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A Test for Freedom of Conscience under the Canadian Charter of Rights and Freedoms: Regulating and Litigating Conscientious Refusals in Health Care

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A TEST FOR FREEDOM OF CONSCIENCE UNDER THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*: REGULATING AND LITIGATING CONSCIENTIOUS REFUSALS IN HEALTH CARE

*Jocelyn Downie & Françoise Baylis**

Conscientious refusal to provide insured health care services is a significant point of controversy in Canada, especially in reproductive medicine and end-of-life care. Some provincial and territorial legislatures have developed legislation or regulations, and some professional regulatory bodies have developed policies or guidelines, to better reconcile tensions between health care professionals' conscience and patients' access to health care services. As other groups

L'objection de conscience de fournir des services de soins de santé assurés est un point de controverse important au Canada, surtout en médecine reproductive et en soins de fin de vie. Certains corps législatifs provinciaux et territoriaux ont développé de la législation ou des règlements et certains organismes de réglementation professionnelle ont développé des politiques ou des lignes directrices afin de réconcilier plus facilement les tensions entre la conscience

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attempt to draft standards and as challenges to existing standards head to court, the fact that the meaning of “freedom of conscience” under the *Canadian Charter of Rights and Freedoms* is not yet settled will become ever more problematic. In this paper, we review the case law and legislative history relating to freedom of conscience. Having shown that the nature and scope of the freedom of conscience provision cannot be settled by either review, we turn to philosophy for insights with respect to the contemporary purpose of protecting freedom of conscience. On this basis, we offer a substantive test for freedom of conscience under the *Charter*. We do so for two reasons. First, we seek to assist those responsible for regulating the conduct of health care professionals in designing and implementing laws and policies that protect and promote the health needs and interests of patients without unjustifiably limiting the *Charter* conscience rights of health care professionals. Second, we seek to inform the analysis of future freedom of conscience *Charter* cases in response to the decriminalization of medical assistance in dying and the licensing of the drugs used for medical abortion.

des professionnels de la santé et l'accès des patients aux services de soins de santé. Alors que d'autres groupes tentent de rédiger des standards et alors que les contestations constitutionnelles des standards existants se rendent en cour, le fait que le sens de la « liberté de conscience » sous la *Charte canadienne des droits et libertés* ne soit pas encore déterminé deviendra d'autant plus problématique. Dans cet article, nous révisons la jurisprudence et le contexte législatif relatifs à la liberté de conscience. Ayant montré que la nature et la portée de la liberté de conscience ne peuvent être établies par l'une ou l'autre des révisions, nous nous tournons vers la philosophie pour des renseignements concernant l'objectif contemporain de protéger la liberté de conscience. Sur cette base, nous offrons un test substantif pour la liberté de conscience sous la *Charte*. Nous faisons ceci pour deux raisons. Premièrement, nous cherchons à aider ceux qui sont responsables de réglementer la conduite des professionnels de la santé en concevant et en exécutant des lois et des politiques qui protègent et promeuvent les besoins de santé et les intérêts des patients sans limiter de manière injustifiable les droits de conscience prévus par la *Charte* des professionnels de la santé. Deuxièmement, nous cherchons à contribuer aux futures instances rapportant à la liberté de conscience de la *Charte* en réponse à la récente décriminalisation de l'aide médicale à mourir et à l'autorisation des médicaments utilisés pour l'avortement médical.

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INTRODUCTION

Conscientious refusal to provide insured health services is a significant point of controversy in Canada, especially in reproductive medicine and end-of-life care. Can a pharmacist legally refuse, on grounds of conscience, to fill a prescription for the birth control pill or emergency contraception? Can a physician, also on grounds of conscience, legally refuse to administer a medical abortion or to provide a surgical abortion? Outside the familiar contexts of contraception and abortion, can a physician legally refuse, on grounds of conscience, to provide artificial insemination to a lesbian woman? Similarly, can a physician legally refuse to provide an elective C-section? Moving to the other end of the life spectrum, can a nurse practitioner legally refuse, on grounds of conscience, to write a prescription for medications to be used for assisted suicide? Can a physician legally refuse, on grounds of conscience, to provide palliative sedation or to participate in euthanasia? Can health care professionals, on grounds of conscience, legally withhold or withdraw potentially life-sustaining treatment against the wishes of a patient's substitute decision maker?¹

In very general terms, the illustrative questions listed above demonstrate fundamental intrapersonal and interpersonal tensions. As regards intrapersonal tensions, the health care professional may experience tension between her freedom of conscience, her duty to treat, her duty to act in the best interests of her patient, her duty to respect patient autonomy, and her duty to not abandon her patient. As regards interpersonal tensions, tension may exist between the health care professional's freedom of conscience and the patient's freedom of conscience, autonomy, and right to access health

¹ These and related questions are discussed in a rich literature on conscientious refusals in health care. See e.g. Hilary Young, "A Proposal for Access to Treatment Contrary to Clinical Judgment" 11:2 McGill JL & Health [forthcoming in 2017]; Daphne Gilbert, "Let Thy Conscience Be Thy Guide (but not *My* Guide): Physicians and the Duty to Refer" (2017) 10:2 McGill JL & Health 47; Julian Savulescu & Udo Schuklenk, "Doctors Have No Right to Refuse Medical Assistance in Dying, Abortion or Contraception" (2017) 31:3 Bioethics 162; Françoise Baylis, "A Relational View of Conscience and Physician Conscientious Action" (2015) 8:1 Int J Fem Approaches Bioeth 18 [Baylis, "Relational View"]; Jacquelyn Shaw & Jocelyn Downie, "Welcome to the Wild, Wild North: Conscientious Objection Policies Governing Canada's Medical, Nursing, Pharmacy, and Dental Professions" (2014) 28:1 Bioethics 33; Carolyn McLeod & Jocelyn Downie, "Let Conscience Be Their Guide? Conscientious Refusals in Health Care", Editorial, (2014) 28:1 Bioethics ii.

care. The Supreme Court of Canada recognizes some of these tensions in *Carter v Canada (AG)*:

In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures. However, we note – as did Beetz J. in addressing the topic of physician participation in abortion in *Morgentaler* – that a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief. In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. *Rather, we underline that the Charter rights of patients and physicians will need to be reconciled.*²

A recent effort to effectively reconcile these tensions can be found in the March 2015 policy statement “Professional Obligations and Human Rights” of the College of Physicians and Surgeons of Ontario (College).³ The section on “Conscience or Religious Beliefs” begins with an articulation of fundamental values enshrined in the *Charter* and their relationship to each other:

The *Canadian Charter of Rights and Freedoms* (the “*Charter*”) protects the right to freedom of conscience and religion. Although physicians have this freedom under the *Charter*, the Supreme Court of Canada has determined that no rights are absolute. The right to freedom of conscience and religion can be limited, as necessary, to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.

² 2015 SCC 5 at para 132, [2015] 1 SCR 331 [*Carter*] [emphasis added].

³ “Policy Statement #2-15: Professional Obligations and Human Rights” (March 2015), online: <www.cpso.on.ca/CPSO/media/documents/Policies/Policy-Items/Human-Rights.pdf> [College, “Professional Obligations”]. See also College of Physicians and Surgeons of Ontario, “Policy Statement #4-16: Medical Assistance in Dying” (June 2016), online: <www.cpso.on.ca/cpso/media/documents/policies/policy-items/medical-assistance-in-dying.pdf>. We use the College’s “Professional Obligations” policy as our example here as it has a more general application.

Where physicians choose to limit the health services they provide for reasons of conscience or religion, this may impede access to care in a manner that violates patient rights under the *Charter* and *Code*. The courts have determined that there is no hierarchy of rights; all rights are of equal importance.⁴

Having grounded the policy on “Professional Obligations and Human Rights” in the *Canadian Charter of Rights and Freedoms*,⁵ the College stipulates that physicians who are unwilling to provide specific medical services for reasons of conscience or religion must: (1) “communicate their objection directly and with sensitivity to existing patients, or those seeking to become patients, and inform them that the objection is due to personal and not clinical reasons;”⁶ and (2) provide the patient with “an effective referral to another health-care provider.”⁷ The policy further stipulates that in an emergency situation where there is the risk of imminent harm, physicians must provide medical care “even where that care conflicts with their conscience or religious beliefs.”⁸ Notably, this policy is presently subject to a court challenge brought by the Christian Medical and Dental Society of Canada, the Canadian Federation of Catholic Physicians’ Societies, the Canadian Physicians for Life, and five individual physicians.⁹ These groups and individuals believe that the College has violated physicians’ freedom of religion, freedom of conscience, and right to equal treatment and benefit under the law.¹⁰

⁴ College, “Professional Obligations”, *supra* note 3 at 4 (referring to the Ontario *Human Rights Code*, RSO 1990, c H19).

⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁶ College, “Professional Obligations”, *supra* note 3 at 5.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, Ottawa, 15-63717 (Ont Sup Ct J) (Amended Notice of Application), online: Canadian Physicians for Life <www.physiciansforlife.ca/wp-content/uploads/2015/07/Amended-Notice-of-Application.pdf>.

¹⁰ *Ibid* at 3. The challenge to the College’s policy statement, “Professional Obligations”, *supra* note 3, and these arguments have been explored in depth: see Gilbert, *supra* note 1.

As provincial and territorial legislatures and professional regulatory bodies continue to strive to develop policies reconciling interpersonal tensions between health care professionals and patients,¹¹ and as challenges to legislation and policies head to court, the parties and courts will be confronted with the fact that the meaning of “freedom of conscience” under the *Charter* is not yet settled. Arguably, this lack of clarity, arising in large part due to a lack of attention,¹² is reflected in Peter Hogg’s *Constitutional Law of Canada*.¹³ In a discussion of the hierarchy of rights under the *Charter*, he references “s. 2 (freedom of religion, expression, assembly and association)”¹⁴ without mentioning “freedom of conscience.” His sole discussion of freedom of conscience appears in the chapter entitled “Religion.” The discussion is only 16 lines long,¹⁵ and the entry in the index under “Conscience” is “See Religion.”¹⁶ Further, as we will demonstrate, a thorough review of relevant case law reveals no clear meaning of freedom of conscience. And while a careful review of legislative intent supports the conclusion that freedom of conscience was deliberately included in the *Charter* as a distinct freedom, the relationship between freedom of conscience and freedom of religion remains unclear.

In this paper, we lay out our review of the relevant case law, followed by a review of the legislative history. Having shown that the nature and scope of the freedom of conscience provision cannot be settled by either review,¹⁷

¹¹ For the results of a comprehensive review of conscientious refusal policies for physicians, nurses, pharmacists, and dentists from across Canada, see Shaw & Downie, *supra* note 1.

¹² The lack of attention from the courts is reflected in the literature. See e.g. Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014), which includes six chapters of analysis yet (quite understandably) only one chapter on conscience. A literature review revealed that the volume of academic articles on freedom of religion as opposed to freedom of conscience distinct from religion is seriously (again, understandably) skewed.

¹³ 5th ed (Toronto: Carswell, 2007) (loose-leaf 2015 supplement) vol 2, ch 36.

¹⁴ *Ibid* at 36-33.

¹⁵ *Ibid* at 42-3 to 42-4.

¹⁶ *Ibid* at I-19.

¹⁷ For prior reviews, see Michael E Manley-Casimir, *The Meaning of ‘Freedom of Conscience’ in the Canadian Charter of Rights and Freedoms: A*

we turn to philosophy for insights with respect to the contemporary purpose of protecting freedom of conscience.¹⁸ On this basis, we offer a substantive test for freedom of conscience under the *Charter*. We do so for two reasons: first, to assist those responsible for regulating the conduct of health care professionals in designing laws and policies that protect and promote the health needs and interests of patients without unjustifiably limiting the *Charter* conscience rights of health care professionals.¹⁹ Second, to contribute to future freedom of conscience *Charter* cases which are likely to be brought with greater frequency and urgency given the recent decriminalization of medical assistance in dying in Canada²⁰ and the licensing of the drugs used for medical abortion.²¹

Polyvocal Cultural Analysis (LLM Thesis, University of British Columbia, 2004) [unpublished]; Howard Kislowicz, Richard Haigh & Adrienne Ng, “Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom” (2011) 48:3 *Alta L Rev* 679.

¹⁸ We focus on the jurisprudential and legislative history (demonstrating there is no satisfactory guidance to be found there). There are, of course, additional tools for statutory interpretation that could be deployed (e.g., textual, consequential, and legal policy). See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014). However, having determined that there was no satisfactory guidance to be found in the jurisprudential and legislative history analysis, we recognized that a future case could benefit from a philosophical analysis of the contemporary purpose of protecting freedom of conscience and the section 2(a) test for conscience that might flow from it. We therefore turned to that project and left the other forms of statutory interpretation to others.

¹⁹ This project is premised on the assumption that the *Charter* applies to the College in relation to this policy, following the reasoning in *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577. It is essential to note that legal arguments about conscientious objection and health care professionals not based on the *Charter* also exist: see e.g. *Cuthbertson v Rasouli*, 2013 SCC 53, [2013] 3 SCR 341. For a discussion of these arguments, see Young, *supra* note 1. These arguments, however, lie outside the scope of this paper.

²⁰ *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, RSC 2016, c 3.

²¹ See Health Canada, “Drugs and Health Products: Regulatory Decision Summary: MIFEGYMISO” (29 July 2015), online: <hc-sc.gc.ca/dhp-mps/prod-pharma/rds-sdr/drug-med/rds_sdr_mifegymiso_160063-eng.php>.

I. REVIEW OF THE RELEVANT CASE LAW

There have been a number of Supreme Court of Canada cases involving “freedom of religion,” some cases in which “freedom of conscience and religion” have been considered together, but no cases in which freedom of conscience has been considered on its own. Below, we chronicle the key Supreme Court of Canada cases that mention freedom of conscience and freedom of religion with a view to gaining a clearer understanding of the nature and scope of freedom of conscience and how this freedom is the same or different from freedom of religion.²² Where appropriate, the analysis of individual cases begins with the lower court decisions that led up to Supreme Court of Canada decisions.

A. *R v Big M Drug Mart*

Not long after the *Charter* was enacted, freedom of conscience was brought before the courts. In *R v Big M Drug Mart*, Big M Drug Mart was charged with violating the *Lord’s Day Act*,²³ which prohibited commercial activity on Sundays. Big M Drug Mart challenged the constitutionality of the act in part under section 2(a) of the *Charter*.²⁴ On appeal, Justice Laycraft stated:

It is not desirable, in my view, at this stage of *Charter* history to attempt a comprehensive definition of “freedom of religion” or “freedom of conscience”. The latter term seems designed to encompass the rights of those whose fundamental principles are not founded on theistic belief.²⁵

²² We do not review cases that mention freedom of conscience but do not advance our understanding of the Court’s view of the relationship between religion and conscience. For example, in *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613, the word “conscience” is only mentioned when the Court is quoting someone else. A number of other cases mention “conscience” when referring to the wording of the *Charter* section in which “religion” is mentioned, i.e., “freedom of conscience and religion,” but, as they are cases claiming only a violation of freedom of religion, they do not advance our understanding of freedom of conscience.

²³ RSC 1970, c L-13, s 4.

²⁴ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 300–01, 18 DLR (4th) 321 [*Big M Drug Mart*].

²⁵ *R v Big M Drug Mart Ltd* (1983), 49 AR 194 at para 42, 9 CCC (3d) 310 (CA).

In this passage, Justice Laycraft suggests that conscience is distinct from religion.

The appeal to the Supreme Court of Canada provided the Court with its first opportunity to consider the meaning of the section 2(a) guarantee of “freedom of conscience and religion.” Justice Dickson (as he then was) made the following reference to conscience:

Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.²⁶

This text seems consistent with Justice Laycraft’s view of conscience as distinct from religion, since the “beliefs” he refers to are presumably religious beliefs. However, Justice Dickson then suggests that freedom of conscience and freedom of religion are not separable concepts:

Attempts to compel belief or practice [in post-Reformation Europe] denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our *Charter*, the single integrated concept of “freedom of conscience and religion.”²⁷

The above text states that conscience and religion are not distinct and that “freedom of conscience and religion” is a “single integrated concept.” Justice Dickson (as he then was) then seems to suggest that freedom of religion is a subset of freedom of conscience:

The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights

²⁶ *Big M Drug Mart*, *supra* note 24 at 337.

²⁷ *Ibid* at 345–46.

to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.²⁸

This text suggests that freedom of religion is “prototypical” and “paradigmatic” of freedom of conscience. In other words, as noted above, freedom of religion is a subset of freedom of conscience.

B. R v Videoflicks Ltd/R v Edwards Books and Art Ltd

Prior to the release of the Supreme Court of Canada’s decision in *Big M Drug Mart*, another case involving Sunday shopping was making its way through the courts. In *R v Videoflicks Ltd*,²⁹ Justice Tarnopolsky delivered what Kislowicz et al refer to as “the first comprehensive analysis of the parameters of conscience as an independent value.”³⁰ In his decision, Justice Tarnopolsky defined freedom of religion and commented on the proper approach to analyzing whether a practice or belief falls within its protection.³¹ He then suggested that this same reasoning should be applied to purely conscience-based claims and offered at least a partial definition of freedom of conscience:

²⁸ *Ibid* at 346–47.

²⁹ (1984), 48 OR (2d) 395, 14 DLR (4th) 10 (CA) [*Videoflicks* cited to OR], aff’d *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1 [*Edwards Books* cited to SCR].

³⁰ Kislowicz, Haigh & Ng, *supra* note 17 at 708.

³¹ *Videoflicks*, *supra* note 29 at 420–422.

In my view, essentially the same reasoning would apply to the fundamental freedom of conscience, except that freedom of conscience would generally not have the same relationship to the beliefs or creed of an organized or at least collective group of individuals. None the less, and without attempting a complete definition of freedom of conscience, the freedom protected in s. 2(a) would not appear to be the mere decision of any individual on any particular occasion to act or not act in a certain way. To warrant constitutional protection, the behaviour or practice in question would have to be based upon a set of beliefs by which one feels bound to conduct most, if not all, of one's voluntary actions. While freedom of conscience necessarily includes the right not to have a religious basis for one's conduct, it does not follow that one can rely upon the Charter protection of freedom of conscience to object to an enforced holiday simply because it happens to coincide with someone else's sabbath. Rather, to make such an objection one would have to demonstrate, based upon genuine beliefs and regular observance, that one holds as a sacrosanct day of rest a day other than Sunday and is thereby forced to close one's business on that day as well as on the enforced holiday. No appellant informed this Court of any such fundamental belief based upon conscience rather than religion.³²

Justice Tarnopolsky thus considers freedom of conscience and freedom of religion as distinct freedoms.

Unfortunately for our purposes, the Supreme Court of Canada paid very little attention to conscience in its decision on the same matter. Chief Justice Dickson quoted Justice Tarnopolsky: "[F]reedom of conscience necessarily includes the right not to have a religious basis for one's conduct ..."³³ and subsequently noted that "freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects."³⁴

³² *Ibid* at 422.

³³ *Edwards Books*, *supra* note 29 at 761, citing *Videoflicks*, *supra* note 29 at 422.

³⁴ *Edwards Books*, *supra* note 29 at 781.

C. *R v Morgentaler*

Two years later, a case arrived at the Supreme Court of Canada which presented an opportunity to consider freedom of conscience separately from freedom of religion. In *R v Morgentaler*,³⁵ the Court considered the constitutionality of the abortion provision in the *Criminal Code*.³⁶ The majority held that section 251 of the *Criminal Code* infringed section 7 of the *Charter* and could not be saved under section 1 of the *Charter*.³⁷ Justice Wilson agreed with the majority in the result, but issued a concurring judgment in which she found that the abortion provisions also violated section 2(a). Justice Wilson acknowledged that in *Big M Drug Mart*, “[t]he Chief Justice [saw] religious belief and practice as the paradigmatic example of conscientiously-held beliefs and manifestations and as such protected by the *Charter*.”³⁸ However, she went on to conclude:

It seems to me, therefore, that in a free and democratic society “freedom of conscience and religion” should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, *as a matter of statutory interpretation, “conscience” and “religion” should not be treated as tautologous if capable of independent, although related, meaning.* Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their “essential humanity”.³⁹

Justice Wilson clearly rejects the view of freedom of religion as paradigmatic and prototypical of freedom of conscience and an embrace of the view

³⁵ [1988] 1 SCR 30, 63 OR (2d) 281 [*Morgentaler* cited to SCR].

³⁶ RSC 1985, c C-46, s 251.

³⁷ *Morgentaler*, *supra* note 35 at 79.

³⁸ *Ibid* at 177–78.

³⁹ *Ibid* at 179 [emphasis added], citing Neil MacCormick, “Civil Liberties and the Law” in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Oxford University Press, 1984) 39 at 41.

of freedom of conscience and freedom of religion as distinct. And while Justice Wilson was speaking only for herself, this opinion is nonetheless notable given the influence it has had on subsequent jurisprudence more generally.⁴⁰

D. B (R) v Children's Aid Society of Metropolitan Toronto

Freedom of conscience surfaced again at the Supreme Court of Canada in *B (R) v Children's Aid Society of Metropolitan Toronto*.⁴¹ In that case, the plaintiffs were Jehovah's Witnesses whose infant daughter had been made a temporary ward of the Children's Aid Society under the Ontario *Child Welfare Act*⁴² and given a blood transfusion against her parents' wishes.⁴³ The plaintiffs claimed that the *Child Welfare Act* contravened section 2(a) of the *Charter* as it infringed their freedom of religion.⁴⁴ In their concurring minority opinion, Justices Major and Iacobucci (also writing for Justices Cory and Lamer on this point) found:

The appellants proceed on the assumption that Sheena is of the same religion as they, and hence cannot submit to a blood transfusion. Yet, Sheena has never expressed any agreement with the Jehovah's Witness faith, nor, for the matter, with any religion, assuming any such agreement would be effective. There is thus an impingement upon Sheena's freedom of conscience which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief.⁴⁵

This text, albeit a minority opinion, suggests that freedom of religion is subsumed under freedom of conscience.

⁴⁰ See Chris Kaposy & Jocelyn Downie, "Judicial Reasoning about Pregnancy and Choice" (2008) 16 Health LJ 281 at 290–95.

⁴¹ [1995] 1 SCR 315, 122 DLR (4th) 1 [*Children's Aid* cited to SCR].

⁴² RSO 1980, c 66.

⁴³ *Children's Aid*, *supra* note 42 at para 96.

⁴⁴ *Ibid* at para 103.

⁴⁵ *Ibid* at para 231.

E. Syndicat Northcrest v Amselem

Some years later, the issue was again argued before the Supreme Court of Canada in *Syndicat Northcrest v Amselem*.⁴⁶ Here, the appellants were Orthodox Jewish co-owners of units in a condominium. They set up *succahs* (ritual huts) on their balconies for Succot (a Jewish holiday).⁴⁷ However, the Syndicat (management of the co-owned property) asked them to remove the *succahs* arguing that “decorations, alterations and constructions on the balconies”⁴⁸ were prohibited under the condominium by-laws. The majority in this case noted:

In order to define religious freedom, we must first ask ourselves what we mean by “religion”. While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion.⁴⁹

This text suggests that conscience and religion are distinct concepts.

In contrast, revealing yet again the lack of a unified view on this at the Supreme Court of Canada, Justice Bastarache (in dissent with Justices LeBel and Deschamps) appeared to take a different view:

Religious precepts constitute a body of objectively identifiable data that permit a distinction to be made between genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience.⁵⁰

...

La Forest J. explained this as follows in in *Ross v. New Brunswick School District No. 15*:

⁴⁶ 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

⁴⁷ *Ibid* at paras 2, 4.

⁴⁸ *Ibid* at para 9.

⁴⁹ *Ibid* at para 39.

⁵⁰ *Ibid* at para 135, Bastarache J, dissenting.

Indeed, this Court has affirmed that freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience.⁵¹

...

Even though religion is, first and foremost, a question of conscience ...⁵²

These three excerpts imply, respectively, that “genuine religious beliefs” are related to conscience, that beliefs protected by freedom of religion come from conscience, and that religion is subsumed under conscience.

E. Alberta v Hutterian Brethren of Wilson Colony

In *Alberta v Hutterian Brethren of Wilson Colony*, the Supreme Court of Canada considered the constitutionality of a provincial requirement that all persons who hold a driver's licence have their photo taken.⁵³ Until 2003, the Hutterian Brethren had been exempt from the requirement. Given their religious objection to being photographed, they argued that the new regulation removing the discretionary aspect of the photo requirement violated their section 2(a) rights.⁵⁴

Two of the dissenting opinions in *Hutterian Brethren* offer further illustrations of the varying understanding of freedom of conscience at the Supreme Court of Canada. Whereas Justice LeBel suggested that freedom of religion is not subsumed under other fundamental freedoms (including freedom of conscience), Justice Abella suggested that “freedom of conscience and religion” are a single integrated concept. In his dissenting opinion, Justice LeBel observed:

⁵¹ *Ibid* at para 136.

⁵² *Ibid* at para 140.

⁵³ 2009 SCC 37 at paras 1–3, [2009] 2 SCR 567.

⁵⁴ *Ibid* at paras 3, 28–30.

Perhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of religion for the purposes of the *Charter*. One might have thought that the guarantee of freedom of opinion, freedom of conscience, freedom of expression and freedom of association could very well have been sufficient to protect freedom of religion. But the framers of the *Charter* thought fit to incorporate into the *Charter* an express guarantee of freedom of religion, which must be given meaning and effect.⁵⁵

Here, Justice LeBel clearly suggests that freedom of religion is not subsumed under the other fundamental freedoms contained in section 2. Justice Abella, on the other hand, analyzing the purpose of the protection of freedom of conscience and religion, notes:

The European Court of Human Rights espoused a similarly liberal conception of freedom of religion in *Kokkinakis v. Greece*:

[F]reedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

While religious freedom is primarily a matter of individual conscience, it also implies ... freedom to “manifest [one’s] religion”.⁵⁶

Justice Abella’s text suggests a return, almost 25 years later, to the conception of freedom of conscience and religion as a single integrated concept.

⁵⁵ *Ibid* at para 180, LeBel J, dissenting.

⁵⁶ *Ibid* at para 128, Abella J, dissenting, citing *Kokkinakis v Greece* (1993), 260A ECHR (Ser A) 20 at para 31.

G. *Carter v Canada (AG)*

In 2015, in *Carter v Canada (AG)*,⁵⁷ the Supreme Court of Canada was asked to revisit its earlier decision in *Rodriguez v British Columbia (AG)*.⁵⁸ Explicitly referencing Justice Beetz's decision in *R v Morgentaler*, the Court appears to return to the conception of freedom of conscience and freedom of religion as being distinct freedoms:

[Four of the intervenors (the Catholic Civil Rights League, the Faith and Freedom Alliance, the Protection of Conscience Project, and the Catholic Health Alliance of Canada)] would have the Court direct the legislature to provide robust protection for those who decline to support or participate in physician-assisted dying for reasons of conscience *or* religion.

...

However, we note – as did Beetz J. in addressing the topic of physician participation in abortion in *Morgentaler* – that a physician's decision to participate in assisted dying is a matter of conscience and, *in some cases*, of religious belief.⁵⁹

H. *Conclusion*

No clear meaning of freedom of conscience can be taken from the jurisprudence. There is a lack of consistency at best, and confusion at worst.

II. LEGISLATIVE HISTORY

Given that no authoritative meaning of “freedom of conscience” can be gleaned from the jurisprudence, we now explore whether any insights can be gleaned from the legislative history. A review of legislative history may reveal understandings of key concepts that, upon reflection and in light of other interpretive rules, a court could choose to adopt. So how did the section 2 text as finally expressed come to be in the *Charter* and what were pol-

⁵⁷ *Carter*, *supra* note 2.

⁵⁸ [1993] 3 SCR 519, 107 DLR (4th) 342.

⁵⁹ *Carter*, *supra* note 2 at paras 130–32, citing *Morgentaler*, *supra* note 35 at 95–96 [emphasis added].

iticians and bureaucrats saying about freedom of conscience as they drafted and debated the text?

In Canada, the phrase “freedom of conscience” first appeared in a provincial bill of rights statute. In 1947, the province of Saskatchewan enacted *The Saskatchewan Bill of Rights Act*.⁶⁰ Section 3, entitled “Right to freedom of conscience,” provided:

Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief, and freedom of religious association, teaching, practice and worship.⁶¹

“Freedom of conscience” first appeared in connection with a federal constitutional document in 1968 when Minister of Justice Pierre Trudeau (as he then was) wrote a policy paper entitled *A Canadian Charter of Human Rights*,⁶² making the case for a constitutional charter. The proposed *Charter of Human Rights* would guarantee the right to “freedom of conscience and religion.” As explained in Trudeau’s paper:

There is some legislative protection now. The Canadian Bill of Rights, section 1, recites “freedom of religion”. The Saskatchewan Bill of Rights, section 3, declares the right to “freedom of conscience, opinion, and belief, and freedom of religious association, teaching, practice and worship”. The Freedom of Worship Act (applicable in Ontario and Quebec) declares the right to “the free exercise and enjoyment of religious profession and worship”. It is arguable, however, that a guarantee of “freedom of religion” does not protect the freedom of the person who chooses to have no religion. To protect such persons, consideration could be given to widening the guarantee to protect, for example, “freedom of conscience”.⁶³

Two points are worth noting here. The first point concerns the move from the broadest of statements, namely, “freedom of conscience, opinion and

⁶⁰ SS 1947, c 35 [*Bill of Rights*, SK].

⁶¹ *Ibid*, s 3.

⁶² Honourable Pierre Elliott Trudeau, *A Canadian Charter of Human Rights* (Ottawa: Queen’s Printer, 1968).

⁶³ *Ibid* at 17–18, citing *Canadian Bill of Rights*, SC 1960, c 44, s 1; *Bill of Rights*, SK, *supra* note 60 at s 3; *Freedom of Worship Act*, RS 1964, c 301, s 1.

belief, and freedom of religious association, teaching, practice and worship” in *The Saskatchewan Bill of Rights Act*, to the closing emphasis in the above paragraph on freedom of conscience, to the final wording of the *Charter*, which joins freedom of conscience and freedom of religion. The second point concerns the stated rationale for adding freedom of conscience to freedom of religion, namely, to protect those who choose to have no religion.

A few years later, the *Victoria Charter* was issued – a product of a constitutional conference held in Victoria, 14–16 June 1971. The *Victoria Charter* included the following article:

1. It is hereby recognized and declared that in Canada every person has the following fundamental freedoms:

freedom of thought, conscience and religion,

freedom of opinion and expression, and

freedom of peaceful assembly and of association;

and all laws shall be construed and applied so as not to abrogate or abridge any such freedom.⁶⁴

Here, “thought” is introduced into the clause about freedom of conscience and religion.⁶⁵

On 20 June 1978, the *Constitutional Amendment Act, 1978* (Bill C-60)⁶⁶ received first reading in the House of Commons. Bill C-60 provided for a

⁶⁴ See Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) vol 1 at 214.

⁶⁵ This language is consistent with article 18(1) of the *International Covenant on Civil and Political Rights*:

Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

(19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

⁶⁶ Bill C-60, *An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to ap-*

Canadian Charter of Rights and Freedoms. Under the heading “Political and Legal Rights and Freedoms,” the bill reproduced the language of the *Victoria Charter*, declaring that “in Canada, every individual shall enjoy and continue to enjoy the following fundamental rights and freedoms: – freedom of thought, conscience and religion ...”⁶⁷ The explanatory notes accompanying the text indicate “freedom of ‘religion’ is expanded from the Bill of Rights to include ‘thought and conscience’.”⁶⁸ Two years later however, on 4 July 1980 when the federal government tabled a discussion draft of the *Charter*, “thought” was no longer one of two concepts expanding “freedom of religion.” Instead, “thought” was now clustered with “belief, opinion, and expression.” Under the heading “Fundamental Freedoms,” section 2 of the discussion draft read:

Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, opinion, and expression, including freedom in the dissemination of news, opinion, and belief; and
- (c) freedom of peaceful assembly and of association.⁶⁹

This revised draft of the fundamental freedoms section narrowed the proposed expansion of “freedom of religion” to “freedom of conscience and religion,” thereby offering protection to individuals who choose to have no religion. Given the interpretive principle of *ejusdem generis*, had “thought” remained in the final text of the *Charter*, this could have had significant implications for the meaning of conscience.⁷⁰ If conscience were in the same

prove and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters, 3rd Sess, 30th Parl, 1978.

⁶⁷ See Bayefsky, vol 1, *supra* note 64 at 347.

⁶⁸ See *ibid*, vol 1 at 348.

⁶⁹ See *ibid*, vol 2 at 599.

⁷⁰ As noted by Manley-Casimir, the implications of the principle of *ejusdem generis* on the placement of conscience within the various subsections of section 2 were noted by the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada [Special Joint Committee] in their discussions of the *Victoria Charter* (*supra* note 17 at 59).

genus as thought, then conscience could have been considered a narrower concept than if it were considered a distinct genus.

On 6 October 1980, the federal government tabled the *Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada*.⁷¹ The resolution asked the Queen to table a bill in the Parliament of the United Kingdom enacting the *Canadian Charter of Rights and Freedoms*, among other constitutional amendments.⁷² Despite a suggestion during the process that conscience be removed from section 2(a) of the draft *Charter*,⁷³ the language of section 2(a) remained unchanged. Thus the category of “freedom of religion” was expanded to “freedom of conscience and religion,” and conscience and religion were kept distinct from thought.

Clarity about legislative intent cannot be drawn from the committee hearings or parliamentary debates about the *Charter*. However echoes of the main points of difference in the evolution of the text outlined above can be found in these records, as illustrated below.⁷⁴

Chief Ackroyd of the Metro Toronto Police argued before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (Special Joint Committee) that the words “of conscience” should be removed or, if not removed, moved to section 2(b) of

⁷¹ (Ottawa: Supply and Service, 1980).

⁷² Bayefsky, *supra* note 64, vol 2 at 744–45.

⁷³ See e.g. The Right Honourable Jean Chrétien, who recalls:

Sometimes humour seemed the only thing that kept us going. At one point we got bogged down trying to define freedom of conscience. “So why put it in the charter?” someone asked. It was the end of the day and I was tired, so I said, “Yeah, why? Let’s leave it out.” Suddenly I felt a hard kick on the back of my chair. It was from Pierre Genest, a hefty and very funny friend who was one of the federal government’s best legal advisers. “I guess we leave it in,” I said. “Trudeau’s spy just kicked me in the ass.” He was more effective than my own conscience.

(*Straight from the Heart*, revised ed (Toronto: Key Porter Books, 1994) at 173).

⁷⁴ We searched the Special Joint Committee, *Minutes of Proceedings and Evidence*, 32nd Leg, 1st Sess for references to conscience and religion and drew illustrative examples from them.

the *Charter* on freedom of thought, belief, opinion, and expression, including freedom of the press and other media. While not expressed in the language of *ejusdem generis*, Chief Ackroyd's concern seemed to be about the potentially expansive effect of including conscience as a component of the section on religion rather than the section on thought. His focus was on acts, namely moral and drug offences, that he felt might then be protected under the *Charter*.⁷⁵

Professor William Black, a member of the Executive Committee of the British Columbia Civil Liberties Association, argued before the Committee for the retention of freedom of conscience:

It seems to me that the value of including freedom of conscience as well as freedom of religion is that it makes clear that people can have very deeply held beliefs that they might not call religious beliefs, but which are equally fundamental to them, and using the phrase "freedom of conscience" it gives them rights as well as people who deeply hold religious beliefs.⁷⁶

This resonates with the conception of conscience as distinct from religion (but as equally deserving of protection).

Svend Robinson spoke against the inclusion of God in the preamble to the Constitution. He referred to freedom of conscience, describing it as a freedom that seemed to mean freedom from religion:

What that means, of course, is that we, as a dualistic society, respect diverse viewpoints; we do not entrench one particular religion; indeed, we do not entrench any religion at all.

⁷⁵ Special Joint Committee, *Minutes of Proceedings and Evidence*, 32nd Leg, 1st Sess, No 14 (27 November 1980) at 13:

My concern would be that in moral offences, whether one can argue before a court that certain sexual behaviour might be within one's rights of freedom of conscience; certain cults believe in the use of certain drugs as part of their conscience; and can they argue that, because it is part of their cult that the use of certain drugs and chemicals give them a right to argue that they have freedom of conscience? That is a type of concern we are raising.

⁷⁶ Special Joint Committee, *Minutes of Proceedings and Evidence*, 32nd Leg, 1st Sess, No 22 (9 December 1980) at 118.

We leave Canadians free to choose for themselves on the basis of their own conscience.⁷⁷

In sum, a review of legislative intent supports the conclusion that freedom of conscience was deliberately kept as a distinct freedom in the *Charter* and was not considered to be adequately protected through freedom of religion. Indeed, its purpose appears to have been specifically to offer those without religious convictions a freedom analogous to the freedom granted to those with religious convictions. Arguably, this purpose also explains why freedom of conscience was not included in the same section as freedom of thought, belief, or opinion. The intent, it would appear, was for conscience to be considered of the same genus as religion, not the same genus as thought, belief, or opinion. That being said, the relationship of freedom of conscience to freedom of religion, its specific meaning, and the purpose(s) of protecting it remain unsettled.

III. CONTEMPORARY UNDERSTANDING OF THE PURPOSE OF FREEDOM OF CONSCIENCE

We now look to the purpose of protecting freedom of conscience in contemporary society. While much has been written on this topic in the philosophical literature,⁷⁸ what follows relies heavily on a perspective originally developed by one of the authors through a process of deep engagement with that literature.⁷⁹

In our view, the purpose of freedom of conscience is to both nurture and facilitate a dialectical process aimed at improving human ethical practice.⁸⁰

⁷⁷ Special Joint Committee, *Minutes of Proceedings and Evidence*, 32nd Leg, 1st Sess, No 42 (21 January 1981) at 41.

⁷⁸ See e.g. Martin Benjamin, "Conscience" in Bruce Jennings, ed, *Bioethics*, 4th ed (Farmington Hills, MI: Gale, 2014) 688; Daniel Brock, "Conscientious Refusal by Physicians and Pharmacists: Who Is Obligated to Do What, and Why?" (2008) 29:3 *Theor Med Bioeth* 187; James F Childress, "Appeals to Conscience" (1979) 89:4 *Ethics* 315; Mark R Wicclair, "Conscientious Objection in Medicine" (2000) 14:3 *Bioethics* 205.

⁷⁹ See Baylis, "Relational View", *supra* note 1 (for a full contextualization and defence of this view).

⁸⁰ See *ibid* at 30. Note that this approach immediately avoids the epistemological trap for conscience claims described by some authors: see e.g. Bryan Thomas,

Ethical progress depends upon thoughtful deliberations among citizens about right and wrong. Such deliberations cannot meaningfully occur in a political, social, and cultural context that encourages undue deference to “unexamined intuitions, feelings of repugnance, unthinking adherence to internalized social norms or familiar generalizations, past assumptions, previously decided moral categories, preconceived notions of right and wrong, divine commands, professional dictates, or the moral majority.”⁸¹ To speak plainly, moral automatons cannot contribute to moral deliberations that enrich our understanding of what it means to live justly and well, which in turn informs our moral norms, as well as our practices, policies, and laws. More generally and importantly, in a secular country like Canada, with citizens who embrace different religions as well as citizens who identify as atheists or humanists, moral deliberations cannot be reduced to religious deliberations.

This perspective on the purpose of freedom of conscience – to nurture and facilitate a dialectical process aimed at improving human ethical practice – informs the view that society has a fourfold interest in: (1) encouraging individuals to engage in thoughtful, reflective inner deliberations about which values, beliefs, and commitments to endorse as their own as part of a shared interest in improving human ethical practice;⁸² (2) encouraging individuals to apply these values, beliefs, and commitments in particular circumstances in rendering their best judgment about what is morally prohibited, morally permissible, and morally required; (3) promoting moral integrity understood as both a personal and a social virtue that aims at keeping one in proper relation to oneself and to others; and (4) encouraging individuals to act in ways that manifest principled consistency, value accountability, and model flexible resilience.⁸³

“Secular Law and Inscrutable Faith: Religious Freedom, Freedom of Conscience, and the Law’s Epistemology” (2010) [unpublished], online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=1275351>.

⁸¹ Baylis, “Relational View”, *supra* note 1 at 30.

⁸² While it is common in the relevant jurisprudence to only make mention of “beliefs,” we purposefully refer to “values, beliefs, and commitments” in part because we believe that not all beliefs are conscious or explicit. It follows that we do not consciously recognize all of our own beliefs. For this reason, it is important to try to get at the cluster or framework of values, beliefs, and commitments, some of which will have been absorbed through socialization and are so deeply ingrained that they are not obvious to us as discrete beliefs.

⁸³ See Baylis, “Relational View”, *supra* note 1 at 31–32.

Moreover, the goal of improving human ethical practice requires individuals to commit to both eschewing undue deference and exercising due diligence. This translates into two specific obligations. First, there is the obligation to assess potentially competing moral values, beliefs, and commitments without attributing special weight to those values, beliefs, and commitments that are the tenets of an identifiable religion. Second, there is the obligation to decide what to do in particular circumstances without assuming that the morally right course of action is one that can be grounded in religious or secular dogma.

The overarching commitment to eschew undue deference and to exercise due diligence presupposes that individuals not only care about their own moral development, but also care about the moral development of others. In turn, this caring motivates conscience-based claims, which are in effect claims about right and wrong. On this view, “people are called on to do moral work in developing and orienting their conscience and to be responsible to others in so doing.”⁸⁴ When an individual makes a conscience-based claim, others are called on to deliberate about whether the claim should be taken seriously (i.e., should be assigned significant moral weight) and, if so, whether it should prevail. These deliberations, whether they are had in the public sphere, in professional organizations, in government, or in the courts, advance both our understanding of what it means to live justly and well, and our ability to do so.

As a society, we have a shared interest in improving human ethical practice, that is to say, in living justly and well. To this end we have a shared interest in nurturing moral agency, not moral automatism. We want citizens to take their moral responsibilities seriously. For this to happen, we need to value freedom of conscience. Valuing freedom of conscience means that we take conscience-based claims seriously.

IV. A TEST FOR FREEDOM OF CONSCIENCE UNDER THE *CHARTER*

In service of the purpose of protecting freedom of conscience as articulated above, we argue that appeals to conscience should be taken seriously when they:

- a. evidence a certain thoughtfulness (i.e., morally engaged thinking that involves the exercise of due diligence in

⁸⁴ *Ibid* at 30.

critically reflecting on [1] the particularities of a situation and [2] the values, beliefs, and commitments to endorse as one's own in rendering one's best judgment);

- b. are consistent with one's best judgment, taking into consideration a shared interest in living justly and well (i.e., are not characterized by undue deference to self or others);
- c. promote moral integrity understood as both a personal and a social virtue (i.e., aim at keeping one in proper relation to oneself and to others); and
- d. manifest principled consistency, accountability, and flexible resilience.⁸⁵

Appeals to conscience that should be taken seriously (i.e., given moral weight) may nonetheless be denied protection under the *Charter*. We propose that for such appeals to justify a conclusion that section 2(a) of the *Charter* has been breached, an individual making a section 2(a) conscience claim should have to prove the following to the court:

- his or her conscience claim has a nexus with specific ethical values, beliefs, or commitments that recommend or demand a particular act;
- he or she is sincere in his or her ethical values, beliefs, or commitments;

⁸⁵ *Ibid* at 32. It has been suggested that the juxtaposition of the noun “consistency” and the adjective “flexible” may lead to confusion on a quick reading insofar as the concepts “consistency” and “flexibility” are antithetical to each other. It is important to note, however, that the text does not refer to “flexibility” but rather to “flexible resilience.” As per the *Oxford Living Dictionaries*, “resilience” is “the ability of a substance or object to spring back into shape; elasticity” (online: <https://en.oxforddictionaries.com/definition/resilience>). As such, the reference to “flexible resilience” in the test alludes to the value of reasoned consistency, as contrasted with stubborn consistency. When facts, circumstances, contexts, etc. change or shift, one's best judgment should be re-examined. Upon re-examination, it may all “spring back into shape,” or a new understanding or perspective may emerge resulting in a revised best judgment. The core idea here is that one's best judgment should neither be wafting on the wind, nor blinkered and intransigent. See Baylis, “Relational View”, *supra* note 1; Françoise Baylis, “Of Courage, Honor, and Integrity” in Lisa A Eckenwiler & Felicia G Cohn, eds, *The Ethics of Bioethics: Mapping the Moral Landscape* (Baltimore: Johns Hopkins University Press, 2007) 193.

- his or her conscience claim is the result of an exercise of ethical judgment that results from:
 - the exercise of due diligence; and
 - the avoidance of undue deference;
- the state action interferes with the freedom to act in accordance with his or her ethical values, beliefs, or commitments; and
- the interference with the act that is grounded in his or her ethical values, beliefs, or commitments is more than trivial or insubstantial.

The elements of the proposed *Charter* test derive from the goal of promoting moral agency in pursuit of the larger goal of improved human ethical practice. Only when the test is satisfied does the appeal to conscience move from “should be given moral weight” to “should be given protection under the *Charter*.”

It is important to acknowledge that the *Charter* test outlined above begins by establishing the substantive elements of conscience that are worthy of protection. It then adopts the structure and elements of the Supreme Court of Canada’s freedom of religion test insofar as they are consistent with the substantive elements of conscience that are worthy of protection, but it is not identical to the Supreme Court of Canada’s freedom of religion test. The freedom of religion test requires the following:

[T]he first step in successfully advancing a claim that an individual’s freedom of religion has been infringed is for a claimant to demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion. The second step is to then demonstrate that the impugned conduct of a third party interferes with the individual’s ability to act in accordance with that practice or belief in a manner that is non-trivial.⁸⁶

The first two elements of our proposed test for freedom of conscience are included in the first step of the Supreme Court of Canada’s test for freedom of religion. The fourth and fifth elements of our proposed test for freedom of conscience fall within the Supreme Court’s second step of the test for freedom of religion. Notably, there is an additional element in our test for freedom of conscience as compared with the Court’s established test for freedom of religion: the required exercise of judgment (the third element).

⁸⁶ *Amselem*, *supra* note 46 at para 65.

Some might object to the proposed *Charter* test for freedom of conscience on the grounds that it is inconsistent with the Supreme Court of Canada's test for freedom of religion. The conscience test requires the exercise of judgment, whereas the religion test does not appear to do so. In response, it can be argued that the two tests are consistent because, although the exercise of judgment is not explicit in the Supreme Court's test for freedom of religion, such a requirement is implicit in that test insofar as the freedom of religion test assumes that the institutionalized religion is doing the judgment work for the individual and the individual's deference to this judgment is not undue. For example, a rabbi might form a judgment grounded in his interpretation of the Torah (potentially supplemented by judgments offered by learned scholars) and his review of the facts, and a member of his congregation might defer to his judgment without such deference being seen as "undue deference." On this reasoning, the proposed test for freedom of conscience would be consistent with the freedom of religion test – it simply makes explicit that which is already implicit for religion.

However, some might object to this reasoning on one of two possible grounds and insist that there is a significant inconsistency between our proposed test for freedom of conscience and the Court's established test for freedom of religion. For example, some might argue that the Court makes no implicit assumptions about the need for judgment within the freedom of religion test. Alternatively, others might grant that while there is an implicit assumption about the need for judgment as outlined above, allowing deference to a religious authority is "undue deference." In either case, inconsistency exists between the test for freedom of religion and the proposed test for freedom of conscience. On this view, the inconsistency makes the test for freedom of conscience more onerous than the test for freedom of religion.

In response, we would concede that the proposed *Charter* test for freedom of conscience is inconsistent with, and *more* onerous than, the current test for "freedom of religion." However, we do not consider this to be a valid criticism of the proposed test insofar as we don't concede that the test is *too* onerous. The purpose of freedom of conscience has been carefully explained and defended, and the test is grounded in that purpose. Having said this, it could be argued that having a more onerous test for freedom of conscience than for freedom of religion means that freedom of conscience is less protected than freedom of religion. What follows from this is not the rejection of our proposed test for freedom of conscience, but rather the provocative question: can the current, less onerous, test for freedom of religion

be defended relative to its purpose?⁸⁷ That is a question for those who would defend the current freedom of religion test to answer.

CONCLUSION

Our review of both the jurisprudence and legislative history of the protection of freedom of conscience under section 2(a) of the *Charter* revealed that the meaning of conscience in section 2(a) of the *Charter* is not yet settled and cannot be settled by looking to either of these sources of interpretive guidance. We therefore asked, “What purpose should section 2(a)’s protection of freedom of conscience serve?” Based on our answer to this question, we proposed a substantive test for future freedom of conscience cases under section 2(a) of the *Charter*, particularly in the realm of health care. In doing so, we hope to have provided a tool that can be used to assist those responsible for regulating the conduct of health care professionals as they struggle to design laws and policies that protect and promote the health care needs and interests of patients without unjustifiably limiting the *Charter* conscience rights of health care professionals. We also hope to have made a positive contribution to future freedom of conscience *Charter* cases, especially (but not only) in the area of health care.

⁸⁷ For some discussion of whether freedom of religion and freedom of conscience warrant the same level of scrutiny, see e.g. Thomas, *supra* note 80.