaging in religiously motivated conduct: in the absence of government, their employer might fire them for any reason, because without government there are no anti-

discrimination laws ... [W]e might speculate about whether, in light of the noxious side effects of peyote, Smith and Black might have acted differently in the absence of government-regulated medical care, or whether, in the absence of government police protection, Smith and Black might have feared violent persecution on account of their religious practices" [Eisgruber, CL & Sager, LG, 1997]. As the above example clearly shows, substantive neutrality's goal of leaving religious choices "unaffected by government" is incoherent — almost every government action influences religious practices, and there is no logical baseline from which to measure government encouragement/discouragement.

12.4. Granting religious exemptions from generally applicable laws may not be the most "substantively neutral" course of action.

It is far from clear that granting religious exemptions from the law minimizes incentives or disincentives for people to change their religious beliefs. Douglas Laycock concedes misgivings about "cases where religious belief coincides too closely with self-interest, as in conscientious objection to military service or payment of taxes. ... If we grant exemptions from military service or general taxation, on the basis of conscientious objection, we will invariably encourage religion. I do not refer to the people willing to feign religious belief in order to claim the exemption. ... I refer instead to the people who honestly persuade themselves that they have come to hold the religious belief that entitles them to the exemption, or who feel pressured to adopt that belief. ... The problem for religious neutrality is that denying the exemption discourages belief in one set of people, and granting the exemption encourage religious belief in another, overlapping, set of people. It is no longer clear that that exemption is the more nearly neutral course. If we suspect that the original number of conscientious objectors is small, and that the number of non-objectors seriously tempted by the exemption is large, then denying the exemption appears to be more nearly neutral than granting it" [Laycock, D, 1990].

13. The judicial process for examining religious exemption claims has long-term negative effects on religious freedom.

13.1. The religious exemption process is biased against unfamiliar minority belief systems.

Legal scholars have noted that a judicial apparatus for granting religious exemptions actually has a corrosive effect on religious freedom. As law professor William Marshall has noted, "exemption analysis threatens free exercise [of religious] values because it requires courts to consider the legitimacy of the religious claim of the party seeking the exemption. Under the exemption analysis, the court must determine, at a definitional level, whether the belief at issue is 'religious'. Then it must determine whether the belief is sincerely held. As has been well-documented, both inquiries are not only awkward and counterproductive; they also threaten the values of religious freedom. ... Minority belief systems — not majority belief systems — will bear the brunt of the definition and sincerity inquiries. A court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous" [Marshall, WP, 1991]. After all, Marshall asks, "[h]ow can one judge the sincerity of an individual's belief without judging the reasonableness of the belief?" [Marshall, WP, 1990]. Marshall points out that the results of the process may be biased and arbitrary: "exemption analysis requires courts to engage in a highly problematic form of constitutional balancing. ... Exemption analysis ... requires a court to weigh the state interest against the interest of the narrower class comprised only of those seeking exemption. This leads to both

unpredictability in the process and potential inconsistency in result as each regulation may be subject to limitless challenges based upon the peculiar identity of the challenger" [Marshall, WP, 1991].

13.2. The religious exemption process forces judges to subjectively evaluate religious doctrine.

A judicial mechanism for analyzing religious exemption will invariably put judges in a position where they must make value judgments about the importance of religious practices. Political science professor Ellis West has pointed out that "in making decisions about claimed exemptions, courts are likely to become entangled with religion in the worst sort of way, namely by making judgments on doctrinal or theological issues. ... In order to determine whether the religious interests at issue outweigh the government interests, they must decide how religiously significant the threatened activity is" [West, E, 1989]. In fact, in *Lyng v. Northwest Indian Cemetery Protective Association*, Justice O'Connor of the U.S. Supreme Court expressed misgivings that a policy of weighing "[t]he value of every religious belief and practice that is said to be threatened by any government program ... offers the prospect of this Court holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, [it] ... would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach ... would cast the judiciary in a role that we were never intended to play" [*Lyng v. Northwest Indian Cemetery Protective Association*, 1988] (quoted in [West, E, 1989]). Even a proponent of religious exemptions, law professor Michael McConnell, is willing to concede this point: "If the government grants religious exemptions from its law it inevitably will be forced to draw lines that require judgments about religious beliefs. The long-term effect of repeated judgments by government officials about the nature and weight of religious beliefs might well be to interfere with the autonomy of religious life" [McConnell, MW, 1986].

The Supreme Court of Canada, to its credit, has recognized this danger. Writing for the majority of the Court in *Syndicat Northcrest v. Amselem*, Justice Iacobucci noted that "the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, 'obligation', precept, 'commandment', custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion" [*Syndicat Northcrest v. Amselem*, 2004]. In an attempt to avoid this problem, the Court adopted an individualized definition of "religious" in which a claimant's practice need not be recognized by religious officials or other members of a faith in order to trigger the right to religious freedom.

However, once the Charter's guarantee of religious freedom has been triggered, a court must still decide if there has been sufficient interference to represent a bona fide infringement of freedom of religion. Writing for the majority, Justice Iacobucci suggested that it "suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs *in a manner that is more than trivial or insubstantial*. At this stage, as a general matter, one can do no more than say that the context of each case must be examined to ascertain whether the interference is more than trivial or insubstantial" [*Syndicat Northcrest v. Amselem*, 2004]. Thus, this policy does not solve the underlying dilemma — although it bypasses the need to define what practices are "religious", it nonetheless provides for the prospect of a court maintaining that some sincerely held religious belief is only interfered with in a way that is "trivial or insubstantial", despite protestations to the contrary from the religious claimants. Nor does it avoid the implicit value judgment involved in balancing religious and state interests: in order to determine whether religious interests supercede government interests in any particular case, courts must judge the "importance" of a religious practice to adherents.

14. Conclusion.

The Canadian government and judiciary should adopt one of two coherent positions with respect to granting individuals an exemption from a neutral, generally applicable law or policy: (1) ideally, such exemptions should not be granted, irrespective of whether they are based on religion or not; or (2) barring that, such exemptions should be granted to accommodate all deeply held human commitments (including religion, culture, secular conscience, and deeply held political / philosophical / ethical / moral / metaphysical beliefs). Either way, the Canadian Secular Alliance believes that the status quo — of legally privileging religious beliefs over all other kinds of beliefs — is untenable.

The intent of this position is not to trivialize religious beliefs. Rather, it is to recognize that the state has an obligation to treat all deeply held human commitments equally, irrespective of whether those commitments happen to be rooted in religious belief or not. As law professors Christopher Eisgruber and Lawrence Sager have noted, “[t]o single out one of the ways that persons come to understand what is important in life, and grant those who choose that way a license to disregard legal norms that the rest of us are obliged to obey, is to defeat rather than fulfill our commitment to toleration. Yet that favoritism is precisely what the privileging view of religious liberty requires” [Eisgruber, CL & Sager, LG, 1994]. They point out that “the only sound conception of religious liberty is founded upon protecting religious exercise against persecution, discrimination, insensitivity, or hostility. There is no coherent normative basis for insisting that religious commitments receive better treatment than other, comparably serious commitments ...” [Eisgruber, CL & Sager, LG, 1997]. Simply put, “religion does not exhaust the commitments and passions that move human beings in deep and valuable ways” [Eisgruber, CL & Sager, LG, 1994].

15. Background note: Freedom of religion in Canada under the Canadian Charter of Rights and Freedoms.

The Canadian Charter of Rights and Freedoms applies to all government action in Canada, and courts are empowered to strike down laws that are in conflict with the fundamental freedoms that it enshrines. Sections 2(a) and 15(1) of the *Charter* provide for freedom of religion:

> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion ...
> ...
> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ... based on ... religion ...

Both sections 2(a) and 15(1) are subject to section 1 of the Charter, which allows state interests to supercede Charter rights provided that the government can prove sufficient justification:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The test for evaluating whether the government has met the onus under section 1 of the *Charter* is set out in the so-called *Oakes* test, which requires that:
(i) the infringing measure has an objective of sufficient importance to warrant overriding a *Charter* right; and
(ii) the means chosen are proportional to the objective, which requires the court to ensure that
(a) the means chosen are rationally connected to the objective,
(b) the means impair the right as little as possible, and
(c) there is proportionality between the effects of the infringing measure and the objective.

In its landmark cases on freedom of religion ([*R. v. Big M Drug Mart Ltd.*, 1985], [*Syndicat Northcrest v. Amselem*, 2004]), the Supreme Court of Canada ruled that:

- the essence of the concept of freedom of religion is the right to
  (i) entertain such religious beliefs as a person chooses;
  (ii) declare religious beliefs openly and without fear of hindrance or reprisal; and
  (iii) manifest religious belief by worship and practice or by teaching and dissemination.

- freedom of religion is subject to such limitations that are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.

- freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion
  (i) 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;
  (ii) regardless of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

- in order to establish that a claimant's freedom of religion has been infringed, it must be shown that
  (i) the claimant sincerely believes in a practice or belief that has a nexus with religion;

(ii) that the impugned conduct of a third party interferes with the claimant's ability to act in accordance with that practice or belief; and
(iii) the interference is more than trivial or insubstantial.

16. Background note: Freedom of religion in Canada under human rights laws.

In addition to the *Charter*, human rights laws have been passed at the federal, provincial, and territorial level. While the *Charter* only applies to government action, these human rights laws protect religious freedom in both the public and private sphere (including the workplace) and create agencies for investigating complaints ("human rights commissions") and for adjudicating complaints ("human rights tribunals").

The Canadian Human Rights Act and its provincial-level counterparts prohibit direct and adverse-effect discrimination based on religion. Section 2 of the Canadian Human Rights Act reads:

> 2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on ... religion ...

Human rights laws do not prohibit direct or adverse-effect discrimination based on non-religious beliefs. For example, in discussing the prohibition of discrimination based on "creed", the Ontario Human Rights Commission notes that "'[c]reed' is defined subjectively. The [Ontario Human Rights] *Code* protects personal religious beliefs, practices or observances, even if they are not essential elements of the creed, provided they are sincerely held. ... Creed does *not* include secular, moral or ethical beliefs or political convictions" [Ontario Human Rights Commission, 1996].

Human Rights laws provide exemptions for religious charities and not-for-profit organizations to engage in what would otherwise be discriminatory hiring practices, but which are reasonably necessary for the organization to serve its religious target population (reviewed in [White, SE & White, MF, 2005]). Organizations that primarily serve people of a particular religion can preferentially hire likewise-identified people, provided the religious membership is a legitimate qualification for the job. The exemption in the Ontario Human Rights Code is typical:

> 24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where, (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their ... creed ... employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment;

16.1. The duty to accommodate.

Under Canadian human rights laws, "discrimination" based on religion includes adverse-effect discrimination — uniform rules that have a disproportionate effect on religious adherents, even if such rules are neutral on their face and not intended to be discriminatory. The Canadian Human Rights Commission notes that "[t]he duty to accommodate involves eliminating or changing rules,

policies, practices and behaviours that discriminate against persons based on a group characteristic, such as ... religion ... . Sometimes, workplaces have rules, policies, practices and behaviours that apply equally to everyone, but which can create barriers based on an irrelevant group characteristic. For example, if you require that employees wear a certain uniform, you may create a barrier to someone whose religious practice requires a certain manner of dress. The duty to accommodate requires employers to identify and eliminate rules that have a discriminatory impact. Accommodation means changing the rule or practice to incorporate alternative arrangements that eliminate the discriminatory barriers" [Canadian Human Rights Commission, 2005]. In instances of adverse-effect discrimination, employers must accommodate the needs of religious adherents to the point of "undue hardship".

16.2. Undue hardship.

In addressing the concept of undue hardship, the Canadian Human Rights Commission notes that "[u]ndue hardship describes the limit, beyond which employers and service providers are not expected to accommodate. Undue hardship usually occurs when an employer or service provider cannot sustain the economic or efficiency costs of the accommodation. There is no formula for deciding what costs represent undue hardship and there is no precise judicial definition of 'undue hardship'. However, remember that 'undue hardship' implies that some hardship may be involved in the duty to accommodate. Employers and service providers are expected to exhaust all reasonable possibilities for accommodation before they can claim undue hardship. Section 15 (2) the Canadian Human Rights Act says undue hardship exists when 'accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost' ... All three of these factors — health, safety and cost — should be considered when determining if an accommodation creates an undue hardship. ... The Supreme Court has listed other factors that may also be considered: the type of work performed, the size of the workforce, the interchangeability of job duties, financial ability to accommodate, the impact on a collective agreement, and impact on employee morale. These factors will vary from case to case, as will the importance of each factor" [Canadian Human Rights Commission, 2005].

16.3. Bona fide occupational requirements.

In addressing the concept of bona fide occupational requirement (BFOR), the Canadian Human Rights Commission notes that a BFOR "is a standard or rule that is integral to carrying out the functions of a specific position. For a standard to be considered a BFOR, an employer has to establish that any accommodation or changes to the standard would create an undue hardship. ... When a standard is a BFOR, an employer is not expected to change it to accommodate an employee. However, to be as inclusive as possible, an employer should still explore whether some form of accommodation is possible anyhow" [Canadian Human Rights Commission, 2005]. The Canadian Human Rights Commission notes also notes that since the Meiorin case [*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999], the Supreme Court of Canada has "established a unified test for BFOR defences to be applied in all cases of direct or adverse effect discrimination. This unified test asks the following questions:

- Is there a standard, policy or practice that discriminates based on a prohibited ground?
- Did the employer adopt the standard, policy or practice for a purpose rationally connected to the performance of the job?
- Did the employer adopt the particular standard, policy or practice in an honest and good faith belief that it was necessary in order to fulfill that legitimate work-related purpose?

- Is the standard, policy or practice reasonably necessary in order to fulfill that legitimate work-related purpose?

This last element requires the employer to show that the standard, policy or practice adopted is the least discriminatory way to achieve the purpose or goal related to the job at issue. It includes the requirement to demonstrate that it is impossible to accommodate individual employees without imposing undue hardship on the employer" [Canadian Human Rights Commission, 2007].

16.4. Religious accommodation.

In addressing the specific issue of religious accommodation, the Canadian Human Rights Commission notes that "[m]ost requests for religious accommodation can be accepted without question as they involve employees who demonstrate a sincere belief in an established religion and involve well-known religious requirements, such as not working on their Sabbath, needing time to pray or not wearing head gear. An individual is not required to prove that his or her religious beliefs are valid, that is, that they are objectively recognized as valid by other members of the same religion or by religious officials. For this reason, it is not appropriate to ask an employee to provide evidence that a particular practice or belief is required by a religion. It is appropriate to inquire into the sincerity of the belief. Sincerity can be assessed by analyzing whether the alleged religious belief is consistent with the individual's other current religious practices. ... Under the Act, an employer should accommodate religious belief when an employee's religious beliefs or practices conflict with a workplace requirement, qualification or practice. The accommodation may modify a rule or exempt an employee from it. Dress codes, break policies, scheduling and recruitment procedures may affect some employees because of their religious beliefs, unless these employees are accommodated.

Dress codes
Workplaces frequently have rules about dress. Employees may have to wear protective equipment or a uniform, or there may be rules about head coverings. These rules may come into direct conflict with religious dress requirements creating a duty to accommodate the employee to the point of undue hardship. In most situations, the uniform can be modified to accommodate the employee's religious observances. If the uniform is used for health or safety reasons, however, employers must look for ways to alter the requirement or the protective clothing to maintain a reasonable level of safety while meeting the employee's religious requirement. ...

Break policies
Sometimes, an employee's regular work hours or specific duties conflict with their religious requirement to pray at particular times of the day. Employers have a duty to accommodate the employee's religious requirements. Possible accommodations include a modified break policy, flexible hours, a private area for devotions or both.

Non-Christian religious holidays
The employer has a duty to grant requests for religious leave unless doing so would cause undue hardship for the employer. Employees can do this by switching shifts, banking time, taking holiday leave or making other scheduling changes. The law is not clear as to whether an employer must give paid leave for religious holidays. In one case, involving teachers, the Supreme Court required that a school board give paid leave to Jewish teachers who required leave for their high holidays, but this may not apply in all employment situations. Some employers provide non-Christian employees with at least the same number of paid religious days as are provided for Christians. The Canada Labour Code, Part III requires employers to provide a paid day off to all employees for the Christian holidays of Christmas Day and Good Friday. Many collective agreements require employers to provide Easter Monday as a paid holiday. Requests for paid leave days for other religious holidays may be accommodated by providing floating leave days or unpaid leave.

Flexible scheduling
An employer can accommodate employees whose religious beliefs do not permit them to work certain hours or days of the week. For example, Seventh Day Adventists and Jews observe a Sabbath from sundown Friday to sundown Saturday. Flexible scheduling may include alternative arrival and departure times on the days when the person cannot work the entire period, or the employee can trade lunch times for early departure or staggered work hours. If the employee has no time off left, the employer should consider letting the employee make up time lost or use floating days off" [Canadian Human Rights Commission, 2005].

17. Background note: Selected Canadian jurisprudence dealing with religious freedom and accommodation.

For reviews of religious freedom and accommodation jurisprudence in Canada, see [Sossin, L, 2009], [Queen's University Human Rights Office, 2005], [Queen's University Human Rights Office, 2006], [Joanis, S, 2001], [Brown, DM, 2000], [Day, S & Brodsky, G, 1996]. A brief summary of significant cases is provided below.

17.1. *Wilson* (1982)

[*Re: Peterborough Civic Hospital and Ontario Nurses Association,* 1982]

Facts:
- The complainant was a registered nurse working in an intensive care unit, where one of her duties was hanging bags of blood for transfusions.
- After becoming a Jehovah's Witness and intensively studying the Bible, she came to the conclusion that "hanging blood" was an "unclean act" that was prohibited by God.
- Subsequently, she refused to hang blood and always asked other nurses to fulfill this duty for her.
- However, on one occasion, two of her colleagues refused to accommodate her, and the incident came to the attention of her supervisor.
- After further discussions in which the complainant confirmed that she would continue to refuse to hang blood, the hospital dismissed her for failing to carry out the duties of her job.

Judicial reasoning:
- The complainant was a Jehovah's Witness and sincerely believed that the Bible prohibited her from hanging blood. Thus, her refusal to hang blood was protected under human rights law.
- The hospital's requirement that every registered nurse hang blood discriminated adversely against the complainant, who could not hang blood for religious reasons.
- In an intensive care unit, it is a reasonable requirement that all nurses be able to hang blood — transfusions are frequent, the work environment is unpredictable, and there is a good chance that a nurse may find themselves alone in a critical situation where they would have to hang blood for a patient. Thus, this occupational requirement is reasonably necessary for the safety of patients in the hospital.
- However, these conditions do not exist in other non-emergency wards of the hospital. Thus, to accommodate the complainant, the hospital could have placed her in a ward other than the emergency and intensive care wards, and notified her colleagues that she had been exempted from the duty to hang blood.

Decision:
- An arbitrator ruled in favour of the complainant, finding that the hospital had illegally discriminated against her on the basis of religion.

17.2. *Caldwell* (1984)

[*Caldwell et al. v. Stuart et al.*, 1984]

Facts:
- The complainant was a Catholic teacher who had taught at St. Thomas Aquinas Catholic High School for 5 years when she was dismissed.
- The school administration terminated her upon learning that she had married a divorced man in a civil ceremony, thus violating 2 tenets of Catholicism: (1) mandatory marriage in a Catholic church, and (2) the prohibition on marrying divorced people.
- The Catholic school held that the complainant had violated a bona fide occupational requirement: that Catholic teachers must serve as a role model for Catholicism to their students by living in accordance with Church doctrine.
- The complainant filed a complaint of discrimination based on marital status and religion, and dismissal without good cause.

Judicial reasoning:
- A religious school has a special exemption under human rights law — as “a charitable, philanthropic, educational, fraternal, religious or social organization” whose target population is an identifiable religious group, it has the power to engage in preferential employment practices that would otherwise be considered discriminatory. Organizations that primarily serve people of a particular religion can preferentially hire likewise-identified people, provided the religious membership is a legitimate qualification for the job. However, not only does a Catholic school have the right to preferentially hire Catholic teachers over non-Catholic teachers, but it also has the right to hire “good Catholic” teachers — who faithfully practice church doctrine in their private lives — over ones who do not.
- The goal of the religious school is to indoctrinate students in the dogma of Catholicism, and the success of such indoctrination depends on the credibility of the indoctrinators. To be good role models, Catholic teachers can be legitimately required by the school to live according to church doctrine both inside and outside the classroom.

Decision:
- The Supreme Court ruled in favour of the Catholic school, ruling that adherence to religious doctrine in one’s private life can be a bona fide occupational requirement in a religious school.

17.3. *O'Malley* (1985)

[*Ontario Human Rights Commission v. Simpsons-Sears*, 1985]

Facts:
- The complainant was a full-time salesperson working at a Sears store when she became a member of the Seventh-day Adventist Church. Since Church doctrine required the observance of the Sabbath, she believed that she could not work from sunset Friday to sunset Saturday.
- However, as a full-time salesperson, she was required to work 2 Saturdays per month. Her supervisor advised her that if she could not work Saturday shifts, she would have to lose her full-time status.
- The complainant switched to part-time status, and eventually filed a complaint of discrimination on the basis of religion.

Judicial reasoning:
- The employer's policy of opening for business on Saturdays did not originate from any intent to discriminate against certain employees.

- However, even in the case of unintentional, adverse-effect discrimination on the basis of religion — i.e., resulting from a neutral policy that is rationally connected to job performance — employers have a duty to accommodate employees who are adversely affected. It is irrelevant whether the discrimination is intentional or not.
- Once a case of prima facie adverse-effect discrimination based on religion is established, it is the responsibility of the employer to prove that steps towards accommodation have been taken.
- Simpson-Sears had failed to present evidence establishing that it had attempted to accommodate the complainant.

Decision:
- The Supreme Court of Canada ruled in favour of the complainant, finding that Sears had illegally discriminated against her on the basis of religion, and ordered the employer to compensate her for lost wages.

17.4. *Bhinder* (1985)

[*Bhinder v. CN*, 1985]

Facts:
- The complainant was employed as a maintenance electrician by Canadian National Railway Company (C.N.) when the company introduced a policy requiring all employees working in the coach yard to wear a hard-hat for safety reasons.
- However, the complainant was a Sikh and believed that he was could not wear any covering on his head other than a turban.
- C.N. refused to make an exception for the complainant, arguing that the requirement to wear a hard-hat was a bona fide occupational requirement for safety reasons.

Judicial reasoning:
- The hard-hat policy was made in good faith, was rationally connected to the operation of the business, and was reasonably necessary to increase the safety of employees. Thus, it represented a bona fide occupational requirement.
- Although the policy was neutral and not adopted with intent to discriminate, it had the effect of adversely discriminating against the complainant on the basis of religion.
- Still, the policy was not a discriminatory practice because it was a bona fide occupational requirement.

Decision:
- The Supreme Court of Canada ruled in favour of the employer, finding that C.N. had not illegally discriminated against the complainant on the basis of religion. The majority of the Court held that when an occupational requirement is found to be bona fide, the employer has no duty to accommodate the employee. The minority of the Court disagreed, holding that even if an occupational requirement is found to be bona fide, the employer is still required to accommodate the adversely affected employee to the point of undue hardship.
- NOTE: The majority's position in this case was later repudiated by *Central Dairy Pool* (see below) and other subsequent rulings of the Supreme Court, which has ultimately adopted the minority's position. If this case were to come before the Court today, the employer would be required to show the impossibility of accommodating the complainant without incurring undue hardship.

17.5. *Roosma* (1985)

[*Roosma v. Ford Motor Co. of Canada No. 4*, 1985]

Facts:

- The two complainants were employees of Ford Motor Company when they became members of the Worldwide Church of God. Since Church doctrine required the observance of the Sabbath, they believed that they could not work from sunset Friday to sunset Saturday.
- However, the collective agreement between Ford and the Canadian Auto Workers Union (CAW) required them to work 21 Friday-night shifts per year.
- Despite their requests for accommodation, neither Ford nor the Union would exempt the complainants from their duty to work Friday-night shifts. After 3 years of escalating discipline, they were dismissed.

Judicial reasoning:
- The complainants' religious belief that they could not work on the Sabbath was sincere.
- By following the collective agreement requiring every employee to work 21 Friday-night shifts per year, both Ford and the CAW had discriminated against the complainants on the basis of religion.
- However, substantial evidence was presented that the complainants could not be accommodated without incurring undue hardship in terms of financial cost, safety, and employee morale:
(i) Replacing the complainants with workers from other parts of the assembly line was impractical — other employees were not adequately trained to perform the complainants' job, making them more prone to mistakes and accidents.
(ii) Replacing the complainants with other similarly trained workers who would work double-shifts was also impractical — employees working double shifts became fatigued, making them more prone to accidents and mistakes (and it was also necessary to pay them overtime wages).
(iii) Moving the complainants to another position in the plant was also impractical — it would entail displacing other employees with higher seniority from sought-after positions, thus seriously disrupting the collective agreement.

Decision:
- An Ontario Board of Inquiry ruled in favour of the employer and Union, finding that Ford and the CAW had not illegally discriminated against the complainant on the basis of religion because they had fulfilled their duty to accommodate to the point of undue hardship.

17.6. Central Dairy Pool (1990)

[*Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990]

Facts:
- The complainant was an employee of the Alberta Dairy Pool and a member of the Worldwide Church of God. When he asked his supervisor for a day off without pay to observe Easter Monday, he was refused.
- The supervisor stated that all employees were required to work on Mondays in order to process the large amount of milk collected over the weekend — if not, the milk would spoil.
- When the complainant failed to show up for work on Easter Monday, he was dismissed.

Judicial reasoning:
- The Monday-work policy was made in good faith, and was rationally connected to the operation of the business.
- Although the policy was neutral and not adopted with intent to discriminate, it had the effect of adversely discriminating against the complainant on the basis of religion.
- The employer did not provide sufficient evidence that accommodating the complainant would incur undue hardship.
- The Court noted that factors relevant to whether hardship is "undue" include "financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employers operation may influence the assessment of

whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations". The Court also noted that inconvenience to other employees is the "price to pay for religious freedom" and does not amount to undue hardship.

Decision:
- The Supreme Court of Canada ruled in favour of the complainant, finding that the employer had illegally discriminated against him on the basis of religion. In doing so, the Court repudiated its ruling in *Bhinder* (see above). Here, the Court held that even if an occupational requirement is found to be bona fide, the employer is still required to accommodate the adversely affected employee to the point of undue hardship.

17.7. *Kurvits* (1991)

[*Kurvits v. Canada (Treasury Board)*, 1991]

Facts:
- The complainant was a member of the Baptist Marathon Church and employed by the Treasury Board of Canada.
- Because the Marathon Baptist Church forbade its members from having Union affiliation, the complainant asked to divert his Union dues to a charitable organization. This was consistent with the collective agreement between the Treasury Board and the public sector Union, which contained a religious exemption provision for employees belonging to a church whose tenets forbade Union affiliation — such employees were allowed to make a contribution equal to the amount of dues to a charitable organization of their choice instead.
- One of the conditions of the exemption was that the employee's church be a registered charity under the Income Tax Act. (Apparently, this requirement was to prevent employees from creating fictitious churches to avoid paying union dues.) However, the Marathon Baptist Church was not registered as a charity under the Income Tax Act, so the complainant's request to divert his Union dues was denied.
- In fact, the Marathon Baptist Church was not registered as a charity under the Income Tax Act because its religious doctrine prohibited it from becoming associated with the state in any way. Still, the employer and Union refused to make an exception.

Judicial reasoning:
- Although the policy of requiring that an employee's church be a registered charity under the Income Tax Act was neutral and not adopted with intent to discriminate, it had the effect of adversely discriminating against the complainant on the basis of religion. His church, due to its religious doctrine, believed that it could not become a registered charity under the Income Tax Act.
- The employer did not provide sufficient evidence that accommodating the complainant would incur undue hardship.

Decision:
- The Canadian Human Rights Tribunal ruled in favour of the complainant, finding that the employer had illegally discriminated against him on the basis of religion. The Tribunal also ordered the employer and the Union to amend the collective agreement to eliminate the discriminatory provision, and to pay $500 each for damage to the complainant's dignity caused by the discrimination.

17.8. *Moore* (1992)

[*Moore v. British Columbia (Ministry of Social Services)*, 1992]

Facts:

- The complainant was a Roman Catholic and employed by the B.C. Ministry of Social Services.
- Because facilitating abortion was contrary to the Catholic religious doctrine, she refused to grant a request for financial assistance to have an abortion.
- Despite her supervisor's order to grant the award, and repeated warnings that failure to carry out this duty of her job would lead to her dismissal, the complainant continued to refuse to authorize financial assistance for abortions.
- After she was dismissed, the complainant filed a complaint of discrimination on the basis of religion.

Judicial reasoning:
- Processing requests for financial assistance for abortions is a part of the job duties of the complainant in her role as a public servant.
- Although the job requirement was neutral and not adopted with intent to discriminate, it had the effect of adversely discriminating against the complainant on the basis of religion.
- The Ministry of Social Services failed to present evidence establishing that it had attempted to accommodate the complainant to the point of undue hardship. The Ministry argued that accommodating the complainant's Catholic beliefs would have been "detrimental to service delivery", because it would have entailed exempting her from all cases involving abortions, sterilization and contraception, and reassigning them to another employee who was not always in the office. However, this was ruled to be "impressionistic" evidence, whereas "concrete" evidence was needed to prove undue hardship.

Decision:
- The B.C. Council of Human Rights ruled in favour of the complainant, finding that the employer had illegally discriminated against her on the basis of religion. (Although irrelevant to the finding of discrimination, the Council also noted that in order to fulfill her duty as a public servant, the complainant should have exempted herself from handling the abortion file immediately so another employee could have processed it.)

17.9. *Renaud* (1992)

[*Central Okanagan School District No. 23 v. Renaud*, 1992]

Facts:
- The complainant was a Seventh Day Adventist and employed as a custodian for the Central Okanagan School District No. 23.
- He was required to work evening shifts from Monday to Friday. However, since Church doctrine required the observance of the Sabbath, he believed that he could not work from sunset Friday to sunset Saturday.
- His employer attempted to create a new Sunday-to-Thursday shift to accommodate him. However, this involved an exception to the collective agreement negotiated with the Union. When approached, the Union refused to allow the creation of the new shift for the complainant, and threatened to file a grievance if the employer proceeded. The employer backed down.
- When the complainant was dismissed for refusing to work Friday-night shifts, he filed a complaint of discrimination on the basis of religion.

Judicial reasoning:
- Although the Monday-to-Friday work schedule was neutral and not adopted with intent to discriminate, it had the effect of adversely discriminating against the complainant on the basis of religion.
- The employer failed to present evidence establishing that it had attempted to accommodate the complainant to the point of undue hardship. The threat of a grievance from the Union does not constitute undue hardship. Although violation of a collective agreement that significantly disrupts

other employees could theoretically constitute undue hardship, in this case the impact on other employees was deemed to be only a minor inconvenience.
- The Union was also found to have discriminated against the complainant in 2 ways: (1) along with the employer, it had formulated a work schedule that adversely discriminated against him on the basis of religion; and (2) it refused to support the employer's attempt to accommodate him.

Decision:
- The Supreme Court of Canada ruled in favour of the complainant, finding that the employer and Union had illegally discriminated against him on the basis of religion. The Court found that both Unions and employers have a duty to accommodate to the point of undue hardship, regardless of the terms of a negotiated collective agreement.

17.10. *Bergevin* (1994)

[*Commission scolaire régionale de Chambly v. Bergevin*, 1994]

Facts:
- The complainants were 3 Jewish teachers employed by a Quebec school board.
- The employer granted them a day off to celebrate Yom Kippur, but without pay. The teachers' union filed a grievance seeking reimbursement for the day's pay.

Judicial reasoning:
- Although the school calendar was neutral on its face, it had the effect of adversely discriminating against the complainants on the basis of religion. Because of their religious beliefs, the complainants had to take a day off work without pay to observe their religious holy days, while the calendar treated Christian holy days as general holidays from work.
- In granting the Jewish teachers a day off work without pay to celebrate Yom Kippur, the school board did not meet its duty to accommodate to the point of undue hardship. The Court ruled that the school board should have permitted them to take the day off *with* pay, because the collective agreement made allowances for days off with pay for a "valid reason", and observance of a holy day can be considered a valid reason.

Decision:
- The Supreme Court of Canada ruled in favour of the complainants, finding that the employer had illegally discriminated against them on the basis of religion.

17.11. Robert-Giffard (1997)

[*Commission des droits de la personne et des droits de la jeunesse (Deschênes) c. Centre hospitalier Robert-Giffard*, 1997]

Facts:
- The complainant was a member of the World Wide Church of God and employed as a part-time cook and cook's assistant by the Centre hospitalier Robert-Giffard
- Although the complainant was required to work Friday evening shifts, Church doctrine required the observance of the Sabbath, and he believed that he could not work from sunset Friday to sunset Saturday.
- For 10 years, the employer accommodated the complainant by letting him go home early on Fridays, provided he took shortened breaks during the week.
- When the complainant was promoted to a full-time position as cook's assistant, he advised the employer that he could not work Friday evenings. The promotion was subsequently withdrawn and offered to another employee with less seniority but who could fulfill the Friday-evening work requirement.

- When the complainant protested, the employer withdrew the promotion from the other employee and tried to formulate an accommodation for the complainant. However, the other employee and his Union threatened to file a grievance, and the employer backed down. When the employer gave up its efforts to accommodate him, the complainant filed a complaint of discrimination on the basis of religion.

Judicial reasoning:
- Although the Friday evening work requirement was neutral and not adopted with intent to discriminate, it had the effect of adversely discriminating against the complainant on the basis of religion.
- The employer failed to present evidence establishing that it had attempted to accommodate the complainant to the point of undue hardship. The threat of a Union grievance does not constitute undue hardship, and accommodating the complainant would have caused only relatively minor financial cost (which also fails to constitute undue hardship).

Decision:
- Following the Supreme Court of Canada's ruling in *Renaud* (see above), the Quebec Human Rights Tribunal ruled in favour of the complainant, finding that both the employer and Union had illegally discriminated against him on the basis of religion.

17.12. *Schroen* (1999)

[*Schroen v. Steinbach Bible College,* 1999]

Facts:
- The complainant was an accounting clerk at Steinbach Bible College, a Mennonite institution, who was dismissed when the school discovered she was a Mormon.
- Although the complainant had been a member of the Mennonite church until the age of 18, she had since converted to the Mormon faith. However, in her application and interview for the accounting clerk job, she stated that she had no objections to the College's Statement of Faith, and gave the impression that she supported the college's objective of training college students “in nurturing faith relations and for ministry work with an evangelical perspective".

Judicial reasoning:
- This was a prima facie case of adverse-effect discrimination, insofar as the complainant was dismissed because of her religion. However, a religious school has a special exemption under human rights law — as “a charitable, philanthropic, educational, fraternal, religious or social organization" whose target population is an identifiable religious group, it has the power to engage in preferential employment practices that would otherwise be considered discriminatory. Organizations that primarily serve people of a particular religion can preferentially hire likewise-identified people, provided the religious membership is a legitimate qualification for the job.
- The complainant was employed as an accounting clerk as opposed to a teacher, and did not directly teach students. However, even as a staff member, the complainant was expected to interact with students, participate in school functions, invite students to her home, and talk to students about her Mennonite faith. The school was clear in requiring all faculty and staff to fulfill its objectives by "sharing faith stories, attending regular prayer meetings and talking to the students about the Christian values being promoted at the school".

Decision:
- The Manitoba Board of Adjudication ruled in favour of the Mennonite school, ruling that adherence to the Mennonite faith was a bona fide occupational requirement for employment at the religious school, even for a non-teaching position. The Board ruled that the complainant had willfully deceived

the employer, because "her original application, resume, interview and her Statement of Faith were all calculated to mislead and conceal the fact that she was of the Mormon faith".

17.13. *Dhillon* (1999)

[*Dhillon v. Ministry of Transportation and Highways*, 1999]

Facts:
- The complainant was a Sikh who wore a turban at all times, as required by Sikh religious doctrine.
- When he applied to take a motorcycle-license driving test, the B.C. Motor Vehicles Division refused to administer the test because he refused to wear a helmet as required by s. 218 of the Motor Vehicle Act.
- The complainant filed a complaint of discrimination on the basis of religion.

Judicial reasoning:
- The complainant sincerely believed that, for religious reasons, he must wear a turban at all times. It was essentially impossible to wear a helmet over a turban.
- Although the helmet requirement was neutral and not adopted with intent to discriminate, it had the effect of adversely discriminating against the complainant on the basis of religion.
- Although the helmet policy had been adopted in good faith and was rationally connected to the goal of protecting public safety, it was not reasonably necessary. In coming to this conclusion, the Tribunal found that: (1) only Sikhs wearing turbans would bear the risk of injury from riding without a helmet; (2) based on statistical analysis, allowing Sikhs to drive motorcycles helmet-free would produce only 13 additional brain injuries per year in B.C. Neither the safety nor the cost concerns amounted to undue hardship.

Decision:
- The B.C. Human Rights Tribunal ruled in favour of the complainant, finding that the B.C. Motor Vehicles Division had illegally discriminated against him on the basis of religion, and ordered the Division to administer the motorcycle-license driving test in the absence of a helmet.

17.14. *Nijjar* (1999)

[*Nijjar v. Canada 3000 Airlines Ltd*., 1999]

Facts:
- The complainant was a Sikh who normally carried a ceremonial dagger (kirpan), as required by Sikh religious doctrine.
- Although he typically carried a 11.5-inch dagger, when traveling by airplane he wore a 3.5-inch dagger in order to comply with Transport Canada's "four inch rule" (limiting blades carried onto aircraft in Canada to less than 4 inches in length).
- However, Canada 3000 had a more stringent policy, which prohibited passengers from carrying any object more potentially dangerous than the on-board eating utensils.
- When the complainant was denied entry to a Canada 3000 flight because of his 3.5-inch kirpan, he filed a complaint of discrimination on the basis of religion.

Judicial reasoning:
- Evidence was presented that Khalsa Sikhism was a legitimate religion, whose code of conduct (the Rahit) required members to wear 5 religious symbols, including a ceremonial dagger (kirpan).
- However, the Tribunal found that the complainant's refusal to wear an innocuous kirpan (that would meet Canada 3000's safety policy) was based on personal preference rather than religious doctrine — the Rahit did not specify a minimum size for the kirpan, nor how sharp it must be. Thus, the complainant could still have complied with Canada 3000's safety policy.

- The Tribunal found that Canada 3000's safety policy was rationally connected to the business of air travel, had been adopted in good faith, and was reasonably necessary. Thus, it was a bona fide requirement.
- Furthermore, the Tribunal found that accommodating the complainant would constitute undue hardship. In coming to this conclusion, the Tribunal found that: (1) although the presence of 3.5-inch kirpans would be unlikely to result in a large increase in injuries on Canada 3000 flights, those that did occur had the potential to be very severe or fatal; and (2) the risk of injury to other passengers was significant, since it was equally likely (if not more likely) that others would be injured if a kirpan were used during an on-board altercation.

Decision:
- The Canada Human Rights Tribunal ruled in favour of the airline, finding that it could not accommodate the complainant without incurring undue hardship.

17.15. *Pannu* (2000)

[*Pannu v. Skeena Cellulose Inc.*, 2000]

Facts:
- The complainant was a Sikh who was employed as a recaust operator in a pulp mill operated by Skeena Cellulose.
- As recaust operator, the complainant was in charge of the area where poisonous gases from elsewhere in the mill were burned off in 2000-degree recaust kilns. In the event of a poisonous gas leak, he was responsible for shutting down the recaust area equipment and ensuring that others evacuated. To carry out this duty without losing consciousness, he would have to wear a self-contained breathing apparatus that formed a protective seal around the mouth and nose. Regulations required that any apparatus-wearer be clean-shaven because facial hair prevented the mask from sealing with the face properly.
- However, as a practicing Sikh, the complainant believed that he must wear a beard, and thus could not be clean-shaven to use the self-contained breathing apparatus properly. When he refused to shave his beard, the employer dismissed him. He then filed a complaint of discrimination on the basis of religion.

Judicial reasoning:
- The Tribunal found that the policy of ensuring that the employee responsible for shutting down the recaust area is clean-shaven was rationally connected to the business, had been adopted in good faith, and was reasonably necessary. Bearded workers could not use the self-contained breathing apparatus safely, nor was there any alternative respiratory equipment available. Ensuring that the recaust operator did not lose consciousness from poisonous gas was not only necessary for his own safety, but was also necessary for the safety of all workers in the area.
- Furthermore, the Tribunal found that accommodating the complainant would constitute undue hardship. In coming to this conclusion, the Tribunal found that: (1) the probability of a poisonous gas leak was significant; and (2) reassigning the safety duty to another employee would have meant enlisting an employee with significantly less experience, thereby risking the safety of all workers in the area.

Decision:
- The B.C. Human Rights Tribunal ruled in favour of the employer, finding that it could not accommodate the complainant without incurring undue hardship.

17.16. *Brockie* (2000)

[*Brillinger v. Brockie*, 2000]

Facts:
- In a commercial transaction, Ray Brillinger (and the Canadian Lesbian and Gay Archives) sought to have material printed by Scott Brockie (and Imaging Excellence Inc.).
- However, Brockie was a Born-Again Christian, who refused to offer his commercial services when he discovered that the client was a homosexual organization. He stated that his religious beliefs prohibited him from providing printing services to homosexuals or homosexual organizations.
- A Board of Inquiry hearing was called to determine whether a remedial order could be issued against Brockie to compel him to provide commercial printing services to Brillinger.

Judicial reasoning:
- The Supreme Court of Canada has ruled that the freedom of religion guaranteed by the Canadian Charter of Rights and Freedoms is "subject to such limitations as are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others". The Board found that the right to access a commercial service available to the general public without being refused on the basis of sexual orientation is a fundamental right that may limit freedom of religion.
- The Board found that a remedial order issued against Brockie to compel him to provide commercial printing services to Brillinger satisfied the *Oakes* test, and was thus constitutional. The *Oakes* test requires that the remedy (1) have an objective of sufficient importance to warrant overriding a Charter right; and (2) employ means proportional to the objective. The second condition requires that (i) the means chosen are rationally connected to the objective; (ii) the means impair the right as little as possible; and (iii) there is proportionality between the effects of the remedy and the objective.

Decision:
- The Ontario Board of Inquiry ruled in favour of Brillinger (and the Canadian Lesbian and Gay Archives), finding that Brockie (and Imaging Excellence Inc.) had illegally discriminated against him on the basis of sexual orientation. Although compelling Brockie to provide printing services to Brillinger infringed Brockie’s right to freedom of religion, it was reasonably necessary to ensure that gays and lesbians are not denied commercial services otherwise available to the general public.
- NOTE: This decision was upheld by the Ontario Divisional Court upon appeal in 2002, but the remedial order was modified such that Brockie would only be required to print neutral material (letterhead and envelopes) that did not conflict with his religious beliefs, and not “gay-positive” material.

17.17. *Jones* (2001)

[*Jones v. C.H.E. Pharmacy Inc. et al.*, 2001]

Facts:
- The complainant was a Jehovah's Witness who was employed as a customer service representative at Shoppers Drug Mart.
- As a Jehovah's Witness, the complainant did not observe Christmas. He believed that although his faith permitted him to stock store shelves with Christmas merchandise, he could not hang Christmas decorations.
- When the complainant was asked by his manager to set out poinsettias, he refused. Later that day, the owner of the store instructed him to set out the poinsettias or face dismissal.
- When the complainant again refused and was subsequently dismissed, he filed a complaint of discrimination on the basis of religion.

Judicial reasoning:
- The complainant sincerely believed that his faith prohibited him from displaying Christmas decorations.

- The employer claimed that the task of setting out poinsettias did not infringe upon the complainant's religious freedom, because the flowers were merchandise (which his religion allowed him to stock) and not decorations (which his religion prevented him from displaying). However, the Tribunal found that although the flowers were for sale (i.e., they were merchandise), they were also festive and set out with the intent to attract customers into the store (i.e. they were also decorations).
- The Tribunal found that the employer did not accommodate the complainant to the point of undue hardship — in fact, setting out the flowers was a trivial task that could easily have been performed by another employee in a few minutes.

Decision:
- The B.C. Human Rights Tribunal ruled in favour of the complainant, finding that the employer had illegally discriminated against him on the basis of religion.

17.18. *Trinity* (2001)

[*Trinity Western University v. College of Teachers*, 2001]

Facts:
- Trinity Western University (TWU), a private religious institution associated with the Evangelical Free Church of Canada, was denied accreditation of the 5th year of its Teacher Training Program by the B.C. College of Teachers (BCCT).
- The BCCT reasoned that TWU graduates would not be adequately prepared to teach in B.C.'s public school system because TWU students signed a Community Standards Contract stating their denunciation of homosexual behavior, which is condemned as a sin in the Bible.
- TWU argued that the BCCT had infringed its right to freedom of religion.

Judicial reasoning:
- The public school system has a legal obligation to provide a discrimination-free environment. Thus, it was legitimate for the BCCT to assess potentially discriminatory practices in evaluating TWU's Teacher Training Program.
- However, the fact that TWU graduates signed the university's Community Standards Contract denouncing homosexuality was insufficient evidence to conclude that they would behave in a discriminatory manner towards homosexual students in the future. The BCCT was unjustified in assuming that the religious belief that homosexual behavior is sinful necessarily leads to discriminatory conduct against homosexual students.

Decision:
- The B.C. Supreme Court ruled in favour of Trinity Western University, and ordered the B.C. College of Teachers to accredit TWU's Teacher Training Program. This decision was subsequently upheld by the B.C. Court of Appeal and the Supreme Court of Canada.

17.19. *Amselem* (2004)

[*Syndicat Northcrest v. Amselem*, 2004]

Facts:
- The complainants were 5 Orthodox Jewish residents of a high-end condominium complex who erected an open-roofed hut (succah) on their balconies during the 9-day Jewish religious festival of Succot.
- However, the condominium complex's by-laws prohibited constructions on balconies. The condominium Syndicate attempted to accommodate the residents by proposing the construction of a communal succah in the complex's gardens, to be built at all residents' expense.

- The residents refused the accommodation, arguing that their personal religious beliefs required that the succah be built on their balconies, and that the order to remove the succahs infringed their right to freedom of religion.

Judicial reasoning:
- The Supreme Court ruled that a religious belief or practice should be constitutionally protected if: (1) it triggers religious freedom; (2) it is interfered with in a non-trivial way; and (3) it does not interfere, in a non-trivial way, with the fundamental rights and freedoms of others.
- However, the Supreme Court was split on whether the complainants' beliefs in this case satisfied the above criteria.
- According to the majority of the Court: (1) Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Therefore, in this case, freedom of religion is triggered because the belief of the 5 claimants was religious and sincerely held. (2) The proposed accommodation (a communal succah in the condominium complex garden) impeded the claimants' ability to practice their religion according to their personal beliefs (by building a personal succah on their own balcony), and therefore constituted non-trivial interference with their religious freedom. (3) Although the presence of the succahs on the balconies reduced the property value of the condominium complex, this was only for 9 days per year. This constituted trivial interference with the rights of others, compared with the violation of the claimants' right to religious freedom.
- According to the minority of the Court: (1) Only objective religious tenets that must be obeyed by all members of a religious group (i.e., the obligation to dwell in a succah during Succot) and not subjective personal religious beliefs (the obligation to build a succah on one's own balcony) trigger freedom of religion. (2) The condominium Syndicate fulfilled its duty to accommodate the claimants when it proposed the construction of a communal succah in the condominium complex garden. Local Jewish religious authorities viewed this as a commendable solution, and the claimants were being unreasonable in refusing it. (3) The presence of succahs on the balconies of this high-end condominium complex greatly reduced its property value and also represented a safety hazard. This constituted non-trivial interference with the rights of others.

Decision:
- The Supreme Court of Canada ruled in favour of the complainants, finding that the condominium complex had illegally violated their right to freedom of religion.

17.20. *Multani* (2006)

[*Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006]

Facts:
- The complainant was a 13-year-old orthodox Sikh student at a Quebec school, who accidentally dropped his ceremonial dagger (kirpan) in the schoolyard.
- Following this incident, the school board authorized the student to wear his kirpan to school provided that it was sealed securely inside his clothing. The student and his parents agreed to this condition.
- However, the school board's governing board and Council of School Commissioners did not accept this arrangement, arguing that the school's code of conduct prohibited all weapons on school grounds. They required that the student wear a harmless, symbolic kirpan made of plastic or wood.
- The student, however, did not accept this accommodation and refused to wear a kirpan made of any material other than metal.
- After being heard in several lower courts, this case eventually came before the Supreme Court of Canada.

Judicial reasoning:

- The Supreme Court ruled that the student's refusal to wear a kirpan made of any material other than metal was based on a sincere belief motivated by religion. Following the decision in *Amselem* (see above), the Court reiterated that "the fact that other Sikhs accept such a compromise [wearing a plastic or wooden kirpan] is not relevant". Prohibiting the student from wearing a metal kirpan constituted non-trivial interference with his right to freedom of religion.
- Furthermore, the Court found that this interference could not be justified by section 1 of the Charter. The Court ruled that: (1) The objective of ensuring safety in schools was sufficiently important to warrant overriding a constitutionally protected freedom. (2) The ban on weapons was rationally connected to this objective. (3) However, the assertion that the presence of kirpans in schools would make them unsafe was unsupported by evidence, and constitutionally protected freedoms cannot be infringed based on a hypothetical fear. Also, the argument that the kirpan was a symbol of violence was "disrespectful to believers in the Sikh religion and [did] not take into account Canadian values based on multiculturalism".

Decision:
- The Supreme Court of Canada ruled in favour of the complainant, finding that the Council of School Commissioners' decision had illegally violated his right to freedom of religion.

17.21. *Black* (2007)

[*407 ETR Concession Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW-Canada, Local 414*, 2007]

Facts:
- In an effort to address security concerns, the employer acquired biometric scanning units at their facility. The biometric scanner imaged an individual's hand to produce a 3-dimensional image by taking 91 measurements of the hand's length, width, thickness and surface area, and then converting them to 9-digit number. This number was stored in a database and used to identify employees. The system did not mark, photograph, or X-ray the individual, and no fingerprint or palm-print was captured.
- 6 employees objected to enrolling in the system on religious grounds. They believed that using measurements of portions of the body for identification purposes would impose the "Mark of the Beast" on them and condemn them to eternal damnation. The employees were members of the Pentecostal church and their beliefs were based upon literal interpretation of the Book of Revelation of St. John the Divine found in the New Testament, which advises the faithful not to take the "Mark of the Beast" on their foreheads or right hands. These beliefs were not mandatory precepts of the Pentecostal Church, but subjective personal interpretations of scripture.
- The employer attempted to accommodate the employees by proposing they use their left hands instead than their right hands, or that they use tight-fitting gloves instead of their bare hands.
- 3 employees accepted these accommodations, but 3 others rejected them and still refused to enroll in the system. The employer subjected these 3 employees to escalating discipline, ultimately dismissing them.
- Their union filed grievances arguing that the employees had a right to be free from discrimination based on religion, and to be accommodated to the point of undue hardship.

Judicial reasoning:
- Following the reasoning of the majority of the Supreme Court of Canada in *Amselem*, (see above) the arbitrator ruled that in order for the employees' beliefs to be protected under the Ontario Human Rights Code, the employees needed only demonstrate a sincerely held belief that had a nexus to religion. It was irrelevant that the employees' beliefs were not shared by other members of the same religion, or that the beliefs were not accepted Church doctrine.

- In examining whether the biometric scanning system was a bona fide occupational requirement, the arbitrator found that the scanning system was adopted in good faith for a purpose rationally connected to the business.
- However, the arbitrator found that the employer had not accommodated the employees to the point of undue hardship. After the employees refused the employer's initial proposals for accommodation, the employer did not explore further alternatives. It did not attempt to accommodate the employees by considering if they could be relocated, whether their work could be performed with less movement within the building, or whether they could use the security system with swipe cards and passwords.

Decision:
- An Ontario Labour Arbitrator ruled in favour of the complainants, finding that the employer had illegally discriminated against them on the basis of religion, and failed to accommodate them to the point of undue hardship.

17.22. *Badesha* (2008)

[*R. v. Badesha*, 2008]

Facts:
- The complainant was a Sikh who wore a turban at all times, as required by Sikh religious doctrine.
- However, section 104(1) of Ontario's Highway Traffic Act requires individuals to wear an approved helmet while operating a motorcycle. The complainant was charged with violating the motorcycle helmet law for riding without a helmet.
- The complainant challenged the law, arguing that it: (1) violated his right to freedom of religion under the Canadian Charter of Rights and Freedoms; (2) violated his right to equality under the Charter; and (3) violated his right to be free from discrimination under the Ontario Human Rights Code.

Judicial reasoning:
- The Court found that the motorcycle helmet law infringed the complainant's freedom of religion. However, it found that the helmet law satisfied the requirements of the *Oakes* test and could be justified as a reasonable limit on freedom of religion under section 1 of the Charter. The Court found that: (1) the law was rationally connected to the objective of highway safety; (2) its impairment of the complainant's religious freedom was minimal; and (3) there was no reasonable way to accommodate the complainant's religious practice without abandoning an important standard required to protect public safety.

Decision:
- The Ontario Court of Justice ruled in favour of the government, finding that it could not accommodate the complainant short of undue hardship without abandoning its interest in public safety.
- NOTE: This decision appears to repudiate the ruling in *Dhillon* (see above).

17.23. Hutterian Brethren (2009)

[*Alberta v. Hutterian Brethren of Wilson Colony*, 2009]

Facts:
- The Hutterites are a small Christian sect who live an agrarian lifestyle in isolated rural colonies. Some believe that the Bible's 2nd commandment ("you shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath") prohibits them from voluntarily having their photographs taken.

- Ever since the Alberta government had started issuing drivers licenses with photographs in 1973, it had allowed an exemption for those who objected based on their religious beliefs. However, the government revoked the photo exemption in 2003, arguing that it needed to maintain an electronic database of photos to combat identity theft.
- 2 Hutterite colonies challenged the law, arguing that it infringed their right to freedom of religion under the Canadian Charter of Rights and Freedoms.
- After being heard in several lower courts, this case eventually came before the Supreme Court of Canada.

Judicial reasoning:
- The Court found that the photo requirement infringed the complainants' freedom of religion. However, it also found that the law could be justified as a reasonable limit on freedom of religion under section 1 of the Charter. The government's pressing and substantial interest in minimizing identity theft outweighed the negative impact on the freedom of religion of Hutterite colony members.
- The Court noted that "it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion. The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver's licence must permit a photo to be taken for the photo identification data bank. Driving automobiles on highways is not a right, but a privilege. While most adult citizens hold driver's licences, many do not, for a variety of reasons." The Court reasoned that although hiring non-Hutterite drivers would impose an economic cost on those Hutterites who chose not to get a driver's license themselves, there was no evidence that this cost would be prohibitive.
- The Court noted that: "The Charter guarantees freedom of religion but does not indemnify practitioners against all costs incident to the practice of religion. Many religious practices entail costs which society reasonably expects the adherents to bear. The inability to access conditional benefits or privileges conferred by law may be among such costs. A limit on the right that exacts a cost, but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue, will be less serious than a limit that effectively deprives the adherent of such choice."
- On a general level, the Court noted that: "By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe Charter rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief."

Decision:
- The Supreme Court of Canada ruled in favour of the government, finding that the universal photo requirement was a reasonable infringement of freedom of religion justified under section 1 of the Charter.

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