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# FREEDOM OF CONSCIENCE: A COMMUNAL-BASED APPROACH

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## ABSTRACT

Despite the plethora of freedom of religion literature (under section 2(a) of the *Canadian Charter of Rights and Freedoms*), the corresponding literature on the freedom of conscience is minimal. To further the discussion on the freedom of conscience, I rely heavily on the philosophical literature to make an important distinction; the difference between individual-based and communal-based conceptions of conscience. Whereas the former is plagued with subjectivity, making it difficult to conceptualize a working framework for the *Charter* right, the latter offers a promising foothold to rise above subjectivity and find a firm footing based on communal relations. In emphasizing the importance of the dialogical nature of human beings and the relational necessity undergirding moral judgements, I argue that the concept of conscience should be understood and practiced in community, rather than individually.

**Keywords:** Freedom of Conscience, Freedom of Religion, Conscience, Relationality, Personhood

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## INTRODUCTION

Humans are a moral species (*homo moralis*<sup>1</sup>), continuously creating and reinforcing moral frameworks. The phenomena of conscience and religion contribute to these moral frameworks by motivating people to pursue various moral objectives. In any multi-cultural community, it is inevitable that moral viewpoints and objectives vary from person to person. Section 2(a) of the *Canadian Charter of Rights and Freedoms* states that everyone has the “freedom of conscience and religion”.<sup>2</sup> This freedom, therefore, appears to act as a safeguard to ensure that people, regardless of their religious or non-religious commitments, can act in accordance with one’s moral convictions. However, the current jurisprudence on section 2(a) is mostly, if not entirely, directed towards the religious component, leaving the legal concept of conscience wanting.

In what follows, it will be argued that in the courts’ attempt to establish a working framework to consider conscience-based claims, the court should adopt an understanding of conscience as a *communal* phenomenon, as opposed to an entirely *individual* phenomenon. By adopting a communal conception of conscience, the courts’ analysis should consider whether the conscience-based claim, at a minimum, considers the values and principles of the surrounding community.

## I. CONSCIENCE

### A. A Brief Linguistic History

For many, the concept of conscience denotes an internal voice, inclination, or disposition towards an act or omission which possesses a moral dimension. It is not uncommon to hear phrases such as “that particular act goes against my conscience” or “my conscience prohibits me from acting in a such a manner”. From an internal heavenly voice<sup>3</sup> to an evolved human faculty,<sup>4</sup> the concept of conscience is a broad and often ambiguous concept, or as CS Lewis aptly put it, the idea of one’s conscience is a “...simmering pot of meanings”.<sup>5</sup>

The linguistic provenance of conscience appears to arise from the Greek playwrights, dating back to the fifth century BCE.<sup>6</sup> A theatrical metaphor, which described the act of “sharing knowledge with oneself, as if one were split into two”, was expressed by the Greek term, *suneidenai*.<sup>7</sup> By breaking apart the Greek term into *sun* and *eidenai*, the term’s meaning becomes clear. The first morpheme, *sun*, meaning “to share” accompanied by the latter, *eidenai*, meaning “knowledge” (alongside the associated term *heautōi*, meaning “oneself”) carries the components

1 Raphael Domingo, “Restoring Freedom of Conscience” (2015) 30:2 *JL & Religion* at 176.

2 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

3 Peter Kreeft & Ronald Tacelli, *Pocket Handbook of Christian Apologetics*, 1<sup>st</sup> ed (Downers Grove: InterVarsity Press, 2003) at 26 (“Conscience is thus explainable only as the voice of God in the soul”).

4 Patricia Churchland, *Conscience: The Origins of Moral Intuition* (New York: WW Norton & Company, 2019) at 71 (“...attachment begets caring, caring begets conscience”).

5 CS Lewis, *Studies in Words* (London: Cambridge University Press, 1960) at 196.

6 Richard Sorabji, *Moral Conscience Through the Ages: Fifth Century BCE to the Present* (Chicago: University of Chicago Press, 2015) at 12.

7 *Ibid.*

necessary to arrive at the metaphor of “sharing knowledge with oneself”.<sup>8</sup> *Suneidôs*,<sup>9</sup> a derivative Greek term of *suneidenai*, later provided a direct translation into the Latin term, *conscientia*,<sup>10</sup> which bears a familiar resemblance to the current English term, conscience.<sup>11</sup>

The previously inward and internalized understanding of conscience – sharing knowledge with oneself – began to incorporate outward and externalized components. One possible explanation of the change in meaning is the imputation of the concept of conscience into the Christian lexicon. Such an event is believed to have taken place when Saint Jerome translated the biblical Greek term, *syneidêsis*, to the Latin term, *conscientia*, in the fourth century.<sup>12</sup> At the time, *conscientia* carried a communal connotation, as it was used to describe either knowledge shared with another,<sup>13</sup> mutual knowing,<sup>14</sup> or knowledge of community standards.<sup>15</sup>

By recounting the etymological roots of the word conscience, one can see two diverging understandings of its composition: the first, an individual self-awareness that arises by *sharing knowledge with oneself*, and the second, a mutual or collective knowledge that arises by *sharing knowledge with another*. The next portion of this paper will examine the philosophical literature and attempt to explicate the competing (or complementary) understandings of conscience.

## B. Individual Conscience: Sharing Knowledge with Oneself

The individualistic conception of conscience deals primarily with the self, forgoing any substantive external element, whether that be reason, a sacred text, or social consensus. By emphasizing the individual, any larger narrative of morality and meaning is pushed to the background. Tom O’Shea, a political and moral philosopher, refers to this concept of conscience as the modern moral conscience and describes it as “an evaluative self-awareness which aims to produce particularistic and motivating moral knowledge”.<sup>16</sup> One can see the etymological root of conscience (sharing knowledge with oneself) in O’Shea’s definition in the idea of an evaluative self-awareness.

The emphasis on the self as a grounding for moral insight and knowledge is argued by some scholars to have been greatly influenced (or reinvigorated) by Jean-Jacques Rousseau’s work,

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8 *Ibid.*

9 *Ibid* at 14. *Sun* means “shared with” and *eidêsis* means “knowledge”.

10 *Ibid.* *Con* means “shared with” and *scientia* means “knowledge”.

11 Others have argued that the Greek term *syneidêsis* was the term which the Latin term *conscientia* derived from.

12 Paul Strohm, *Conscience: A Very Short Introduction* (New York: Oxford University Press, 2011) at 8, who states that Jerome’s use of *conscientia* carried with it the connotations that attached it to “public expectation” and the “public sphere”, which appear to have derived from *Ciceronian* and *classical-legal* understandings of the term.

13 John Cottingham, “Conscience: What is its History and Does it Have a Future?” (2019) 45:3 *Hist European Ideas* 338 at 339.

14 Strohm, *supra* note 12 at 4.

15 Churchland, *supra* note 4 at 8.

16 Tom O’Shea, “Modern Moral Conscience” (2018) 26:4 *Intl J Philosophical Studies* 582 at 583.

*Emile* (1763).<sup>17</sup> Rousseau can be understood as describing humans with an innate principle of justice endowed into their souls. Rousseau writes, “[t]here is in the depths of souls, then, an innate principle of justice and virtue according to which, in spite of our own maxims, we judge others as good or bad. It is to this principle that I give the name conscience”.<sup>18</sup> By positing a natural endowment of justice, individuals are justified in considering their conscience to be a truth-preserving faculty that produces correct moral judgments. Therefore, the modern moral conscience can have one explanation based on an innate principle of justice within the person.

Much of the modern conscience literature departs from Rousseau’s endowment of justice, while it still highly prioritizes the self as determinative in moral matters. It seems that remnants of Rousseau’s conception of conscience can be found in the literature of personal integrity as conscience. William Lyons writes that an important aspect of conscience is the development of “an objective moral point of view of our own”,<sup>19</sup> which we commit ourselves to acting on.<sup>20</sup> This objective moral point of view (in other words, conscience) is foundational to one’s personal integrity. By acting in accordance with one’s personal objective moral viewpoint, we preserve our personal integrity, which in turn protects one’s autonomy, self-respect, and identity.<sup>21</sup>

These individualistic and self-oriented conceptions of conscience inevitably bring to light the problem of the efficacy and value of individual conscience. History is full of examples where one’s conscience has been “twisted out of all recognition” and has “made men do what they believed to be their duty”, when such acts were morally grotesque.<sup>22</sup> Unless tempted to adhere to a relativistic moral philosophy, one should be skeptical about the weight, emphasis, and trust put on one’s individual conscience to arrive at correct moral deductions.

### C. Communal Conscience: Sharing Knowledge with Another

In contrast to the individual-based conscience, communal conscience<sup>23</sup> incorporates external principles to a greater degree. The contrast between these two conceptions of conscience (and by extension, the self) can be seen in much of Charles Taylor’s work. He writes, “[f]or the pre-modern... I am an element in a larger order... The order in which I am placed is an

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17 Charles Taylor, *The Malaise of Modernity* (Toronto: House of Anansi Press, 1991) at 27; Carl Trueman, *The Rise and Triumph of the Modern Self: Cultural Amnesia, Expressive Individualism, and the Road to Sexual Revolution* (Wheaton, IL: Crossway, 2020) at 122.

18 Trueman, *supra* note 17 at 122.

19 William Lyons, “Conscience: An Essay in Moral Psychology” (2009) 84:4 *Philosophy J* 477 at 488.

20 It should be noted that Lyons account of conscience is non-authoritative, meaning that one’s conscience does not necessarily reflect the true nature of objective morality (see *ibid*).

21 Patrick Lenta, “Freedom of Conscience and the Value of Personal Integrity” (2016) 29:2 *Ratio Juris* 246 at 248-253.

22 Martin van Creveld, *Conscience: A Biography* (London: Reaktion Books, 2015) at 164. Specifically, see Chapter V titled, “Conscience in the Third Reich”.

23 By communal conscience, I refer to the tradition of conscience that relies heavily on various social architectures. A similar term, “collective conscience”, can be seen as groups or institutions possessing a singular conscience. See Brian Bird, “The Call in Carter to Interpret Freedom of Conscience” (2018) 85:2 *SCL Rev* 107 at 123 and Kevin Wildes, “Institutional Identity, Integrity and Conscience” (1997) 7:4 *Kennedy Ins Ethics J* at 413.

external horizon which is essential to answering the question, who am I?...for the modern, the horizon of identity is to be found within, while for the pre-modern it is without”.<sup>24</sup> The Canadian philosopher, George Grant, shares a similar viewpoint as Taylor. Regarding modern society, Grant writes, “[w]e no longer consider ourselves as part of a natural order... We see ourselves rather as the makers of history, the makers of our own laws. We are authentically free since nothing beyond us limits what we should do”.<sup>25</sup> There are striking parallels between the analyses that Grant and Taylor offer on the modern understanding of the self. Moreover, one can see the parallels between Taylor’s understanding of the modern self<sup>26</sup> and O’Shea’s modern moral conscience. The emphasis put on locating one’s identity by looking inward appears to form the basis for moral convictions and conscience-based claims grounded in internal, subjective beliefs. Therefore, rather than finding a principle of justice engraved within ourselves, as Rousseau opined, conceptions of communal conscience look to the “external horizon” or to “externally accountable standards” outside the self.<sup>27</sup>

As noted earlier, when Saint Jerome translated the biblical Greek term, *syneidêsis*, to the Latin term, *conscientia*, in the fourth century,<sup>28</sup> the concept of conscience inevitably entered the arena of theological debate. Max Scheler, a Catholic philosopher, writes, “[o]nly the cooperation of conscience and principles of authority and the contents of tradition with the mutual correction of subjective sources of cognition guarantees [moral insight].”<sup>29</sup> In other words, conscience must be buttressed against external authorities. Scheler, along with others (for example, Martin Luther and John Calvin), were worried about the efficacy of “special illuminations”<sup>30</sup> of conscience being held over other external sources of moral authority. Within the Christian tradition, as Paul Strohm notes, there was a clear divide between how much weight conscience should be given as an authority to arrive at moral conclusions.<sup>31</sup> However, the commonality between these concerns was that conscience should not be treated as an inerrant source of moral knowledge, but rather one part in a larger normative framework to arrive at moral conclusions.

After much theological debate, the idea of conscience began to take on a more secular formation around the 17<sup>th</sup> century.<sup>32</sup> Richard Sorabji writes, “Kant thus secularized conscience to the extent making God no longer an objective feature of it”.<sup>33</sup> For Kant, conscience was

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24 The quote originates in Charles Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) at 258, but was condensed in Joseph Calano, “Charles Taylor and the Modern Moral Sources of the Self” (2015) *Scientia: Research J College Arts & Sciences* 121 at 121.

25 George Grant, *Philosophy in the Mass Age* (Toronto: University of Toronto Press, 1998) at 38.

26 See Charles Taylor, *Sources of the Self* (Cambridge: Harvard University Press, 1989).

27 O’Shea, *supra* note 16 at 591.

28 Strohm, *supra* note 12 at 8. Strohm states that Jerome’s use of *conscientia* carried with it the connotations that attached it to “public expectation” and the “public sphere”, which appear to have derived from *Ciceronian* and *classical-legal* understandings of the term.

29 *Ibid* at 33.

30 Strohm, *supra* note 12 at 31.

31 *Ibid* at 35-36.

32 Strohm, *supra* note 12 at 39.

33 Sorabji, *supra* note 6 at 180.

the “internal court in man”,<sup>34</sup> which “determines whether an agent has acted in conformity with or contrary to the moral law in a given instance”.<sup>35</sup> The reference to the moral law, regardless of what exactly that consists of, is an external reference point which grounds whether the person’s action was correct or not. According to Kant, since people are unable to judge themselves in relation to the moral law, they must observe themselves from another’s perspective<sup>36</sup> – or in legal terminology, from the viewpoint of the “reasonable person”. By incorporating another person into the court of conscience, Kant’s concept begins to resemble the idea of sharing knowledge with another, rather than an entirely individualistic conception of conscience. This communal sharing of knowledge is also reflected in some of the more current literature on conscience.

Recently, Françoise Baylis put forward a conception of conscience titled, “the relational view of conscience”.<sup>37</sup> Baylis’ conception of conscience consists of three primary parts: first, a thoughtful and reflective deliberation about which values, beliefs and commitments endorse one’s own; second, one’s best judgement about what should be done, taking into consideration a shared interest in living justly and well; and finally, an action that is aimed at keeping one in proper relation to oneself and in proper relation with others.<sup>38</sup> This conception of conscience incorporates communal standards and social consensus as one must not only be concerned about their own personal integrity, but also with social integrity. Such a conception incorporates a strong care ethic,<sup>39</sup> emphasizing the personalized nature of decision making, rather than abstract syllogisms about what the objective moral law demands of us.

As I have put forward, communal conceptions of conscience are those that substantially incorporate external elements into moral deliberation, compared to the individual conscience which lacks such external elements. O’Shea writes, “[c]onscience is better able to be morally responsive when it is buttressed by appropriate social architecture.”<sup>40</sup> In this sense, when one’s conscience is engaged and active, its efficacy is tempered against collective social values. This is not to say that communal modes of conscience are infallible, as groups and societies can fall into error just as individuals can.<sup>41</sup> However, communal modes of conscience have one additional fence to climb in arriving at a wrong decision – the concerns and moral disagreement of our neighbours who might disagree with us.

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34 Strohm, *supra* note 12 at 45.

35 Samuel Kahn, *Kant’s Theory of Conscience* (Cambridge: Cambridge University Press, 2021) at 2.

36 Strohm, *supra* note 12 at 45-50.

37 Françoise Baylis, “A Relational View of Conscience and Physician Conscientious Action” (2015) 8:1 Intl J Feminist Approaches to Bioethics at 18.

38 *Ibid* at 30.

39 Care ethics can be seen to emphasize (external) personal relationships over abstract moral principles. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Cambridge: Harvard University Press, 1982) at 104-05.

40 O’Shea, *supra* note 16 at 593.

41 van Creveld, *supra* note 22 at 164.

## II. FREEDOM OF CONSCIENCE

### A. Legal Analysis

By considering the various philosophical approaches to conscience, one can now approach the courts' dealings with conscience with a more critical eye. In the same way that the courts have struggled with defining religion<sup>42</sup>, the courts should begin in their struggle to define conscience. As Rober Vischer puts it, “[i]f our society is committed to facilitating the flourishing of conscience, it makes sense for the law to account for conscience’s *true nature*”.<sup>43</sup> To be fair, judges are unlikely to arrive at a complete analysis of the true nature of conscience – such an expectation would be unrealistic. However, it is reasonable to expect the courts to broach the topic and begin to consider what conscience’s true nature might consist of. After all, the Supreme Court did state in *Amselem*, “[i]n order to define religious freedom, we must first ask ourselves what we mean by ‘religion’”.<sup>44</sup> Such a statement holds true here as well. Next, a brief legal analysis of four cases will be presented. By analyzing the courts’ dealings with conscience, one is better situated to then make suggestions in how the Court ought to move their analysis forward.

### B. Pre-Charter Jurisprudence

The conscience jurisprudence can be conveniently divided into two narratives: pre-*Charter* and post-*Charter*. Regarding the former, Brian Bird writes, “the overwhelming majority of pre-*Charter* jurisprudence that implicates conscience intimately links it to religion. In short, conscience is mainly understood as *religious* conscience”.<sup>45</sup> In this perspective, if conscience is primarily understood as a religious conscience, then those who don’t affiliate with any religious tradition or creed are at a disadvantage in their ability to manifest and protect their sphere of moral autonomy. There are two instances in the pre-*Charter* jurisprudence, however, where conscience and religion can be seen to be “weakly” separated,<sup>46</sup> – in other words, where the conception of conscience can be understood to be based in secular frameworks. Moreover, the two cases that follow can be seen as a starting point in considering the difficulty of classifying beliefs as religious-based or conscience-based.

#### i. *Anderson*

In *Re Civil Service Association of Ontario (Inc) v Anderson*,<sup>47</sup> a union worker refused to pay union fees since “his conscience dictated that strikes were morally wrong” because unions were

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42 The Court stated in *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 39 [*Amselem*] that to define religion may not be “possible”.

43 Robert Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* (Cambridge: Cambridge University Press, 2010) at 99 [emphasis added].

44 *Amselem supra* note 42 at para 39.

45 Brian Bird, “Rediscovering Freedom of Conscience in Canada” (2021) 84 Sask L Rev 23 at 43.

46 *Ibid.* As Bird notes, the cases of *Re Civil Service Association of Ontario (Inc) v Anderson*, 1975 CanLII (ONSC) [*Anderson*] and *Butler v York University Faculty Association* referred to conscience and religion as distinct legal concepts.

47 *Anderson, supra* note 46.



“disruptive to society and the economy”.<sup>48</sup> At the time of this case, there were exemptions in an Ontario statute that permitted individuals to not pay union fees if such union fees contravened their religious convictions or beliefs.<sup>49</sup> Interestingly, Anderson argued his belief was religious because his church community encouraged their congregants in “the making of individual moral judgments”.<sup>50</sup> Despite the church’s involvement on this matter, the union argued that the labour relations tribunal misconstrued Anderson’s belief as religious<sup>51</sup> and the belief was “purely conscientious and thus not religious”.<sup>52</sup> Ultimately, the tribunal allowed Anderson to refrain from paying the union fees based on their finding that Anderson’s beliefs should be characterized as a “religious conviction[s] or belief[s]”.<sup>53</sup> In the judgement, the appellate court wrote,

It is trite to say that in some circumstances, or with respect to some individuals, matters of morality might well be quite *separate and distinct* from matters of religious belief. However, it does not follow that a matter of individual morality and conscience may not, for some individuals, be an important element or tenet in their religious convictions or belief. Mr. Anderson, as found by the tribunal, regards the matter of making individual moral judgments on issues of this sort as being an element of his religious convictions or belief.<sup>54</sup>

The court’s decision hinged on whether Anderson’s belief (i.e., “strikes are immoral”) was religiously based or secularly based. Arguably, his belief was not religious, as his church community encouraged their congregants to make “individual moral judgments.” This category, that of individual moral judgements, is incredibly broad, which one could reasonably argue includes all sorts of beliefs, including beliefs that go against the church’s religious doctrinal beliefs. As Bird notes, “[t]he Court in *Anderson* arguably committed a leap in logic. The claimant’s ‘religious’ belief was that one must form and follow one’s conscience, but the belief that strikes are immoral, a product of acting on that religious belief was strictly speaking, a conscientious belief or moral judgement unique to him as an individual”.<sup>55</sup> That said, it is likely that Mr. Anderson’s strong comments about his “religion [as] an inseparable part of his day to day living”,<sup>56</sup> moved the court in determining Anderson’s belief to be religious. The main point of this case that is worth noting is the court’s mention of “individual morality and conscience” not necessarily comprising “an element or tenet” of one’s “religious convictions or belief”. The Court, therefore, acknowledges that for some individuals, conscience (as well as individual matters of morality) may be based in religious or non-religious foundations.

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48 *Ibid* at para 1.

49 Bird, *supra* note 45 at 43 and *Anderson* at para 1.

50 *Anderson*, *supra* note 45 at para 1.

51 *Ibid* at para 2.

52 Bird, *supra* note 45 at 43.

53 *Ibid*.

54 *Anderson*, *supra* note 47 at para 6.

55 Bird, *supra* note 45 at 42.

56 *Anderson*, *supra* note 47 at para 4.

ii. *Butler*

In *Butler v York University Faculty Association*, a similar case (approximately six years after *Anderson*), Butler, a university professor, argued that having to pay union dues was entirely against his conscience.<sup>57</sup> He grounded his claim in the fact that since the university is a place of “human culture”,<sup>58</sup> the university should respect his “conscience and integrity”.<sup>59</sup> Under the *Labour Relations Act*,<sup>60</sup> there was an exemption to paying union fees based on one’s “religious conviction or belief”.<sup>61</sup> The Board, thereby, had to determine whether Butler’s strong convictions regarding union fees was religious in nature. The Board wrote,

What the applicant is in effect asking the Board to do is to legislate the word “religious” out of section 39 altogether. This is not an appropriate function for the Board... Had the Legislature chosen to grant the objection simply on the basis of “personal conviction”, or “genuine belief”, or “matters of conscience”, it could easily have done so. But it did not. The section is not written simply for “conscientious objectors”.<sup>62</sup>

The Board determined that since the legislation expressly accounts for religious-based convictions but not those which are conscience-based, Mr. Butler’s personal convictions or matters of conscience were not protected. The Board appears to acknowledge the existence of conscience-based beliefs as separate from religious-based beliefs. To clarify, the Board did not say that there exists a right (or sphere of protection) to personal convictions or matters of conscience that are not based in religion. However, the Board acknowledged (at least conceptually) that for some persons, matters of belief and conscience are not necessarily linked nor grounded in religion. In both *Anderson* and *Butler*, the courts acknowledged that for some, conscience-based claims will not be religiously grounded. As noted at the beginning of the pre-*Charter* section, these two cases represent outliers since most pre-*Charter* jurisprudence sees conscience as “*religious* conscience”.<sup>63</sup> These cases foreshadow of a conversation that continues in the post-*Charter* jurisprudence. The next section will survey two of the major cases that deal with conscience as it relates to the freedom of conscience, after the enactment of the 1982 *Charter*.

### C. Post-Charter Jurisprudence

The post-*Charter* cases discuss section 2(a) of the *Charter* which reads, “[e]veryone has the following fundamental freedoms: freedom of conscience and religion”.<sup>64</sup> As stated in *R v Edwards Books and Art Ltd*,<sup>65</sup> “[t]he purpose of section 2(a) is to prevent interference with profoundly held personal beliefs that govern one’s perception of oneself, humankind,

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57 *Butler v York University Faculty Association*, 1981 CanLII 827 (ONLRB) [*Butler*].

58 *Ibid* at para 7.

59 *Ibid*.

60 *Labour Relations Act*, RSO 1980, c 228.

61 *Bird*, *supra* note 45 at 42.

62 *Butler*, *supra* note 57 at para 16.

63 *Bird*, *supra* note 45 at 43.

64 *Charter*, *supra* note 3 at s 2(a).

65 *R v Edwards Books and Art Ltd*, 1986 CanLII 12 (SCC) at para 97 [*Edwards Books*].

nature, and, in some cases, a higher or different order of being”. Others, such as Derek Ross, have argued that “[a]t their core [freedom of conscience and religion] are centered on the fundamental importance of truth and its observance”.<sup>66</sup> In both the courts’ perspective and scholars, such as Ross, section 2(a) has a broad overarching purpose to protect a person’s ability to pursue and believe varying truth-claims about the nature of reality and the meaning of human existence. However, most section 2(a) jurisprudence discusses the meaning and the scope of religious freedom. The freedom of conscience on the other hand, has been neglected and seemingly “forgotten”.<sup>67</sup>

#### i. *Big M Drug Mart*

We now turn to *R v Big M Drug Mart*, a leading case in freedom of conscience analysis.<sup>68</sup> Big M Drug Mart was charged with being in violation of the *Lord’s Day Act*, which prohibited “any work or commercial activity upon the Lord’s Day” (i.e. Sunday).<sup>69</sup> Big M Drug Mart subsequently challenged the *Lord’s Day Act* as being unconstitutional due to its violation of section 2(a) of the *Charter*.<sup>70</sup> In the Court’s decision, there are several passages that begin to shed light on the Court’s understanding of what freedom of conscience may consist of. After briefly describing the importance of a society which accommodates diversity in beliefs, Chief Justice Dickson (as he then was) opined,

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*.<sup>71</sup>

Chief Justice Dickson by acknowledging the importance of both negative and positive aspects of freedom. Stated differently – freedom consists of one’s ability to maintain a level of autonomy in the *forum internum* (i.e. private beliefs and thoughts) as well as a level of freedom in the *forum externum* (i.e. manifesting private beliefs and thoughts). As seen in the last sentence of this statement, Chief Justice Dickson (as he then was) refers to beliefs *or* conscience, which appears to distinguish between the two legal concepts. Nevertheless, since conscience has been steeped in religion for so long, one should be skeptical about any statement that does not clearly and precisely separate the two concepts. Later in *Big M Drug Mart*, Chief Justice Dickson (as he then was) offers a strong and definitive statement on the importance of persons being able to hold and manifest religious non-belief. He writes,

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66 Derek Ross, “Truth-Seeking and the Unity of the Charter’s Fundamental Freedoms”, in Dwight Newman, Derek Ross, and Brian Bird, eds, *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis, 2020) at 83.

67 See Mary Ann Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013) at 195; Waldron titles a chapter, “Freedom of Conscience: The Forgotten Human Right”.

68 *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC) [*Big M Drug Mart*].

69 *Ibid* at para 5.

70 *Ibid* at para 14.

71 *Ibid* at para 95 [emphasis added].

The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest *whatever* beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own... Equally protected, and for the same reasons, are expressions and manifestations of *religious nonbelief* and refusals to participate in religious practice... 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.<sup>72</sup>

Again, Chief Justice Dickson (as he then was) takes note of non-religious belief and states that individuals should “be free to hold and manifest *whatever* beliefs” their conscience dictates. In the context of *Big M Drug Mart*, however, Chief Justice Dickson’s (as he then was) statements may simply refer to not being coerced to abide by religious traditions and conventions, such as closing on Sundays. LaLater in his judgement, Chief Justice Dickson (as he then was) makes an interesting comment about the integrated nature of section 2(a):

Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our *Charter*, the single integrated concept of freedom of conscience and religion.<sup>73</sup>

Drawing a definitive conclusion from such a passage is difficult, given its overtly theistic perspective, as evident in the passage itself. However, the pre-*Charter* position of conscience as religious conscience seems to be alive and well in Chief Justice Dickson’s (as he then was) statement, given the reference to God planting the conscience “in His creatures”. Additionally, Chief Justice Dickson (as he then was) strongly links conscience with religion as one concept. It is possible that the two concepts could work separately but attempting to decipher any implications from this statement would be speculative. Bird writes, “[t]he discussion of s. 2 (a) in *Big M Drug Mart* does not specify whether ‘conscience’ and ‘religion’ do any work independently of one another and, if they do, what the division of labour between them might be.”<sup>74</sup> Despite not being able to ascertain a clear “division of labour” between conscience and religion, it is clear that Canadians are entitled to manifest belief systems that do not incorporate religion. What that manifestation would entail is another question – whether it is simply the right to not be coerced or a more robust right to manifest conscience-based beliefs. The following case sheds more light on these unanswered questions.

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72 *Ibid* at para 123 [emphasis added].

73 *Ibid* at para 120 [emphasis added].

74 Bird, *supra* note 45 at 51.

ii. *Morgentaler*

Three years after *Big M Drug Mart*, the decision in *R v Morgentaler*<sup>75</sup> addressed freedom of conscience in a somewhat different tone. It focused on whether the abortion provisions in the *Criminal Code* were in contravention to section 7 of the *Charter* and if so, could the infringement be saved under section 1 of the *Charter*?<sup>76</sup> The majority held that section 7 of the *Charter* was violated and could not be saved under section 1.<sup>77</sup> Regarding conscience – Justice Wilson, in a concurring judgment, stated the following:

In my view, the deprivation of the s. 7 right with which we are concerned in this case offends s.2(a) of the *Charter*. I say this because I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state? I believe, for the reasons I gave in discussing the right to liberty, that in a free and democratic society it must be the conscience of the individual.<sup>78</sup>

There is much to be said about Justice Wilson’s statement, including an intriguing philosophical question regarding collective conscience. The more relevant aspect of her statement, however, is the strong link between “moral decision(s)” and “matters of conscience”. It seems fair to deduce from Justice Wilson’s statement that conscience-based beliefs are often those which concern moral or normative matters. Attempting to deduce any implications from this statement about the separation between conscience-based and religious-based beliefs would be premature. Later in her judgement, Justice Wilson states:

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”.<sup>79</sup>

This statement can be seen as the strongest and clearest statement to date that purports to separate conscience and religion. She begins by referencing religion and conscience together, but then states that the two should not be seen as “tautologous” – despite their related meaning. Moreover, Justice Wilson argues that conscientious-based beliefs can be grounded in religious

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75 *R v Morgentaler*, 1988 CanLII 90, 1988 CarswellOnt 9541 (SCC) [*Morgentaler*].

76 *Ibid* at para 1.

77 *Ibid* at para 79.

78 *Ibid* at para 256.

79 *Ibid* at para 260.

or secular moralities. One may even draw a connection to the previous quote by Wilson J., where conscience looked to be linked to moral decisions. In this sense, morality (whether secular or religious) is an essential component in Wilson J.'s understanding and conception of conscience. Whereas religion is concerned with religious practices and manifestations of religiously based beliefs, conscience might begin to be considered manifestations of internal moral beliefs held by the individual. Justice Wilson's statement about conscience adds an interesting new dimension to the conscience jurisprudence, but it should be reiterated that such thoughts are *obiter dicta*. After *Morgentaler*, the freedom of conscience jurisprudence remained static, except for the few times it was indirectly addressed in relation to freedom of religion.<sup>80</sup>

#### D. Confusion or Clarity: The Supreme Court of Canada on Conscience

The cases surveyed are not the only cases in the Supreme Court of Canada jurisprudence that have touched on the topic of conscience. There are others, such as *Alberta v Hutterian Brethren of Wilson Colony*,<sup>81</sup> *Syndicat Northcrest v Amselem*<sup>82</sup> or *Carter v Canada (Attorney General)*,<sup>83</sup> that discuss conscience. Although these cases do contribute to the overall context and understanding of the Supreme Court's position on the freedom of conscience, a lengthy analysis of each is not necessary. There is a common view that the Canadian jurisprudence is not clear about the meaning of conscience. Jocelyn Downie and Baylis state, "[n]o clear meaning of freedom of conscience can be taken from the jurisprudence. There is a lack of consistency at best, and confusion at worst".<sup>84</sup> Similarly, Bird suggests, "Canadian legal history does not settle that matter of what is protected by freedom of conscience in s. 2(a) of the *Charter*".<sup>85</sup> Both Bird, and Downie and Baylis have very different conceptions of what the freedom of conscience should incorporate, but all agree that the clarity and precision around the fundamental freedom is lacking.

### III. CONCEPTUALIZING CONSCIENCE

The first portion of this paper traced the historical and philosophical developments regarding conscience. The concept of conscience manifested itself in two primary modes: communal and individual – or, in slightly different terminology (relying on Taylor and O'Shea) – the pre-modern and the modern conscience. The second portion of the paper analyzed two cases in the pre-*Charter* era and two cases in the post-*Charter* era. Despite the consensus regarding

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80 See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] and *Amselem*, *supra* note 42.

81 In *Hutterian Brethren*, *ibid* at paras 128 and 180, a few comments were made regarding freedom of conscience in a dissenting opinion, similar to those in *Amselem*.

82 In *Amselem*, *supra* note 42 at para 48, the Court defines religion in opposition to those beliefs that are secular, socially based or conscientiously held. In this sense, such beliefs may be thought to be considered conscience-based beliefs. However, such a conclusion is highly speculative.

83 In *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*] at paras 130-132, a brief comment suggested that conscience and religious beliefs may be separated.

84 Jocelyn Downie, & Françoise Baylis, "A Test for Freedom of Conscience Under the Canadian Charter of Rights and Freedoms: Regulating and Litigating Conscientious Refusals in Health Care" (2017) 11:1 McGill JL & Health S1 at S18.

85 Bird, *supra* note 45 at 59.

the lack of clarity and precision surrounding the meaning of conscience, the Court was seen to strongly emphasize the importance of preventing interference with “profoundly held personal beliefs”.<sup>86</sup> In what follows, I will argue that the Court, in its attempt to arrive at a working understanding of freedom of conscience, should incorporate communal aspects of conscience to bulwark against the possibility of conscience becoming a completely subjective and individualistic concept.

### A. Reframing Conscience

The Canadian *Charter* is highly individualistic – specifying the rights and protections that each person possesses. A dyadic framing runs through the *Charter*, positioning individuals against the state.<sup>87</sup> This dyadic framing likely relies on an underlying metaphysic, where the individual is placed prior to the relational or the communal.<sup>88</sup> Unfortunately, such a framing has tended to marginalize certain communal aspects of *Charter* rights. Benjamin Berger notes (in the religious freedom context) that our laws have a distinct “epistemologically colonial” framing that implicitly biases and favours the individual over the communal.<sup>89</sup> When pondering the idea of what conscience is, it is reasonable to think that the freedom of conscience should be understood as primarily individual. In this regard, the freedom of conscience will mirror the courts’ understanding of the freedom of religion: “in essence religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment”.<sup>90</sup> Conscience, therefore, will likely be deemed a deeply held personal conviction connected to one’s normative framework and integrally linked to one’s self-definition and personal fulfillment. Before the court arrives at an understanding of conscience, it has a unique opportunity – an opportunity to look at its past dealings with religious freedom and determine to what extent freedom of conscience will mirror or depart from that jurisprudence.

### B. The Primacy of Relation

Constructing an entirely subjective framework for conscience might be correct if moral decisions were entirely idiosyncratic and personal. However, developing an entirely internal and personal moral conscience (which makes/informs moral decisions) without consideration of external relationships is a fanciful fiction. As Charles Taylor writes,

“The general feature of human life that I want to evoke is its fundamentally *dialogical* character. We become full human agents, capable of understanding ourselves,

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86 *Edwards Books*, *supra* note 65 at para 97.

87 Kathryn Chan, “Religious institutionalism: A Feminist Response” (2021) 71:4 Toronto JL 443 at 461.

88 John Borrows has a fascinating chapter examining the law’s metaphysic in relation to treaty interpretation in his book: John Borrows, *Law’s Indigenous Ethics* (Toronto: University of Toronto Press, 2019). He writes, “Law’s exile of moral, philosophical, and religious insight about the nature of its own meaning-making metaphysics sustains a dangerous lack of self-reflexivity... We need legal processes that are more transparent about their nature and sources so that they can be questioned and placed in the realm of contestation” at 67.

89 Benjamin Berger, “Law’s Religion: Rendering Culture” (2007) 45:2 Osgoode Hall LJ 277 at 283 and 286.

90 *Amselem*, *supra* note 42 at para 48.

and hence of defining an identity through our acquisition of rich human languages of expression...The genesis of the human mind is in this sense not inherently “monological”, not something each accomplishes on his or her own, but dialogical”.<sup>91</sup>

This is the underlying metaphysic that grounds a communal conscience, as opposed to one which postulates and overemphasizes a person’s self-sufficiency to the point where their relation to others is either pushed to the background or forgotten entirely. It is worth contemplating a monological and individual metaphysic, however, to see how it fares against our actual understanding and experience of the primacy of human relationships and the dialogic.

In William James’ 1891 address to the Yale Philosophical Club, he postulates an entirely material world, consisting of only physical facts. According to James, the moral landscape in such a world drastically changes when “one sentient being...is made a part of the universe”.<sup>92</sup> Once one person enters the picture, James argued that all moral relations reside in that person’s consciousness.<sup>93</sup> In such a world, the person is the “sole creator of values in that universe” and there exists no moral obligations or demands external to themselves.

The reason for raising James’ hypothetical world is that it bears a familiar resemblance to philosophies postulating solitary thinkers using abstract principles to deduce the correct action in any given scenario (i.e., Descartes’ solitary thinker). What these hypothetical solitary thinkers have in common is a remarkable self-sufficiency – a self-sufficiency that conveniently leaves out their reliance upon others. The Lockean or Hobbesian<sup>94</sup> social contracts are great examples of this. Ponder the following phrase by Hobbes, “...consider men as if but even now sprung out of the earth, and suddainly (like Mushromes) come to full maturity without all kind of engagement to each other”.<sup>95</sup> Such a statement is difficult to fathom, given the analogy between the development of persons and mushrooms. Such “atomistic”<sup>96</sup> thinking fails to capture the necessity of relation. The care ethicist, Virginia Held, writes, “[m]oralities built on the image of the independent, autonomous, rational individual largely overlook the reality of human dependence and the morality it calls for”.<sup>97</sup> The reality is that humans are necessarily reliant on others not only for their existence but also for their initial sustenance and survival. The priority and necessity of this initial caring relationship cannot be overlooked.<sup>98</sup> As Buber would say, “[i]n the beginning is relation...”, as opposed to: “[i]n the beginning is isolation...”.<sup>99</sup> The former is known and experienced to be true, as opposed to the latter – which is merely postulated.

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91 Charles Taylor, *The Malaise of Modernity* (Toronto: House of Anansi Press, 1991) at 32-33.

92 *Ibid* at 33.

93 *Ibid*.

94 Charles Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) at 187.

95 Joseph Health, *Methodological Individualism*, (November 2020), online: <[The Stanford Encyclopedia of Philosophy: plato.stanford.edu/entries/methodological-individualism/](https://plato.stanford.edu/entries/methodological-individualism/)> [perma.cc/7Y95-6JSL].

96 I use this term in reference to Taylor’s paper titled, “Atomism”, in Taylor, *supra* note 94.

97 David Copp, *The Oxford handbook of Ethical Theory* (New York: Oxford University Press, 2006) at 538.

98 Virginia Held, *The Ethics of Care: Personal, Political, and Global* (New York: Oxford University Press, 2006) at 33.

99 Martin Buber, *I and Thou* (London: Routledge, 2004) at 27-28. For more on Buber’s philosophy and its possible implications on the freedom of conscience, see Andy Steiger, “Rights and Responsibilities of Conscience: The Courts Cannot Have It Both Ways” (2023) 113 in Barry W. Bussey & Angus J. L. Menuge, eds, *SC L Rev* (2<sup>nd</sup>) (Toronto: LexisNexis Canada, 2023) at 203.



### C. The Primacy of Relation and Legal Personhood

The priority and necessity of relation is true for natural persons, but it also looks to be true for *legal* persons. According to *Black's Law Dictionary*, “so far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties”.<sup>100</sup> Legal persons are not necessarily natural persons, as corporations are also deemed to possess legal personality.<sup>101</sup> Therefore, the idea of legal personality is more of a legal fiction, rather than an actual category grounded in a metaphysical reality. Ngaire Naffine writes, “[t]he legal ‘person’, the one whom law is for, is imagined as pure abstraction, the basic conceptual unit of legal analysis”.<sup>102</sup> Naffine’s language of the “basic conceptual unit of legal analysis” is incredibly helpful here. Like the discussion of *atomism* above, there is a tendency to view legal persons as isolated legal entities based on either a legal, rational, religious, or natural conception of personhood.<sup>103</sup> Despite one’s preferred philosophical anthropology, the primacy of relation still holds true for each of the four conceptions. Naffine writes:

This fifth metaphysical approach is one that sees the person both in law and society as formed by their relations, rather than by their inherent characteristics... In this view, the way that law forms the person—relationally—directly reflects the way that the person is formed in society, likewise relationally; that is to say, the nature and form of legal relations, which make legal persons, mirror or picture... the nature and form of real human relations, which turn us into human subjects: into human persons.<sup>104</sup>

Naffine makes the analogy this paper has been working towards, that persons and legal persons are formed in relation to one another. A person comes into existence with the help of others, and a legal person comes into existence based on a pre-existing legal system that recognizes their legal personality. Without the pre-existing legal system, comprised of other legal persons, there would be no legal person to grant the newborn the status of legal personhood. Therefore, both natural and legal aspects of persons appear to be based in relation to and dependent on one another. The necessity of relation also has important implications when persons (or legal persons) engage in moral reasoning and moral judgments.

### D. Relations and Moral Judgment

Conscience-based judgments are often (if not always) moral judgements. As Justice Wilson stated in *Morgentaler*, conscience is highly linked to moral decisions.<sup>105</sup> Given the priority of

100 Visa Kurski, *A Theory of Legal Personhood*, 1st ed (Oxford: Oxford University Press, 2019) at 1.

101 Michael Welters, “Towards a Singular Concept of Legal Personality” (2014) 92:2 Can Bar Rev 417 at 417-18 and 426 92(2); “What We Talk about When We Talk about Persons: The Language of a Legal Fiction” (2001) 114:6 Harvard LR 1745 at 1750.

102 Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person*, 1st ed (Portland: Hart Publishing, 2009) at 1.

103 Naffine argues that there are essentially four primary modes of understanding what the legal person should be based on: legality rationality, religiosity, and naturalism. See Naffine, *supra* note 101 at 167.

104 *Ibid* at 169.

105 *Morgentaler*, *supra* note 75 at para 256.

relation in human development (as seen above), relation also seems to play an important role in moral judgements. At first, a moral decision or moral judgement like conscience, could be arrived at in either an *individual* or *communal* manner; in the former process, one arrives at a moral judgement through a personal process. For example, if one takes Rousseau's idea of the innate principle of justice within individuals,<sup>106</sup> then individuals can arrive at a moral judgment given their innate "justice-oriented" faculty, or as seen in William Lyons's account, conscience is "an objective moral point of view of our own",<sup>107</sup> which we commit ourselves to acting on.<sup>108</sup> Our moral judgments, therefore, would be dependent on which course of action best aligns with the prior normative precepts that we have committed to acting on. Of course, there are other individual models which one could conceive of, but the principle remains the same – moral judgements are internally produced by a personal and internal mechanism. From my perspective, there are two reasons why one should be concerned or wary of such an individualistic approach to moral judgements. First, such moral judgements appear entirely subjective and thereby lack a validity and objectivity when applied to other external contexts. Second, individual modes of moral judgement often fail to consider other people's perspectives and values during the deliberation process. As Baylis writes, "one's best judgment must originate from something more than undue deference to self".<sup>109</sup>

By incorporating relational aspects into our moral judgments, we begin to "free ourselves from idiosyncrasies and [personal] inclinations".<sup>110</sup> Hannah Arendt develops a preliminary concept of moral judgement which utilizes the idea of an "enlarged mentality" – a concept that originated with Kant.<sup>111</sup> For Arendt, an enlarged mentality "involves the act of reflecting on a matter from the perspective of others"<sup>112</sup> or "imagining judgments from the standpoints of others".<sup>113</sup> Otherwise, when one only considers moral judgments from their own point of view, such judgments are prone to being idiosyncratic and failing to take into consideration other important perspectives. By incorporating the viewpoint of others into one's moral judgement – as an external element – one can buttress against subjective shortcomings. Of course, how well one can imagine standing in another's place will vary. A large part of the success of an enlarged mentality will be the amount of information one can gain about another's position and perspective. In this sense, as Nedelsky notes, "[t]he whole process of the enlarged mentality works within a community that shares at least a core of the underlying

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106 Trueman, *supra* note 18 at 122.

107 William Lyons, "Conscience: An Essay in Moral Psychology" (2009) 84:4 *Phil J* 477 at 488. It should be mentioned that depending on what ethic one adopts for themselves, it might better fall under the communal category. For example, if one adopts a hedonist ethic it would be fairly individual, but if they adopt a care ethic, it would be fairly communal.

108 As stated previously, it should be noted that Lyons' account of conscience is non-authoritative, meaning that one's conscience does not necessarily reflect the true nature of objective morality.

109 Baylis, *supra* note 37 at 29.

110 Jennifer Nedelsky, "Communities of Judgment and Human Rights" (2001) 1:2 *Theoretical Inquiries in Law J* 245 at 250.

111 Madeleine Sinclair, "Freedom of Religion in Canada and France: Implications for Citizenship and Judgment" (2006) 15 *Dal J Leg Stud* 39 at 41.

112 *Ibid* at 41.

113 Nedelsky, *supra* note 111 at 250.

values, conceptions, and understandings of the world”.<sup>114</sup> Viewed in this way, it would be incredibly difficult to incorporate the viewpoint of others with whom a person is unable to communicate with (or at least learn about from varying modes of communication) and begin to understand their perspective. In sum, the enlarged mentality appears to have significant restraints. However, the general principle remains applicable. Engagement with others and understanding their perspective before making a moral judgement (or conscience-based decision) is critical in arriving at a justified and defensible position.

### E. Canadian Conscience: A Communal-based Approach

How then does conscience work in practice? And – what sorts of restraints or limits should be placed on expressions of conscience? In attempting to determine the bounds of this legal concept, it may be helpful to start with a fairly wide conception and begin to narrow it down. To begin, it is clear that conscience cannot be viewed as an infallible witness – whether that be grounded in Rousseau’s innate endowment of justice<sup>115</sup> or various divine special illuminations”.<sup>116</sup> Conscience-based judgements must be recognized as fallible and therefore, need some sort of restraint or proxy. The “Promethean Ideal” must be avoided.<sup>117</sup> Baylis and Downie proposed a novel *Charter* test for freedom of conscience and wrote, “[t]he 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”.<sup>118</sup> Baylis and Downie’s coupling of moral agency with improved human ethical practice is a great place to begin when considering a test for freedom of conscience. In what follows, I suggest that the principle of relation should undergird the freedom of conscience jurisprudence.

#### i. The Relation Principle

As argued in the sections above, relationality is a necessary starting point in our understanding of the human person. No person is an island – no matter how hard they try. When one makes a conscience-based claim, they are appealing to others in hopes that they will recognize the validity of their claim. Communicating a conscience-based claim to another person starts a conversation (a mode or manifestation of relation) explaining why the particular action or

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114 *Ibid* at 267.

115 Trueman, *supra* note 18 at 122.

116 Strohm, *supra* note 12 at 31.

117 See McPherson’s chapter Existential Limits in his book: David McPherson, *The Virtues of Limits*, 1st ed (Oxford: Oxford University Press, 2022) at 5. He describes the “promethean ideal” as “playing God” and explains the virtue of limitations.

118 See Downie & Baylis’ proposal in “A Test for Freedom of Conscience Under the Canadian Charter of Rights and Freedoms: Regulating and Litigating Conscientious Refusals in Health Care” (2017) 11:1 McGill JL & Health 51 at S28.

omission is important to the person.<sup>119</sup> The claimant is hoping to elicit understanding from the respondent by helping the person see things from their point of view. Such a process reflects Arendt's idea of an "enlarged mentality". There is simply no way around the necessity of relation when making conscience-based claims in a community composed of *homo moralis* – a moral species. Therefore, claims of conscience must make an appeal to the external community. Similarly, freedom of religion claimants must demonstrate that their religious belief has a "nexus with religion".<sup>120</sup> In requiring the religious claimant to demonstrate a nexus with religion, the court is essentially requiring the claimant to demonstrate how their religious belief connects to an external order or framework.<sup>121</sup> Religion must then be a combination between the ethic (an individual action) and the metaphysical (the external moral framework). Likewise, the court should also require the claimant to demonstrate that their conscience-based belief has a nexus (or connects) to an external value system or ethical framework.

However, instead of that framework being based on a connection to the divine, the external value system and ethical framework must incorporate a connection or appreciation to the surrounding community and its values or principles. Defining the surrounding community as well as the most relevant community is a difficult task. Since we are discussing the Canadian *Charter*, I would argue that the relevant community is the Canadian community. The Canadian community is founded on certain relevant core principles such as, federalism, democracy, constitutionalism, and the rule of law – as specified by the Supreme Court of Canada.<sup>122</sup> Moreover, the Court describes democracy as:

...the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs,

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119 Language also seems to be a powerful argument for the primacy of relation, as language appears to inherently reflect the relation dimension of our social lives. Consider the following quote by Taylor, "[b]ut my principal point here is not that these words for roles, relations, activities, spheres, allow each of these severally to be part of our world, but rather the holistic point that our language for them situates them in relation to each other, as contrasting or alternating, or partially interpenetrating. To grasp them in language is to have some sense of how they relate. This relationality may be more or less articulate in one or other of its aspects, may be more or less clearly defined. But some sense of it is always present in human life qua linguistic..." in Charles Taylor, *The Language Animal: The Full Shape of the Human Linguistic Capacity* (London: The Belknap Press of Harvard University Press, 2016) at 22.

120 *Amselem*, supra note 42 at para 46.

121 One cannot help but be reminded of Geertz's statement regarding religion as the combination of a metaphysic and an ethic. Geertz writes, "[n]ever merely metaphysics, religion is never merely ethics either...The powerfully coercive "ought" is felt to grow out of a comprehensive factual "is", and in such a way religion grounds the most specific requirements of human action in the most general contexts of human existence"; see Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) at 126.

122 This non-exhaustive list was given by the SCC in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para 32.

respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.<sup>123</sup>

This description of democracy entails a variety of highly communal aspects: social justice, equality, accommodation of beliefs, respect for group identity and participation of individuals and groups in society. All of these values are incredibly relation based. One's personal ethic or value system should not represent the Hedonist,<sup>124</sup> but rather, it should reflect some form of pluralism that incorporates a variety of communal interests. Of course, there will be vigorous debate about whether the value system in question is beneficial to the surrounding community, but that is not the point. The point is that the claimant, at a minimum, views their value system as beneficial to the community, rather than entirely self-interested and self-beneficial. By requiring the claimant to demonstrate the value of their conscience-based claim to the surrounding community, the claimant will inevitably need to "enlarge their mentality" and enter into a process of engagement with their fellow citizens. The person making a conscience-based claim should be required to demonstrate a nexus to their surrounding community, thereby grounding the claim in the communal, rather than the personal.

The current thesis aims to justify the incorporation of a communal element into the freedom of conscience test. To do so adds to the ongoing conversation about what conscience is and how the courts should best approach it. It seems that given the primacy and necessity of relation regarding natural persons, legal persons, and moral judgement, claims of conscience must incorporate communal aspects. It is my view that the concept of conscience should be understood as an exercise in knowledge sharing (i.e. sharing knowledge with another), rather than mere private knowledge holding (i.e. sharing knowledge with oneself). The former will promote an ongoing conversation of the rights and responsibilities of living in community with one another, whereas the latter will likely promote a continuing emphasis of self without consideration of one's neighbour. Other requirements such as sincerity or importance of belief will also need to be incorporated into an actual *Charter* test, both of which will now be briefly mentioned.

## ii. Determining a Threshold

To establish a practical working concept of the freedom of conscience, the court will need to sift through the various claims that will be brought forward. Not all freedom of conscience claims will rise to a level worth protecting. Trivial or insincere claims will need to be vetted. While it is beyond the scope of this paper to establish a thorough threshold test and what such a test would consist of, it does need to be preliminarily addressed. In this regard, I have two suggestions that may be fruitful for further analysis.

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123 *Ibid* at para 64.

124 Jeremy Webber, "Understanding the Religion in Freedom of Religion" at 39 ("A person who was profoundly hedonistic, down to the very core of their being, would be unlikely to succeed in a case for special accommodation!") in Peter Cane, Carolyn Evans & Zoe Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008).

The first suggestion relies on Jocelyn Maclure and Taylor’s distinction between mere preferences and core beliefs and commitments, which they refer to as “convictions of conscience”.<sup>125</sup> Maclure and Taylor write:

Not all beliefs and preferences, therefore, can be the basis of requests for accommodations. If beliefs and preferences do not contribute toward giving a meaning and direction to my life, and if I cannot plausibly claim that respecting them is a condition for my self-respect, then they cannot generate an *obligation* for accommodation. That is why a Muslim nurse’s decision to wear a scarf at work cannot be placed on the same footing with a colleague’s choice to wear a baseball cap.<sup>126</sup>

Moral convictions appear to refer to beliefs that guide action and are core to one’s understanding of the world. On the other hand, preferences or mere opinions do not significantly contribute to how one behaves or understands the world. The former deserves protection because one’s convictions are likely to be contributing factors to how one views oneself. The difficulty arises when the court is inevitably asked to discern between preferences and convictions. The court could opt for a sincerity test, much like the current freedom of religion test. Alternatively, the court could attempt to determine whether such conscience-based convictions are integral to the claimant’s worldview.

My second suggestion is based on the philosopher, Gilbert Ryle, who put forth five criteria in which one’s claims of conscience can be weighed against to determine one’s sincerity:

1. That he *utters* it regularly, relevantly and without hesitation.
2. That other things which he says regularly, relevantly and unhesitatingly, presuppose it.
3. That he is ready or eager to try to persuade other people of it and to dissuade them of what is inconsistent with it.
4. That he regularly and readily behaves in accordance with it, on occasion when it is relevant.
5. That when he does not behave in accordance with it, he feels guilty, resolves to reform, etc.<sup>127</sup>

Ryle’s five criteria appear to provide a basic framework for attempting to ascertain whether one’s purported conscience-based claims are more than mere preferences. Moreover, it seems that the court in the case of *Maurice v Canada (Attorney General)* followed a similar framework in determining whether a conscience-based belief can be sustained by the available evidence.<sup>128</sup> The court in *Maurice* writes,

On the evidence in the present case, I have no difficulty finding that the Applicant does have a strongly held belief regarding the consumption of animal products. The Applicant’s numerous questions and grievances regarding this issue, the extensive

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125 Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience* (Montreal: Harvard University Press, 2011) at 13.

126 *Ibid* at 76-77.

127 Gilbert Ryle, “Conscience and Moral Convictions” (1940) 7:1 *Analysis* J 31 at 33.

128 *Maurice v Canada (Attorney General)*, 2002 FCT 69 [*Maurice*].

time and effort he has expended on this judicial review, as well as his sustained efforts to maintain a vegetarian diet, is strong evidence that he holds a conscientiously held belief that falls under the meaning of “conscience” under s.2(a) of the *Charter*.<sup>129</sup>

As one can see, the court referenced Maurice’s past behaviour to ground the validity of his conscience-based claim. Ryle’s first, second, and fourth criteria appear to be engaged in the court’s comments. Despite the court’s reliance on behavioural factors as evidence, there are reasons that such a test may not work in practicality. For example, what if the claimant recently began to hold such a moral conviction, so the external evidence is slim or non-existent? Moreover, finding possible witnesses to testify may also prove challenging. Such inquiries into the sincerity of one’s beliefs will prove difficult, which is likely one reason why the *Charter*’s section 2(a) freedom of religion test sets the bar low regarding whether one sincerely believes in the given religious proposition. Nevertheless, a threshold analysis will be necessary to adjudicate on such issues. What that threshold consists of is a matter worthy of future discussion and analysis.

## CONCLUSION

The freedom of conscience jurisprudence remains largely unexamined compared to the vast amounts of jurisprudence on its counterpart, the freedom of religion. On the other hand, the philosophical literature on the nature of conscience is vast. What emerged from surveying the philosophical literature was a general tendency to view conscience as either a private act of sharing knowledge with oneself or a communal act of sharing knowledge with another. The latter concept not only better accounts for the primacy of relation regarding natural persons, legal persons, and moral judgment, but it also avoids a sort of atomism that over-emphasizes our self-sufficiency – a view which fails to capture our true dependence on our fellow humans. Given the limitations of an individualistic conception of conscience, I proposed the idea of a communal conscience, a view that takes seriously the dialogical nature of human beings not only in their formation but also in their daily interactions. The merit and utility of each person’s conscience-based claim will be debatable, but by engaging other persons, we are collectively working towards a more ethical progression based on the values of our community. Those values include, but are not limited to, democracy, moral agency, and the rule of law. The freedom of conscience should not enable individuals to act on any conviction they have. Instead, it should enable persons to act in accordance with their normative precepts, reinforcing communal values that contribute to both their own flourishing and that of their neighbors.

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129 *Ibid* at para 15.