

An Exemption for Sincere Believers: The Challenge of *Alberta v. Hutterian Brethren of Wilson Colony*

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Résumé de l'article

Dans l'affaire *Alberta c. Hutterian Brethren of Wilson Colony*, la Cour suprême du Canada a reconfiguré son approche quant à l'article 1 de la *Charte canadienne des droits et libertés* en statuant que la dernière étape du critère établi dans *R. c. Oakes* (soit la condition de proportionnalité entre les effets salutaires et délétères d'une mesure) formait le cadre essentiel de son analyse. L'auteure suggère que l'accent mis par la cour sur cette dernière étape du critère *Oakes* ne représentait pas la meilleure réponse aux arguments spécifiques avancés par l'Alberta en matière d'atteinte minimale. L'Alberta soutenait que la province ne pouvait exempter les hutteurs de l'exigence de prise de photo de permis, même s'ils s'y opposaient pour des motifs religieux. La province justifiait cette position à la lumière de son interprétation de la décision *Syndicat Northcrest c. Amselem*, selon laquelle les gouvernements ne pouvaient enquêter sur la sincérité des croyances religieuses. L'Ontario, en tant qu'intervenant, a appuyé les arguments de l'Alberta. Bien que la cour n'ait pas abordé l'analyse de l'atteinte minimale, l'auteure suggère que les provinces ont interprété *Amselem* de façon inutilement stricte. L'auteure propose ainsi une exemption qui adhère aux critères d'*Amselem* tout en remplissant les objectifs de l'Alberta en matière de sécurité. De façon plus générale, l'auteure stipule que la préoccupation des provinces dans *Hutterian Brethren* démontre le rôle critique que joue le critère de l'atteinte minimale dans *Oakes* pour générer des solutions aux conflits entre les lois d'application générale et les pratiques religieuses minoritaires. Par contraste, l'accent mis par la cour sur le critère des effets proportionnels pourrait malheureusement décourager les parties de formuler des alternatives potentiellement novatrices.

AN EXEMPTION FOR SINCERE BELIEVERS: THE CHALLENGE OF *ALBERTA V. HUTTERIAN BRETHREN* OF *WILSON COLONY*

—CASE COMMENT—

*Sara Weinrib**

In *Alberta v. Hutterian Brethren of Wilson Colony*, the Supreme Court of Canada reconfigured its approach to section 1 of the *Canadian Charter of Human Rights and Freedoms* by holding that the final step of the *R. v. Oakes* test—the requirement of proportionality between a measure's salutary and deleterious effects—provided the critical framework for its analysis. The author suggests that the Court's emphasis on the last step of the *Oakes* test was not the most appropriate response to the specific minimal impairment argument Alberta presented. Alberta argued that the reason it could not safely offer an exemption from its licence photo requirement to Hutterites who objected to photos on religious grounds was because *Syndicat Northcrest v. Amselem* restricted government inquiries into the sincerity of religious beliefs. Ontario intervened in support of Alberta's concerns. Although the Court did not address this minimal impairment argument, the author argues that it reflects an unnecessarily strict reading of how *Amselem*'s guidelines would apply in this context. In support, the author presents an exemption that would have cohered with *Amselem* and achieved Alberta's safety objectives. The author then argues more broadly that the provinces' concerns in *Hutterian Brethren* demonstrate the critical role the minimal impairment step of the *Oakes* test plays in generating solutions to clashes between laws of general application and minority religious practices. The Court's new emphasis on the proportionate effects test, in contrast, may unfortunately discourage both parties from formulating potentially innovative alternatives.

Dans l'affaire *Alberta c. Hutterian Brethren of Wilson Colony*, la Cour suprême du Canada a reconfiguré son approche quant à l'article 1 de la *Charte canadienne des droits et libertés* en statuant que la dernière étape du critère établi dans *R. c. Oakes* (soit la condition de proportionnalité entre les effets salutaires et délétères d'une mesure) formait le cadre essentiel de son analyse. L'auteure suggère que l'accent mis par la cour sur cette dernière étape du critère *Oakes* ne représentait pas la meilleure réponse aux arguments spécifiques avancés par l'Alberta en matière d'atteinte minimale. L'Alberta soutenait que la province ne pouvait exempter les huttérites de l'exigence de prise de photo de permis, même s'ils s'y opposaient pour des motifs religieux. La province justifiait cette position à la lumière de son interprétation de la décision *Syndicat Northcrest c. Amselem*, selon laquelle les gouvernements ne pouvaient enquêter sur la sincérité des croyances religieuses. L'Ontario, en tant qu'intervenant, a appuyé les arguments de l'Alberta. Bien que la cour n'ait pas abordé l'analyse de l'atteinte minimale, l'auteure suggère que les provinces ont interprété *Amselem* de façon inutilement stricte. L'auteure propose ainsi une exemption qui adhère aux critères d'*Amselem* tout en remplissant les objectifs de l'Alberta en matière de sécurité. De façon plus générale, l'auteure stipule que la préoccupation des provinces dans *Hutterian Brethren* démontre le rôle critique que joue le critère de l'atteinte minimale dans *Oakes* pour générer des solutions aux conflits entre les lois d'application générale et les pratiques religieuses minoritaires. Par contraste, l'accent mis par la cour sur le critère des effets proportionnels pourrait malheureusement décourager les parties de formuler des alternatives potentiellement novatrices.

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Introduction

In 2003, Alberta terminated the exemptions it previously offered to drivers who objected to licence photos on religious grounds.¹ The Hutterites interpret the Second Commandment to forbid them from having their photos taken and therefore objected to the change of policy as a violation of their right to freedom of religion under subsection 2(a) of the *Canadian Charter of Rights and Freedoms*.² Alberta conceded this point, but argued that this infringement was justified according to the three-step test in *R. v. Oakes* for establishing the justification of a legislative measure under section 1 of the *Charter*.³ Although the Hutterites were successful at trial and at the Alberta Court of Appeal, the Supreme Court of Canada narrowly upheld Alberta's amendment as a reasonable limit on the Hutterites' rights.⁴

Hutterian Brethren is noteworthy for its lengthy discussion of the last step of the *Oakes* test, which requires proportionality between a measure's salutary and deleterious effects.⁵ This step had not previously played a significant role.⁶ Nevertheless, Chief Justice McLachlin affirmed that

¹ The statutory basis for these exemptions was Alberta's *Operator Licensing and Vehicle Control Regulation* (Alta Reg 320/2002, s 14(1)(b)), which gave the Registrar discretion to determine in what circumstances a photo was required: "Before issuing or renewing an operator's licence ... the Register ... may require an image of the applicant's face, for incorporation in the licence." The amendment eliminated this discretion by replacing "may" with "must": *Operator Licensing and Vehicle Control Amendment Regulation*, Alta Reg 137/2003, s 3, amending *Operator Licensing and Vehicle Control Regulation* Alta Reg 320/2002, s 14(1)(b). See also *Alberta v Hutterian Brethren of Wilson Colony*, 2007 ABCA 160, 417 AR 68 at para 4 [*Hutterian Brethren (CA)*].

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The Second Commandment prohibits making "an idol, or any likeness of what is in heaven above or on the earth beneath": Exodus 20:4; Deuteronomy 5:8. See also *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (Factum of the Appellant at para 41 [FOA]).

³ [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*].

⁴ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*]. At the Alberta Court of Queen's Bench, LoVecchio J held that the minimal impairment test was not met and restored the pre-2003 regime (*Hutterian Brethren of Wilson Colony v Alberta*, 2006 ABQB 338, 57 Alta LR (4th) 300 at para 39). At the Alberta Court of Appeal, Conrad and O'Brien JJA also held that the amendment did not minimally impair the Hutterites' rights (*Hutterian Brethren (CA)*, supra note 1 at para 46, Slatter JA dissenting).

⁵ For a detailed analysis of the Court's application of this step, see Sara Weinrib, "The Emergence of the Third Step of the *Oakes* Test in *Alberta v Hutterian Brethren of Wilson Colony*" 68:2 UT Fac L Rev [forthcoming in 2011].

⁶ Frank Iacobucci described this step to require only a "resume of previous analysis" ("Judicial Review by the Supreme Court of Canada Under the Canadian Charter of Rights and Freedoms: The First Ten Years" in David M Beatty, ed, *Human Rights and*

the third step of the *Oakes* test provided the critical methodological framework to assess Alberta's regulation. On this basis, she then concluded that the salutary effects of Alberta's amendment outweighed its detrimental effects on the Hutterite claimants' rights. Justice Abella, who wrote the principal dissent, also affirmed the critical significance of the third step but concluded that the regulation's deleterious effects outweighed its marginal security benefits. Justice LeBel in a separate dissent, supported by Justice Fish, called for a return to the centrality of the Court's minimal impairment test, but did not elaborate on the conclusions the minimal impairment test would have called for in this instance.

In this article, I consider whether the Court's emphasis on the last step of the *Oakes* test was an appropriate response to the specific minimal impairment argument Alberta presented. The minimal impairment test requires the government to demonstrate that its impugned law impairs the right in question no more than is necessary to accomplish its desired objective.⁷ The Court accepted that Alberta's objective in terminating its exemptions was to "[maintain] the integrity of the driver's licensing system in a way that minimize[d] the risk of identity theft."⁸ However, in its minimal impairment submissions, Alberta clearly stated that continuing to offer the exemption to Hutterites and other sincere religious believers would not undermine this objective. Alberta's position was, rather, that it could not safely offer this exemption after *Syndicat Northcrest v. Amselem*, a Supreme Court of Canada decision restricting judicial—and presumably also governmental—inquiries into the sincerity of religious beliefs.⁹ Alberta thus concluded that an amendment terminating exemptions constituted a minimal impairment of the Hutterites' rights. Ontario intervened in support of Alberta's concerns; it then addressed them by proposing an alternative exemption model that it acknowledged potentially contravened *Amselem*.

This article argues that Ontario's and Alberta's reading of *Amselem* was unnecessarily strict, and that the Court, by failing to analyze this reading, missed a critical opportunity to assess how *Amselem*'s guidelines

Judicial Review (Dordrecht: Martinus Nijhoff, 1994) 93 at 121). Peter Hogg similarly concluded that this "[proportionate effect] step has no work to do, and can safely be ignored" (*Constitutional Law of Canada*, 5th ed (Scarborough, Ont: Thomson Carswell, 2007), vol 2 at 153. See also Pierre Blanche, "The Criteria of Justification Under Oakes: Too Much Severity Generated Through Formalism" (1991) 20:2 Man LJ 437 at 443: "[T]he third step has no real weakening impact on the first two steps. It comes too late in the process ... it seems that it is a step that should almost never be reached."

⁷ For a discussion of the transformations the minimal impairment test has undergone since *Oakes*, see *infra* note 50.

⁸ *Hutterian Brethren*, *supra* note 4 at para 42.

⁹ 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

would apply in this context. This argument proceeds in three sections. Section I discusses the *Amselem* test for the demonstration of sincere belief, reviewing the framework Justice Iacobucci put in place as well as the questions he left open for future litigation. Section II describes the shadow *Amselem* cast over the *Hutterian Brethren* litigation by recounting Alberta's and Ontario's concerns with *Amselem* and the Court's response to these submissions. Section III argues that Alberta and Ontario construed *Amselem* unnecessarily strictly, and proposes an exemption that would, it argues, cohere with *Amselem* while protecting Alberta's objectives. Such an exemption would have met the minimal impairment test and made it unnecessary for the Court to turn to the proportionate effects test in this instance.

What is at stake in this extended treatment of a line of argument to which the Court did not respond? Clashes between laws of general application and minority religious practices are likely to escalate in the future as a result of broad factors such as the growth of the administrative state,¹⁰ the development of technologies that may aid the state in addressing security concerns,¹¹ the rise of immigration from communities with different conceptions of the significance of seemingly neutral requirements,¹² and the greater secularization of Canadian society as a whole.¹³ In *Hutterian Brethren*, the Court chose to consider such clashes in the third step of the *Oakes* test rather than the second. But the provinces' concern as to the proper application of the *Amselem* ruling demonstrates

¹⁰ Paul Horwitz asserts that "as the reach of the administrative state extends even further into every aspect of life, law is bound to disturb an increasing number of religious practices." ("The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54:1 UT Fac L Rev 1 at 3). More particularly, Moin Yahya reflects on the significant role driver's licences have played in the growth of the administrative state: "When the automobile was invented over 100 years ago, few could have imagined that the piece of paper certifying the competence of its drivers would become a major instrument of state control in the 21st century." "Driver's Licence Photos: Security Concerns Shouldn't Trump Religious Freedom" *The Lawyer's Weekly* (28 August 2009), online: <<http://www.lawyersweekly.ca>>.

¹¹ Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard J Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87 at 100. In this respect, Alberta argued that two recent developments justified its mandatory photo requirement: "There are, first, threats to the public that did not exist in 1974, which, second, we may now reduce with facial recognition technology and digital photos of licensees." *Hutterian Brethren*, FOA, *supra* note 2 at para 19.

¹² Dieter Grimm notes that "new lines of conflict" have appeared as a consequence of immigration: "General laws that do not have religious implications in Western countries or reflect the Christian tradition of the Western world enter into conflict with the religious norms of the immigrants" ("Conflicts Between General Laws and Religious Norms" (2009) 30:6 Cardozo L Rev 2369 at 2370-71).

¹³ Horwitz, *supra* note 10 at 3.

the critical role the minimal impairment test plays in responding to these escalating tensions; it is at this stage in the analysis that the Court can scrutinize the legislature's reasons for not providing an alternative and remove any barriers that may have arisen due to uncertainty as to the nature or scope of the *Charter* guarantee. If the Court does not respond to these questions at this stage, it may restrict the legislature's ability to protect all of its citizens and the rights they bear.

I. The *Amselem* Test for Sincere Religious Belief

This section reviews the framework for freedom of religion that Justice Iacobucci set out in *Amselem*, considering in particular how this framework applied to the particular facts of this case as well as the guidelines it provided for future litigation. It concludes by noting some particular issues *Amselem* left unresolved—issues squarely raised by Alberta and Ontario in *Hutterian Brethren*. It is important to lay out the facts and reasoning in *Amselem* in some detail in this section, as the sections that follow will return to these passages to assess Alberta's and Ontario's readings of *Amselem*, as well as the constitutionality of my proposed exemption.

In *Amselem*, Orthodox Jews, who co-owned condominium units in Montreal, asserted a right to build a succah on their balconies to celebrate a nine-day festival.¹⁴ The syndicate of co-ownership claimed that this action violated a bylaw prohibiting alterations of its balconies, and sought a permanent injunction prohibiting erection of these structures. It proposed that Jewish residents set up a communal succah in the garden instead.¹⁵ The parties called experts at trial who differed as to whether Jewish law required Jews to erect individual succahs: the applicants' expert, Rabbi Ohana, testified that the biblical obligation to dwell joyously in a succah required Jews to erect their own succahs when factors such as the transport of children meant that a communal succah would cause distress; the respondents' expert, Rabbi Levy, denied that such factors obligated Jews to erect their own succahs.¹⁶

¹⁴ Iacobucci J defined a succah as a "small enclosed temporary hut or booth, traditionally made of wood or other materials such as fastened canvas" in which Jews are commanded to dwell temporarily during the festival of Succot (*Amselem*, *supra* note 9 at para 5). Although the word *condominium* does not appear in the case, "it is clear from discussion of the parties' relationship under Quebec law that it may be usefully summarized by use of this term, which is familiar in the common law provinces": *Hutterian Brethren*, FOA, *supra* note 2 at para 68, n 50,

¹⁵ *Amselem*, *supra* note 9 at para 13.

¹⁶ *Ibid* at paras 23, 73.

Justice Iacobucci held that the claimants' rights to religious freedom had been violated. In doing so, he rejected the notion that the Court could determine a subsection 2(a) claim by assessing the doctrinal interpretations of competing religious authorities. Instead, he stressed the primacy of subjective articulations of belief over the objective endorsement of these beliefs:

[F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.¹⁷

Justice Iacobucci thus affirmed that subsection 2(a) protects sincere individual beliefs or practices even if a religious leader denies their significance.¹⁸

Justice Iacobucci then demarcated a complex spectrum of religious experiences that subsection 2(a) protects:

[P]rovided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either *objectively required by the religion*, or that he or she *subjectively believes that it is required by the religion*, or that he or she *sincerely believes that the practice engenders a personal, subjective connection* to the divine or to the subject or object of his or her spiritual faith, *and as long as that practice has a nexus with religion*, it should trigger the protection ... of s.2(a) of the Canadian Charter.¹⁹

This critical passage identified three potential sources of sincere religious belief. First, belief may arise from the objective requirements of a religion. Second, it may be based on a claimant's subjective beliefs as to the objective requirements of a religion, affirming that practices whose obligatory nature is a matter of controversy within the religious community are also protected. Finally, beliefs are protected even if they have no basis in a religion's objective requirements, as long as they have a "nexus with religion" and engender a subjective connection to the divine.

¹⁷ *Ibid* at para 46.

¹⁸ Although the dispute in *Amselem* arose under the *Quebec Charter of Human Rights and Freedoms'* protection of "freedom of religion" (RSQ c C-12, s 3), Iacobucci J repeatedly affirmed that the principles he established also applied to the guarantee of freedom of religion that is set out in ss 2(a) of the *Charter*: *Amselem*, *supra* note 9 at paras 40, 57, 66, 69.

¹⁹ *Ibid* at para 69 [emphasis added, original emphasis omitted].

Justice Iacobucci's first two categories seem relatively straightforward. With respect to the first category, most religions have a core group of uncontested objective requirements, such as attending worship services. The claimants in *Amselem*, on the other hand, seem to fall into the second category, since they believed that their religion mandated them to set up individual succahs in this instance, despite Rabbi Levy's denial of this obligation. Justice Iacobucci's third category—beliefs that “engende[r] a personal, subjective connection to the divine” and have a “nexus with religion”—is the most difficult to understand. This difficulty arises partly because the claimants in *Amselem* do not provide an example of this kind of belief. However, as I elaborate below, it is also because this category brings to light some of the deepest tensions involved in the liberal state's protection of religion.

Justice Iacobucci provided two examples of believers who seem to fall into this third category:

Jewish women, for example, strictly speaking, do not have a biblically mandated “obligation” to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict “obligation” to do so? ... Should an individual Jew, who may personally deny the modern relevance of the literal biblical “obligation” or “commandment”, be precluded from making a freedom of religion argument despite the fact that for some reason he or she sincerely derives a closeness to his or her God by sitting in a succah? Surely not.²⁰

Justice Iacobucci's two figures—the “observant Jewish woman” and the “liberal Jewish man”—represent two various responses of those who identify with a traditional religion while accepting certain modern liberal precepts. The “observant Jewish woman” may not sincerely believe that she is under an obligation to dwell in a succah, given traditional Judaism's gender-based allocation of obligations. Yet she claims that subsection 2(a) should protect her adoption of practices traditional leaders require only of men. The “liberal Jewish man”, on the other hand, seems to be a man who *is* under traditional obligation to dwell in a succah (at least according to some rabbis), but has accepted secular precepts and, as a result, no longer *believes* he is under this obligation. He calls for subsection 2(a) to protect a practice that is fulfilling for him even though his interpretation of this practice no longer accords with orthodox precepts.

These figures illustrate the many complex ways religious identification may develop in a modern liberal state: the “observant Jewish woman”

²⁰ *Ibid* at para 68.

expresses a sincere belief in a practice, but is not recognized by the religion as the appropriate person to hold these beliefs; the “liberal Jewish man”, in contrast, meets the formal criteria for recognition, yet does not sincerely believe in the literal biblical obligation. For Justice Iacobucci, the liberal commitment to state neutrality clearly calls the state to protect a broader spectrum of religious experience than orthodox leaders would sanction. As Grimm similarly reflects, in a modern constitutional democracy, “religious freedom must not be turned into a protection of orthodoxy.”²¹

On a theoretical level, Justice Iacobucci’s judgement admirably attempts to protect religious practices in both their traditional and modern iterations. However, it also generates a complex practical problem: under *Amselem*, the court and the government cannot simply echo a religious leader’s identification of the beliefs and practices that merit protection. Rather, they must conduct their own assessment of whether particular practices merit protection under subsection 2(a). How is the court or government to assess the sincerity of these claims?

Justice Iacobucci set out some broad guidelines. First, he affirmed that the religious claimant had the burden of demonstrating sincere religious belief, and that the court was “qualified to inquire into sincerity of a claimant’s belief, where sincerity [was] in fact at issue.”²² However, he cautioned that inquiries should be “as limited as possible” and were intended “only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice.”²³

Justice Iacobucci then provided the following specific directions on a claimant’s use of objective evidence to demonstrate sincere belief:

A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant’s religious obligations as being, but rather what the claimant views these personal religious “obligations” to be, *it is inappropriate to require expert opinions to show sincerity of religious belief*. An “expert” or an authority on religious law is not the surrogate for an individual’s affirmation of what his or her religious beliefs are.²⁴

²¹ *Supra* note 12 at 2374.

²² *Amselem*, *supra* note 9 at para 51.

²³ *Ibid* at para 52.

²⁴ *Ibid* at para 54 [emphasis added].

Justice Iacobucci's assertion that the court cannot require expert opinions as to the sincerity of religious belief seems consistent with his recognition of a complex spectrum of religious experiences. Requiring a claimant to provide evidence of a religious leader's approval of the practice at issue turns freedom of religion into "a protection of orthodoxy."²⁵

The facts of *Amselem* enabled Justice Iacobucci to provide these guidelines without directly addressing two difficult and interrelated questions. The first question is what sort of evidence the court or state can request in order to assess sincerity of religious practice when sincerity is in fact at issue (sincerity of belief was hardly at issue in *Amselem*; as Ontario later submitted to the Supreme Court in *Hutterian Brethren*, it was highly unlikely anyone would want to build a succah for any reason other than sincere religious belief²⁶). The second question is how broadly to construe Justice Iacobucci's third category, the protection of practices that "engende[r] a personal, subjective connection to the divine" and have a "nexus with religion" (the Jewish claimants in *Amselem* did not provide examples of this category; instead, they claimed the right to a practice with a scriptural basis whose interpretation was contested within their religious community—Justice Iacobucci's second category.) This third category could be interpreted broadly to protect idiosyncratic spiritual beliefs that are not associated with an identified religious community. If it is interpreted in this manner, to bring these two questions together, what evidence can the state require to assess a claim that is not associated with an identified religion, in a situation where sincerity is at issue, and the harm posed by an insincere claim is significant? This question formed the basis of Alberta's and Ontario's critiques of *Amselem*, to which we now turn.

II. The Shadow *Amselem* Cast over *Hutterian Brethren*

This section considers the Court's minimal impairment analysis in *Hutterian Brethren* from the perspective of both the submissions and the ultimate ruling. Part A reviews Alberta's and Ontario's submissions to the Court. Alberta declared it was not possible for it to provide an exemption after *Amselem*. Ontario, after echoing Alberta's concerns, proposed an alternative exemption model that set aside some of the central tenets of *Amselem*. Part B considers the Supreme Court of Canada's response to these submissions, and suggests that, since the Court did not address Alberta's and Ontario's readings of *Amselem*, the debate between Chief Jus-

²⁵ Grimm, *supra* note 12 at 2374.

²⁶ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (Factum of the Intervener, Attorney General of Ontario at para 18 [FOI]).

tice McLachlin and Justice Abella as to the extent to which the Court, in its minimal impairment analysis, should defer to Alberta was premature.

A. *Alberta's and Ontario's Submissions*

In its minimal impairment submissions, Alberta repeatedly admitted to the Court that it was able to offer an exemption to the Hutterites and other sincere religious believers without compromising its objectives:

We note that our concern is not the granting of an exception to people who assert a religious objection to the photograph requirement *as such*. Our concern is instead the opportunities that an exemption affords wrongdoers.²⁷

Similarly:

[O]ur concern is not about numbers as such, or with the numbers of claims for exemption that might be made in good faith. Alberta increased the security of the Operator's License because wrongdoers *lie* to take advantage of its currency as identification.²⁸

In these passages, Alberta made clear that offering exemptions to sincere believers would not undermine the integrity of its licensing system. Alberta straightforwardly acknowledged that it could provide an exemption to the claimants at hand without impairing its objectives, as long as this exemption did not enable insincere claimants—"wrongdoers"—to apply successfully.

The province then argued that the reason it could not offer this exemption to the claimants before it was because *Amselem* restricted its ability to distinguish between sincere and insincere claimants:

Amselem implies structural constraints on any religious exemption from the photo requirement. The issue in this case is not whether the Respondents, as specific claimants, may safely be granted an exemption from the photo requirement. Rather, the issue is whether the Respondents *and everyone else who is able to claim the benefit of religious freedom* as described in *Amselem* may safely be granted an exemption from the photo requirement.

...

[T]he foundational characteristic of freedom of religion—its subjectivity—competes *directly* with the essential purpose of the photo requirement, which impedes those who would *falsely* obtain a driver's licence.²⁹

²⁷ *Hutterian Brethren*, FOA, *supra* note 2 at para 65 [emphasis in original].

²⁸ *Ibid* at para 73 [emphasis in original].

²⁹ *Ibid* at paras 70, 73 [emphasis in original].

Alberta's claim in these passages was that *Amselem's* conception of religion as subjective situated fraudulent and sincere professions of religious belief within an identical structure: both articulated an idiosyncratic private sphere that was not objectively verifiable. It was thus not possible for the province to provide an exemption after *Amselem*.

Alberta's reading of *Amselem* is troubling. How can the *Charter* prevent the government from distinguishing between fraudulent and sincere religious beliefs, given their dramatically different normative values to society? The presence of religious minorities is a value to be preserved,³⁰ while those who make fraudulent claims to obtain false documentation undermine the state's ability to protect its citizens and should be prevented. Alberta thus problematically intimated in these passages that the Court's construal of subsection 2(a) in *Amselem* prevented the province from recognizing the religious minorities the *Charter* obligates it to protect.

Ontario supported Alberta's contentions, but proposed a different solution. It accepted that *Amselem* made it difficult for provinces to draft an exemption for the Hutterites without rendering themselves vulnerable to many false claims.³¹ However, whereas Alberta declared it was categorically not possible for the province to provide this exemption after *Amselem*, Ontario suggested that *Amselem* should be distinguished to allow the province to craft a narrow and highly structured exemption in situations where sincerity of belief was at issue and the potential for harm from an insincere profession of belief was great.³²

Ontario presented its own exemption to the photo-licence requirement as an example of such an exemption. Ontario currently provides exemp-

³⁰ S 27 of the *Charter* (*supra* note 2) affirms the value of religious minorities to Canada by stating, "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." For a discussion of the role s 27 could have played in the Court's analysis in *Hutterian Brethren*, see Robert E Charney, "How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief" (2010) 51 Sup Ct L Rev (2d) 47 at 69-72.

³¹ Ontario stated that
 in light of the Court's analysis in *Amselem*, provincial governments face a difficult policy conundrum. Is it possible to draft an exemption from the mandatory photo requirement that will exempt the Respondents' members (who are a discrete community with a long established and easily verified sincere religious objection to being photographed) but will not exempt false claims of religious belief[?] (*Hutterian Brethren*, FOI, *supra* note 26 at para 19).

This argument is elaborated by Charney (*supra* note 30 at 56), who represented Ontario in *Hutterian Brethren*.

³² *Hutterian Brethren*, FOI, *supra* note 26 at para 18.

tions to applicants who can establish the following three indicia of sincere religious belief:

1. Membership in a registered religious organization that prohibits personal photographs.
2. A letter of support from a religious leader of this organization.
3. Scriptural passages that substantiate the religious prohibition.³³

Although Ontario's courts have yet to rule on the constitutionality of Ontario's exemption,³⁴ each prong seems to challenge *Amselem*:

1. The requirement of membership in a community that prohibits personal photographs undermines Justice Iacobucci's affirmation that subsection 2(a) protects practices the obligatory nature of which is a matter of controversy.³⁵
2. The requirement of a religious leader's letter contradicts Justice Iacobucci's exhortation that it was "inappropriate to require expert opinions to show sincerity of religious belief."³⁶
3. The requirement that the claimant's belief be substantiated by a scriptural passage seems to create a narrower basis for protection than *Amselem*'s broad protection of practices that have a "nexus with religion".³⁷

Ontario admitted in its factum to the Court that this model "appear[ed], on its face, to be inconsistent with this Court's reasons in *Amse-*

³³ These criteria were developed under a policy entitled Permanent Valid Without Photo (PVWP). The statutory basis for this policy is ss 32(13) of the *Highway Traffic Act* (RSO 1990, c H8), which grants the Minister discretion to require a digital photo for driver's licences. See also *Hutterian Brethren*, FOI, *supra* note 26 at paras 2-3.

³⁴ The constitutionality of these requirements was challenged in *Bothwell v Ontario (Minister of Transportation)* (2005), 24 Admin LR (4th) 288, 193 OAC 383 (Div Ct) [*Bothwell* cited to Admin LR], but the Court concluded that since the applicant lacked sincere religious belief, it was not necessary to consider this challenge.

³⁵ Iacobucci J made this distinction explicit in a passage not discussed in Section 1, above, in which he declared that "any incorporation of distinctions between 'obligation' and 'custom' or, as made by the respondent and the courts below, between 'objective obligation' and 'subjective obligation or belief' within the framework of a religious freedom analysis is dubious, unwarranted and unduly restrictive" (*Amselem*, *supra* note 9 at para 67). This distinction is also apparent in Iacobucci J's discussion of the "observant Jewish women" and the "liberal Jewish man": see text accompanying note 20.

The question of whether Ontario's requirement of membership in a religious community coheres with *Amselem* is discussed in detail in Section III.B, below (I conclude that this requirement is consistent with *Amselem*).

³⁶ *Amselem*, *supra* note 9 at para 54.

³⁷ *Ibid* at para 69.

lem.”³⁸ However, it argued that the Court should distinguish the guidelines in *Amselem* to recognize Ontario’s model in this circumstance since—unlike in *Amselem*—the potential harm posed by an insincere claim was significant.³⁹ Ontario concluded by stating that, “Ontario agrees with Alberta that, if *Amselem* precludes the limited approach used in Ontario’s PVWP, then no exemption would be the only alternative that would meet the province’s policy objectives.”⁴⁰

Ontario’s proposal reflects an attempt to escape the constitutional irony of Alberta’s position, discussed above, in which the Court’s definition of freedom of religion prevented the province from protecting the claimants before it. Nevertheless, it still accepts as its starting point both *Amselem*’s subjective definition of freedom of religion and Alberta’s understanding of *Amselem*’s restrictions on state inquiries into sincerity of belief. As a result, Ontario’s alternative is underinclusive, since not all the believers whom Justice Iacobucci stated merited protection would be able to meet its criteria.⁴¹

This underinclusiveness can be demonstrated through a story that has circulated about an application Ontario reportedly denied.⁴² An Old Order Amish man applied for Ontario’s exemption, and included in his application a letter from a church elder who confirmed the religious prohibition against photographs, but stated that the Amish religion also prohibited driving a car. The church elder then asserted that if the applicant was prepared to violate religious precepts by driving a car, he should have no objection to having his photo taken. Ontario reportedly denied the Amish man’s application on the basis of this letter.⁴³ However, one could speculate that the Amish man in this story sincerely believed in the prohibition against taking photographs, and yet did not sincerely believe in the prohibition against driving. Perhaps both prohibitions are contested, or perhaps the applicant had a need to drive that he reconciled with his faith in a manner not accepted by the church elder. In such cases, Ontario’s ex-

³⁸ *Hutterian Brethren*, FOI, *supra* note 26 at para 21.

³⁹ See *ibid* at para 18.

⁴⁰ *Ibid* at para 21.

⁴¹ It is unclear how this underinclusiveness plays out in practice in Ontario. Ontario stated that since its policy had been introduced, it had received eighty applications for exemptions and had not yet granted one, since all applicants “either have not met the Ministry’s criteria or have not completed the application process,” but it did not elaborate on the basis for these rejections (*ibid* at para 6).

⁴² Charney relates this story but notes that it may be apocryphal: *supra* note 30 at 58, n 43. I rely on it only as an example of a sincere believer who would be excluded from Ontario’s exemption.

⁴³ *Ibid*.

emption may turn into a “protection of orthodoxy”, in that it enables the positions of orthodox leaders to hold sway even if the individual claimants can demonstrate the sincerity of their beliefs.

Of course, since the claimants in *Hutterian Brethren* easily met Ontario’s criteria, it was open for the Court to accept Ontario’s exemption and leave the question of the claimants potentially excluded from it for another day. Nevertheless, in Section III, I consider whether Ontario’s proposal could be modified to better protect the full spectrum of religious practices Justice Iacobucci identified in *Amelem*.

B. The Supreme Court of Canada’s Response

The Supreme Court of Canada did not address Alberta’s and Ontario’s concerns with *Amelem* in *Hutterian Brethren*. Instead, Chief Justice McLachlin’s majority judgment and Justice Abella’s principal dissent each accepted Alberta’s proposition that providing an exemption would undermine its objective of ensuring the integrity of its licensing system, while diverging on the extent of the risk that providing an exemption would pose to this objective.

Chief Justice McLachlin began her minimal impairment analysis by claiming that this case called for her to accord the legislature a measure of judicial deference, since this was a “complex social issu[e] where the legislature may be better positioned than the courts to choose among a range of alternatives.”⁴⁴ The chief justice accorded Alberta this deference by refusing to calculate the precise extent to which providing an exemption undermined Alberta’s objectives:

The claimants’ argument that the reduction in risk would be low, since few people are likely to request exemption from the photo requirement, assumes that some increase in risk and impairment of the government goal may occur, and hence does not assist at the stage of minimal impairment.⁴⁵

Chief Justice McLachlin then concluded that even though it was “difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, it [was] clear that the internal integrity of the system would be compromised” by an exemption.⁴⁶

Chief Justice McLachlin’s commitment to supporting the legislative process led her to conclude that the minimal impairment analysis should

⁴⁴ *Hutterian Brethren*, *supra* note 4 at para 53.

⁴⁵ *Ibid* at para 59.

⁴⁶ *Ibid* at para 81.

no longer be considered the critical framework for assessing whether infringements of freedom of religion were justified:

Freedom of religion cases may often present this “all or nothing” dilemma. Compromising religious beliefs is something adherents may understandably be unwilling to do. And *governments may find it difficult to tailor laws to the myriad ways in which they may trench on different people’s religious beliefs and practices*. The result may be that the justification of a limit on the right falls to be decided not at the point of minimal impairment, which proceeds on the assumption that the state goal is valid, but at the stage of proportionality of effects.⁴⁷

In this critical passage, the chief justice charts a new course for subsection 2(a) litigation, based on the difficulty of governments “tailoring” laws so as not to infringe the myriad of beliefs found in Canada’s multicultural society. Yet in charting this new course, Chief Justice McLachlin did not address the particular reason Alberta found it difficult to tailor this exemption.

Justice Abella criticized Chief Justice McLachlin’s approach as overly deferential, but she also did not consider Alberta’s specific concern with *Amselem*. Instead, Justice Abella stressed that the government had the onus of proving that the risk posed by an exemption was significant in practice, and determined that in this case, Alberta had not met this burden: there was “no evidence from the government to suggest ... why the exemption [was] no longer feasible, or so dramatically obstructs the government’s objective that it cannot be re-instated.”⁴⁸ In coming to this conclusion, Justice Abella did not reference Alberta’s argument that an exemption was no longer feasible given the strictures of *Amselem*. Likewise, Justice Abella would have declared Alberta’s mandatory photo requirement unconstitutional, “in the absence of the availability of an exemption on religious grounds,”⁴⁹ but she did not offer guidance as to how Alberta could draft such an exemption in a manner that cohered with *Amselem*.

It is tempting to attribute Chief Justice McLachlin and Justice Abella’s contrasting approaches to the minimal impairment test to their different positions in the Court’s well-known debate as to the appropriate level of deference to the legislature: Chief Justice McLachlin called for strong deference while Justice Abella affirmed the state’s burden to substantiate its projection of risks.⁵⁰ However, it seems to me that Alberta’s and Ontario’s particular

⁴⁷ *Ibid* at para 61 [emphasis added].

⁴⁸ *Ibid* at para 156.

⁴⁹ *Ibid* at para 176.

⁵⁰ As is well known, the minimal impairment test has undergone a number of transformations. In *Oakes*, Dickson CJC articulated this test to require “cogent and persuasive”

concerns should have attracted more attention. Alberta did not argue that judicial crafting of an exemption would burden its legislative role. Rather, Alberta claimed that the Court's past jurisprudence *restricted* its ability to continue to provide an exemption on religious grounds, even though the religious minority requesting the exemption posed no risk. It sought guidance from the Court on an issue squarely within the Court's expertise and institutional competence. Such guidance would have supported Alberta's legislative function, rather than curtailed it.

III. An Exemption for Sincere Believers

In this section, I consider how the Court could have responded to Alberta's and Ontario's concerns. Part A provides an alternative interpretation of *Amselem*, different from that of Alberta and Ontario, and proposes a three-pronged exemption that modifies Ontario's proposal according to this reading. Part B elaborates on how each prong of this proposal coheres with *Amselem*'s restrictions on state inquiries into religious practice as I understand them. Part C argues that Alberta and Ontario could have provided this exemption without impairing their objective of protecting identity fraud, considering their articulations of this objective as well as Canadian and American case law on this issue. Finally, Part D speculates as to whether, had the Court been provided with this alternative, Chief Justice McLachlin would have nevertheless maintained that Alberta met the minimal impairment test by refusing to provide an exemption, given the emphasis she placed on deference in her minimal impairment analysis.

A. Drafting an Exemption

Before setting out my proposed exemption, it is necessary to return to Alberta's and Ontario's interpretations of *Amselem* and consider them in more detail. Alberta stated in its submissions to the Court that "[t]he subjective character of [the conception of religious freedom in *Amselem*] implies that a person who claims a religious objection to the photo requirement with

evidence that the measure impaired rights "as little as possible" (*supra* note 3 at 138-39). Yet almost immediately afterward, in *R v Edwards Books and Art Ltd* ([1986] 2 SCR 713, 35 DLR (4th) 1 [*Edwards Books*]) Dickson CJC expressed concern that such a rigorous standard would impede the formation of laws intended to protect vulnerable groups. Subsequently, the Court articulated other considerations that called for deference, such as laws premised on complex social science evidence, laws that reconcile the interests of competing groups, and laws that allocate scarce resources. See Hogg, *supra* note 6 at 149-53; Timothy Macklem & John Terry, "Making the Justification Fit the Breach" (2000) 11 Sup Ct L Rev (2d) 575 at 589-94.

apparent conviction is presumptively entitled to an exemption.”⁵¹ Ontario similarly argued that “[u]nless the province can rely on the kind of objective criteria apparently rejected by this Court in *Amselem*, it cannot offer a religious exemption.”⁵² Alberta and Ontario thus read *Amselem* to prohibit the use of evidence to determine the subjective sincerity of belief.

This interpretation does not seem to me to follow necessarily from Justice Iacobucci’s reasoning in *Amselem*. As discussed in Section I, Justice Iacobucci contemplated that a claimant’s beliefs would be objectively verified in several passages. First, he asserted that freedom of religion should not be protected beyond the ability of claimants to demonstrate sincere belief, defining freedom of religion as the freedom “to undertake practices and harbour beliefs, having a nexus with religion, in which an individual *demonstrates that he or she sincerely believes*.”⁵³ Although he cautioned that these inquiries should be “as limited as possible,”⁵⁴ he stressed that the Court was “qualified to inquire into the sincerity of a claimant’s belief, where sincerity [was] in fact at issue.”⁵⁵ Applying these guidelines, Justice Iacobucci declined to assess the claimants’ beliefs rigorously as to their obligation to erect individual succahs. However, as Ontario noted, sincerity was not at issue in this case since it was unlikely anyone would insincerely claim a right to build a succah.⁵⁶ Since the sincerity of applicants for an exemption from a photo-licence requirement is at issue, it is difficult to see how *Amselem* prohibits a more comprehensive inquiry.

How could a more comprehensive inquiry be structured? Further in his judgment, Justice Iacobucci made clear that a claimant could choose to adduce any supporting material that would prove sincerity of belief, such as letters from religious leaders, expert opinions, evidence of established practices, evidence that the alleged belief was consistent with other current religious practices, or general evidence supporting credibility.⁵⁷ He imposed only one restriction: the assessor could not require expert opinion—or, presumably, any other particular indicia of religious belief.⁵⁸

⁵¹ *Hutterian Brethren*, FOA, *supra* note 2 at para 71.

⁵² *Hutterian Brethren*, FOI, *supra* note 26 at para 20. In Ontario’s oral submissions it also requested that the Court distinguish *Amselem* in order to permit the province to “require objective verification of a shared religious belief as a condition to qualify for a religious exemption”: *Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (Oral argument, Intervener [OAI]).

⁵³ *Amselem*, *supra* note 9 at para 46 [emphasis added].

⁵⁴ *Ibid* at para 52.

⁵⁵ *Ibid* at para 51.

⁵⁶ *Hutterian Brethren*, FOI, *supra* note 26.

⁵⁷ *Amselem*, *supra* note 9 at paras 53-54.

⁵⁸ *Ibid* at para 53.

Thus, *Amselem* did not limit the use of evidence to determine the subjective sincerity of belief; rather, it prohibited the province from requiring that claimants prove that their leaders unanimously approved of their particular manifestations of the belief at issue.⁵⁹

The following exemption modifies Ontario's proposal in order to bring it in line with the guidelines in *Amselem*:

For an applicant to be granted an exemption to the photo-licence requirement, he or she must demonstrate sincere religious belief by establishing:

A. Membership in a religious community:

This may be demonstrated by a letter of support from an established member of this community or by other indicia of community membership.

B. That the objection to photographs arises from membership in this religious community:

This may be demonstrated by evidence as to the origins or basis of these practices, for example in religious texts.

C. Individual commitment to the practice of abstaining from taking photographs:

This may be demonstrated by evidence of past or current practice.

The exemption stipulates that the applicant has the onus of demonstrating sincere belief, which it divides into three distinct elements. It then provides examples of what kinds of evidence the applicant could adduce to demonstrate each of these elements. However, instead of singling out any piece of evidence as determinative, it enables the applicant to choose what evidence at the applicant's disposal would best satisfy these criteria. The province would then assess whether this evidence, in its totality, met the burden of demonstrating sincere belief.

B. Does this Exemption Cohere with Amselem?

The first question to consider, in assessing the feasibility of my proposed exemption, is whether it is consistent with *Amselem*. In this section, I evaluate each prong of my exemption according to this standard.

⁵⁹ The Alberta Court of Appeal interpreted *Amselem* similarly: "[A]lthough *Amselem* may limit the ability of the Province to require proof about the objective validity of an applicant's belief, it does not in any way limit the use of evidence to determine the subjective sincerity of the belief" (*Hutterian Brethren (CA)*, *supra* note 1 at para 51).

Prong A: Membership in a Religious Community

Prong A requires the claimant to prove membership in a particular religious community. This raises the question of whether such a requirement is consistent with *Amselem*'s broad protection of beliefs that "engender[s] a personal, subjective connection to the divine" (Justice Iacobucci's third category).⁶⁰ As discussed in the conclusion to Section I, Justice Iacobucci did not make clear how broadly he was willing to construe this nexus. In other passages, he described religion in individualistic terms, noting, for example, that freedom of religion "revolves around the notion of personal choice and individual autonomy and freedom."⁶¹ Alberta and Ontario both expressed concern that this third category enabled Justice Iacobucci to protect idiosyncratic spiritual beliefs, making it easier for fraudulent claimants to claim an exemption.⁶² However, in this section, I argue that, despite some of the individualistic language used in *Amselem*, this decision did not protect beliefs that emerge in isolation for three reasons.

First, *Amselem* did not provide the appropriate factual basis for the Court to consider protecting idiosyncratic religious beliefs, since the claimants belonged to a discrete religious community. Rather, at issue in *Amselem* was whether the claimants had the right to observe *individually* the precept of building a succah, or whether collective observance of this practice (in a communal succah) would suffice. Responding to these facts, Justice Iacobucci protected a range of doctrinal interpretations regarding the obligations a Jewish holiday imposed on individual adherents.⁶³ However, the facts did not enable him to consider whether religious beliefs that emerge in isolation are protected.⁶⁴

⁶⁰ *Supra* note 9 at para 69.

⁶¹ *Ibid* at para 40.

⁶² Ontario argued to the Court that after *Amselem* it may no longer be possible to draft an exemption that would not exempt "claims based on personal, political or philosophical concerns like privacy (which, as a conscientious objection may be easily confused with or disguised as religious)": *Hutterian Brethren*, FOA, *supra* note 2 at para 19. Ontario also submitted in oral argument that the Court should distinguish *Amselem* as requiring "objective verification of a *shared religious belief*": *Hutterian Brethren*, OAI, *supra* note 52 [emphasis added]. For Alberta's submissions expressing this concern, see *Hutterian Brethren*, FOA, *supra* note 2 at para 70.

⁶³ Iacobucci J asserted that religious beliefs that were not "in conformity with the position of religious officials" were protected (*Amselem*, *supra* note 9).

⁶⁴ The Supreme Court of Canada has emphasized the critical role facts play in decisions that delineate *Charter* guarantees. In *MacKay v Manitoba* ([1989] 2 SCR 357 at 361, 61 DLR (4th) 385), Cory J asserted that "*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevita-

Second, the critical passage in which Justice Iacobucci stressed the significance of preserving individual spiritual beliefs is heavily qualified. Recall this passage, discussed above, in which Justice Iacobucci demarcated three potential sources of religious belief:

[P]rovided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either *objectively required by the religion*, or that he or she *subjectively believes that it is required by the religion*, or that he or she *sincerely believes that the practice engenders a personal, subjective connection* to the divine or to the subject or object of his or her spiritual faith, *and as long as the practice has a nexus with religion*, it should trigger the protection ... of s. 2(a) of the Canadian Charter.⁶⁵

Justice Iacobucci stipulated here that subsection 2(a) protects beliefs where “the practice engenders a personal, subjective connection to the divine”—a quotation which admittedly raises the spectre of “religions of one.” However, Justice Iacobucci immediately qualified this broad protection with the clause, “[A]s long as the practice has a nexus with religion.” Thus, Justice Iacobucci did not demarcate a protection for “spiritual” beliefs that emerge in isolation from “religion”. Since Justice Iacobucci did not define these terms, the question is whether “religion” includes those with only one adherent. This interpretation seems doubtful to me because it would rob Justice Iacobucci’s qualification of any content; his qualification would now read as an assertion that subsection 2(a) protects beliefs that engender a subjective connection to the divine as long as they have a nexus with beliefs that are idiosyncratic. Furthermore, Justice Iacobucci used the word “religion” in a manner synonymous with religious communities elsewhere in this passage. For example, his assertion that subsection 2(a) protects practices that are subjectively believed to be “required by the religion” would not make sense if Justice Iacobucci imagined that it was possible for “religion” to consist of one person’s spiritual beliefs, because in this case there would be no conflict between this person’s subjective beliefs and the religion’s objective requirements. A reading of this passage as protecting idiosyncratic religious beliefs is, therefore, difficult to sustain in context.

Finally, *Amselem* did not engage with judicial and academic treatments of this issue. On the judicial side, courts have struggled with how to interpret subsection 2(a)’s dual protection of “freedom of conscience and religion”. Put simply, is religious thought one form of individual conscien-

bly result in ill-considered opinions.” See also *Danson v Ontario* (AG), [1990] 2 SCR 1086 1100-101, 73 DLR (4th) 686.

⁶⁵ *Amselem*, *supra* note 9 at para 69 [emphasis added]. See also text accompanying *supra* note 19.

tious thought, in which case idiosyncratic spiritual beliefs should be protected? Or can religious thought be distinguished from conscientious thought on the ground that it emerges collectively? In the Supreme Court of Canada's foundational cases on subsection 2(a), it stressed the similarity between religious and conscientious thought: Chief Justice Dickson affirmed in *R. v. Big M Drug Mart Ltd.* that the purpose of protecting freedom of religion is "the notion of the centrality of individual conscience";⁶⁶ in *Edwards Books* he similarly described freedom of religion as containing "both individual and collective aspects."⁶⁷ However, since these early cases, the Court has rarely engaged with freedom of conscience as distinct from freedom of religion, and there is no majority judgment on the issue.⁶⁸

The critical literature is likewise conflicted. Whereas some assert that "a belief that is spiritual does not need to be shared by anyone else, as long as it is sincerely held,"⁶⁹ others stress that the protection of religion rests on the view that religious beliefs "are an integral part of the individual's cultural identity or membership."⁷⁰ This tension reflects two competing rationales for protecting freedom of religion: the first is the liberal commitment to freeing autonomous individual beliefs from state interference,⁷¹ and the second involves protecting minority groups.⁷² The conun-

⁶⁶ [1985] 1 SCR 295 at 346, 60 AR 161.

⁶⁷ *Supra* note 50 at 781.

⁶⁸ Wilson J's famous concurring opinion in *R v Morgentaler* held that the decision to terminate a pregnancy should be protected as a matter of conscience under ss 2(a), which she defined as protecting "personal morality which is not founded in religion" ([1988] 1 SCR 30 at 178, 44 DLR (4th) 385). Lamer CJC's dissent to *Rodriguez v British Columbia (AG)* echoed these reflections, maintaining that the "*Charter* has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions" ([1993] 3 SCR 519 at 553, 107 DLR (4th) 342).

⁶⁹ Horwitz, *supra* note 10 at 10.

⁷⁰ Richard Moon, "Introduction: Law and Religious Pluralism in Canada" in Richard Moon, ed, *Law and Legal Pluralism in Canada* (Vancouver: UBC Press, 2008) 1 at 8. Grimm also argues that "[r]eligion presupposes a community that is united in its belief in some truths of a transcendental nature and that develops common forms of worship and interaction. One would [not] call ... the transcendental assumptions of a single person a religion" (*supra* note 12 at 2373).

⁷¹ As Stephen L Carter notes, "Liberals cherish religion, as they cherish all matters of private conscience, and liberal theory holds that the state should do nothing to discourage free religious choice": *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York, Anchor Books, 1994) at 977.

⁷² This rationale is buttressed by s 27 of the *Charter*, which requires the *Charter* to "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" (*supra* note 2, s 27). In Wilson J's dissenting opinion in *Edwards Books*, she argued that an interpretation of ss 2(a) that protected the religious

drum is this: if religious choice is viewed simply as an expression of private conscience, what distinguishes religious and secular beliefs? As Jeremy Webber reflects, “a definition that treats religious freedom as merely a special case of the freedom to choose one’s conception of the good fails to account sufficiently for the singling out of religion.”⁷³

Returning to the particular context of *Hutterian Brethren*, the question at hand is whether *Amselem* closed the door to an exemption that would require applicants to demonstrate identification with a particular religious community. Ontario and Alberta seemed to believe it had, but given the facts *Amselem* responded to, Justice Iacobucci’s carefully qualified statements on this point, and the decision’s failure to engage with the line of judicial and critical scholarship outlined above, I would disagree. The question of whether beliefs that are not shared by a community are protected by subsection 2(a) remains to be litigated on the proper factual foundation.

Prong B: That the Practice Arises from Membership in this Religious Community

The second prong in my model requires the claimant to establish that the practice at issue is identified with the claimant’s religious community. This prong is reminiscent of Ontario’s requirement that the religious organization “prohibit” personal photographs.⁷⁴ As discussed in Section II, however, the requirement of a prohibition did not seem consistent with Justice Iacobucci’s assertion in *Amselem* that subsection 2(a) should not “protect only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion.”⁷⁵ In contrast, my proposal affirms *Amselem*’s protection of religious practices that are not obligatory or whose obligatory nature is contested within the religious community.

Prong C: Individual Commitment to the Practice

This prong requires the claimant to demonstrate commitment to the practice at issue by providing evidence of past or current practice. Alberta seemed to conclude that such a requirement was inconsistent with *Amselem*. Alberta claimed, for example, that after *Amselem*, “a person who

freedom of individuals but not the groups they belonged to was precluded by s 27 (*supra* note 50 at para 202).

⁷³ “The Irreducibly Religious Content of Freedom of Religion” in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 178 at 179.

⁷⁴ See text accompanying note 35.

⁷⁵ *Supra* note 9 at para 43. See also *supra* note 36.

claims a religious objection to the photo requirement with apparent conviction [was] presumptively entitled to an exemption.”⁷⁶

Alberta likely drew this conclusion from a passage in *Amselem* in which Justice Iacobucci stressed that a claim should not fail on the grounds that the claimant’s past commitment to this practice was not entirely consistent. The issue arose in *Amselem* because some of the claimants had not erected individual succahs in previous years, choosing instead to celebrate the holiday at the households of family members.⁷⁷ In response, Justice Iacobucci made clear that this variation in practice did not render the claimant’s claim specious. He explained that it was

[i]nappropriate ... [to] rigorously study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs.⁷⁸

Alberta seemed to extrapolate from this passage that because *Amselem* prohibited scrutiny of a claimant’s past practice, a claimant who professed a certain belief but could not provide evidence of past practice supporting this belief would succeed.

However, this passage in *Amselem* does not render evidence of past practice irrelevant to the determination of a claim’s sincerity. Justice Iacobucci made clear that religious practices evolve slowly—over a lifetime—and thus it should be rare for a claimant who is not able to offer any evidence of past practice to succeed. Furthermore, considering the facts of *Amselem* from which Justice Iacobucci’s statement arose, the claimants *had* demonstrated a past commitment to this holiday by observing it with family members. The issue in *Amselem* was the interpretation of the biblical commandment to dwell joyously in a succah, and the particular question before the Court was whether the claimants sincerely believed that erecting a communal succah in the garden of the condominium would not satisfy this obligation. The fact that claimants had chosen to celebrate the holiday in the past in the *individual succahs* of their family members did not undermine the sincerity of their claim that *sharing* a succah with all condominium members would infringe their beliefs.

Prong C of my proposed exemption is therefore in line with Justice Iacobucci’s exhortation in *Amselem* that a believer’s evolving manifestations of religious belief over time should not be subjected to mechanical state scrutiny. In practice, it would mean that that the Old Order Amish

⁷⁶ *Hutterian Brethren*, FOA, *supra* note 2 at para 71.

⁷⁷ *Supra* note 9 at para 16.

⁷⁸ *Ibid* at para 53.

man's application, discussed above, would not fail on the basis that his past practices with respect to driving were inconsistent with his past practices with respect to photographs, as long as the claimant could also provide sufficient evidence demonstrating his membership in an Amish community (prong A) that objects to the practice of taking photographs (prong B).⁷⁹

To conclude, although my proposed exemption develops *Amselem's* guidelines to suit a more complex context, it does not contradict Justice Iacobucci's reasoning in this case or the conclusions he drew based on the facts before him.

C. Does this Exemption Undermine Alberta's Objectives?

The next issue to consider is whether my proposed exemption would enable Alberta and Ontario to meet their objectives of protecting against identity fraud. After all, even if this exemption cohered with *Amselem*, if it did not provide the province with sufficient criteria to distinguish sincere from insincere claims, it would have no potential to alter the Court's minimal impairment analysis in *Hutterian Brethren*. In this part, I address this issue by considering how my exemption would enable the provinces to distinguish between insincere claimants and the three kinds of sincere claimants Justice Iacobucci identified in *Amselem*.

Recall that Justice Iacobucci first asserted that subsection 2(a) protects those whose practices or beliefs were "objectively required by the religion."⁸⁰ This category protects members of an organized religion with a recognized record of objecting to the photograph requirement, such as the Amish, Molokans, and Hutterites.⁸¹ It would be very difficult for an insincere believer to provide evidence of membership in such a group (prong A), since these communities isolate themselves from modern secular society in many other respects and have a well-documented commitment to the practice of not taking photographs. As a result, this model would easily enable Alberta and Ontario to identify those who insincerely claim to be members of such religions.

⁷⁹ Incidentally, the letter the church elder reportedly wrote on behalf of this applicant seems to me to confirm prongs A and B of my proposed exemption, as the elder recognized the claimant as a member of his community and affirmed that Old Order Amish are prohibited from taking photographs. See text accompanying note 43.

⁸⁰ *Amselem*, *supra* note 9 at para 69.

⁸¹ For a discussion of the photo requirement exemption with respect to Molokans, see *Valov v California (Department of Motor Vehicles)*, 34 Cal Rptr (3d) 174, 132 Cal App (4th) 1113 (2005).

Second, Justice Iacobucci declared that subsection 2(a) protects claimants who sincerely believe a practice is required by their religion, even if this belief is contested by some religious leaders. The American case of *Quaring v. Nebraska (Department of Motor Vehicles)* demonstrates how the provinces might determine the sincerity of such a claimant.⁸² Quaring was a Pentecostal Christian woman who had long believed that the Bible prohibited the taking of photographs; consequently, she possessed no family photos, did not take pictures of her own wedding, refused to allow any photography in her home, and removed labels displaying pictures on food-stuffs. Although some branches of the Pentecostal Church subscribe to such a belief, it was not shared by Quaring's local church community. As a result, it is unlikely Quaring would have been able to satisfy Ontario's current requirements for an exemption, since she would not have been able to offer a letter of support from a religious leader in her community. However, under my proposed exemption, Quaring could have demonstrated that she belonged to a local Pentecostal church (prong A), that her beliefs were rooted in traditional Pentecostal teachings (prong B), and that she had a long history of abstaining from taking photographs (prong C). Given the amount of evidence a sincere believer such as Quaring would have been required to proffer under this model, it is unlikely that an insincere claimant could similarly demonstrate adherence to a veritable religious practice.⁸³

Third, Justice Iacobucci protected under subsection 2(a) "a person who sincerely believes that [a] practice engenders a personal, subjective connection to the divine," as long as these beliefs have a "nexus with religion."⁸⁴ As discussed in the conclusion of Section I, this category raised particular concerns for Ontario and Alberta, since an insincere claimant would likely claim that his beliefs were also protected under this category.

⁸² 728 F (2d) 1121, 1984 US App LEXIS 24956 (8th Cir, 1984), aff'd 472 US 478 (1985) [*Quaring*, cited to F (2d)].

⁸³ Interestingly, the state's argument in this case closely paralleled Alberta's in *Hutterian Brethren*. It argued that Quaring's application should not be accepted since she was not able to provide objective criteria of religious faith, and without such criteria, it would become too easy for any applicant to claim this objection, and exemptions would "be available virtually on demand." (*ibid* at 1127). The US Court of Appeals for the Eighth Circuit rejected this argument. It stressed Quaring's identification with a historical and scattered community that shared these concerns, and concluded that "by showing that they possess no photos or pictures," persons, like Quaring "requesting an exemption for religious beliefs based on the Second Commandment can easily demonstrate the sincerity and valid nature of their belief" (*ibid*).

⁸⁴ *Amselem*, *supra* note 9.

In Ontario's submissions to the Court, it stated that the *Bothwell* case illustrated this concern.⁸⁵ Bothwell expressed uneasiness with Ontario's policy of taking all licence photos with a digital camera and storing them in a database. After being informed that Ontario only provided exemptions for religious objections, he claimed that his "personal relationship with Jesus Christ" led him to believe that the Second Commandment prohibited photos.⁸⁶ He then held a press conference to discuss his case and invited the media to bring cameras. The court dismissed Bothwell's PVWP application for failing to demonstrate sincere religious belief. Noting Bothwell's press conference, the court held that at the root of his objections were secular concerns about privacy related to government databases, rather than a claim with a "nexus to religion."⁸⁷ Ontario argued in *Hutterian Brethren* that, if it were not allowed to continue requiring its three objective criteria (i.e., membership in a religious organization, a letter of support from a religious leader, and scriptural passages substantiating a religious prohibition), it would only be able to catch wrongdoers like Bothwell on rare occasions where they, like Bothwell, "slipped up" and held a press conference.⁸⁸

However, Ontario would also be able to distinguish insincere claimants like Bothwell from sincere claimants under my model. After all, even if Bothwell had not called a press conference, he would not have been able to satisfactorily demonstrate any of the three elements of sincere religious belief my proposed exemption requires: he could not have proved membership in a religious community that objected to photographs (prongs A and B)⁸⁹ or provided evidence of past or current practice (prong C).⁹⁰ The facts of *Bothwell*, therefore, suggest that my proposed modification to Ontario's criteria is rigorous enough to enable the province to identify insincere claimants. Since Justice Iacobucci affirmed in *Amselem* that the claimant held the burden to demonstrate his sincere belief, an applicant who professes sincere belief but who cannot provide objective evidence supporting this belief should not succeed.⁹¹

⁸⁵ *Hutterian Brethren*, FOI, *supra* note 26 at para 5. See also *Bothwell*, *supra* note 34.

⁸⁶ *Ibid* at paras 18, 23.

⁸⁷ *Ibid* at para 43, 55.

⁸⁸ *Hutterian Brethren*, OAI, *supra* note 52.

⁸⁹ The Ontario Divisional Court noted that when Bothwell found out about the government's exemption policy "he began to search for a congregation to join that had a religious objection to photographs, without success": *Bothwell*, *supra* note 34 at para 24.

⁹⁰ The Ontario Divisional Court also noted that Bothwell had posted photos of himself on his website, and did not object to members of the media taking his photograph: *ibid* at paras 60-61.

⁹¹ *Supra* note 9 at para 46.

The case law thus far indicates that the objective criteria in my proposed exemption—although less rigorous than those in Ontario’s current exemption—would still enable the state to identify insincere claimants.

D. Would the Supreme Court of Canada Have Accepted this Exemption?

The final question to consider in this section is whether, if the Hutterites or an intervener had proposed the exemption I drafted above, Chief Justice McLachlin would have accepted this alternative and held that Alberta had not met the minimal impairment test, despite her emphasis on the deference she owed Alberta in this context.⁹²

Recall that Chief Justice McLachlin declined to quantify the precise risk exemptions posed within the minimal impairment calculation. As discussed in Section II, she rejected the Hutterites’ argument that the risk of an exemption would be low, saying “The claimants argument ... assumes some increase in risk and impairment of the government goal may occur, and hence does not assist at the stage of minimal impairment.”⁹³ My proposed exemption does not seem to alter this minimal impairment reasoning, since any exemption creates more of a risk than a blanket policy that does not allow for an exemption.

Nevertheless, it is worth considering the nature of the risk this exemption would create. Elsewhere in her judgment, Chief Justice McLachlin elaborated on the manner in which an exemption might undermine Alberta’s objectives. For example, she repeatedly noted that even if only sincere religious claimants were granted non-photo licences, this “would not prevent a person from assuming the identity of the licence holder and producing a fake document, which could not be checked in the absence of a photo in the data bank.”⁹⁴ This is the sole risk that even a perfectly tailored exemption, perfectly applied, could not guard against.

Let us consider this scenario in more detail. What would happen if a wrongdoer tried to appropriate the identity of a sincere religious claimant in order to obtain a non-photo licence? There are several possible eventualities to consider. First, the wrongdoer could attempt to appropriate the identity of a claimant who did not have a licence. However, this situation provides no novel risk given that there are 700,000 Albertans who do not

⁹² I am grateful to Professor Lisa Austin for suggesting that I consider this question and for outlining the conclusions that could be drawn in this part.

⁹³ *Hutterian Brethren*, *supra* note 4 at para 59.

⁹⁴ *Ibid.* See also *ibid* at para 11: “To the extent that licences exist without holder photos in the central photo bank, others can appropriate the identity of the licence holder without detection by the facial recognition software.”

have a licence,⁹⁵ and thus cannot pose a cause for concern. Second, the wrongdoer could attempt to appropriate the identity of a claimant who had been issued a non-photo licence. In this case, the databank would notice that an applicant was seeking a licence using the same name, birth date, and other identifying information as a religious claimant who was already in the system, and would recognize that either the licence holder or the applicant was a wrongdoer. The problem here, as Chief Justice McLachlin noted, is that in the “absence of a photo in the data bank,” it would not be clear which party was the wrongdoer. Thus, the central risk posed by my exemption is the risk that an official could not correctly determine the wrongdoer in this instance.

If we accept the exemption model I proposed above, it is hard to see how this risk would be realized. The objective evidence my exemption requires would also provide a basis on which to distinguish wrongdoers from sincere religious believers in this instance. For example, a religious official who had standing in the community could vouch for the applicant, in the same way that professionals affirm that a passport application correctly identifies an applicant. Alternatively, the applicant could provide evidence of long-standing identification with this community, or evidence of commitment to this practice. Thus, if the Supreme Court of Canada had addressed Alberta’s interpretation of *Amselem*, and interpreted *Amselem* in the manner I outlined above, it is difficult to see on what basis it could have subsequently deferred to Alberta’s minimal impairment concerns.

Conclusion: Future Subsection 2(a) Challenges and the Role of the Minimal Impairment Test

Although Alberta’s concern with how to structure a religious exemption was not recorded in the pages of the Supreme Court of Canada’s decision in *Hutterian Brethren*, it provides an important starting point to assess the implications of the Court’s new approach to subsection 2(a) claims. As discussed in Section II, above, *Hutterian Brethren* marks a significant methodological departure for the Court, because Chief Justice McLachlin affirmed that the proportionate effects test may often provide the critical framework for assessing freedom of religion claims. This critical passage bears repeating in full:

Freedom of religion cases may often present this “all or nothing” dilemma. Compromising religious beliefs is something adherents may understandably be unwilling to do. And governments may find it difficult to tailor laws to the myriad ways in which they may trench on different people’s religious beliefs and practices. The result may be

⁹⁵ *Ibid* at para 63.

that the justification of a limit on the right falls to be decided not at the point of minimal impairment, which proceeds on the assumption that the state goal is valid, but at the stage of proportionality of effects.⁹⁶

What are the potential implications of this methodology for future subsection 2(a) claims? Let us begin by noting that the minimal impairment and proportionate effects tests generate distinct products. The minimal impairment test considers whether there are alternative methods of achieving the state's objective. It thus considers whether there is another way to address each party's needs, to protect both the integrity of the society as a whole and the functioning of minority groups within it. In contrast, the proportionate effects analysis determines, in the event that no alternative route can be found, whose interests should prevail. Grimm's formulation of the third step of *Oakes* starkly stresses this aspect:

[B]alancing does not save ... the judge from deciding which right or interest shall ultimately prevail in which situation. This means that religious freedom may be on the *losing side* regardless of the importance of a religious requirement for the believer. There are situations in which the *only alternative* is adaptation to the secular norm or emigration.⁹⁷

The proportionate effects test thus potentially reduces the many alternatives presented in the minimal impairment analysis to two stark choices: adaptation or emigration. As Grimm acknowledges, this may be appropriate in some very difficult circumstances. However, what are the implications of declaring, as Chief Justice McLachlin and Justice Abella did in *Hutterian Brethren*, that the proportionate effects test provides the critical framework to assess many of these claims?

Turning to the proportionate effects test before exhausting the minimal impairment inquiry may have the unfortunate consequence of discouraging legislative innovation at a time when it is sorely needed. In *Hutterian Brethren* the question of whether an exemption to the licence photo requirement was feasible—the classic question of a minimal impairment analysis—raised difficult questions as to the scope of the subsection 2(a) guarantee, such as whether religious beliefs can emerge in isolation. The Court's proportionate effects analysis, in contrast, did not require these questions to be considered.⁹⁸ Thus, if the Court turns to the proportionate effects analysis prematurely, it may restrict the legisla-

⁹⁶ *Hutterian Brethren*, *supra* note 4 at para 61.

⁹⁷ *Supra* note 12 at 2382 [emphasis added].

⁹⁸ For an analysis of why the last step of the *Oakes* test did not provide a suitable framework to consider these questions in *Hutterian Brethren*, see Weinrib, *supra* note 5.

ture's ability to craft constitutional alternatives that further the state's policy objectives.

The Court's new methodology may likewise discourage rights claimants from considering potential alternatives. As an example, consider the alternative of fingerprinting. In the course of litigation, the Hutterites brought up this alternative in fits and starts: they suggested it in oral argument at the Alberta Court of Appeal, and then elected not to pursue it at the Supreme Court of Canada, seemingly after being informed that the act of fingerprinting also involved the taking of a photograph.⁹⁹ Yet in their application to the Court for a rehearing, the Hutterites requested that the Court consider whether fingerprinting would provide a viable alternative to Alberta's photo requirement.¹⁰⁰ Although any explanation of the shift in the Hutterites' position remains speculative, their inconsistent positions regarding this alternative brings to mind a potential difficulty in litigating freedom of religion claims. The minimal impairment analysis assumes the religious adherents are able to evaluate precisely how different alternatives impact their faith. However, since litigation often takes place in response to novel technological or social incursions into the religious sphere, this may not always be the case. The search for alternatives may require religious leaders to learn about the technology at issue as well as to reinterpret foundational guiding texts with these new developments in mind. It is possible that in the course of litigation a communal shift may occur, opening up new options that were not immediately apparent. Turning to the proportionate effects analysis prematurely may discourage religious claimants, as well as the legislature, from embarking on this difficult process.

Chief Justice McLachlin anchored her assertion of the importance of the proportionate effects test in the difficulty that legislatures have in tailoring laws to protect the diversity of beliefs found in Canada's multicultural society. Although it is surely difficult for religious adherents to "compromise" their beliefs, and for governments to "tailor" their laws, the minimal impairment analysis nevertheless calls on all parties to think through the unique challenges of protecting freedom of religion in a liberal democracy. If the Court had responded to Alberta's and Ontario's concerns pertaining to the nature of a religious-based exemption after *Amselem*, its guidance may have enabled Alberta to develop an alterna-

⁹⁹ *Alberta v Hutterian Brethren of Wilson Colony*, [2007] SCCA No 397 (Responding Motion Record of the Appellant at paras 16-18).

¹⁰⁰ *Alberta v Hutterian Brethren of Wilson Colony*, [2007] SCCA No 397 (Motion Record for Order and Re-Hearing of the Hutterian Brethren of Wilson Colony at para 6). The Court dismissed this application without giving reasons in *Alberta v Hutterian Brethren of Wilson Colony*, [2007] SCCA No 397 at para 10.

tive in this instance. More critically, the Court's remarks would have encouraged future parties to these clashes to scrutinize whether the rights of religious claimants truly conflict with the greater good.
