Review Essay

Emerging Debates on Collective Religious Freedom in Canada

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A Review of **Richard Moon's** ***Freedom of Conscious and Religion*** (2014), **Mary Waldron's** ***Free to Believe: Rethinking Freedom of Conscience and Religion in Canada*** (2013), **Benjamin Berger's** ***Law's Religion: Religious Difference and the Claims of Constitutionalism*** (2015), and ***Religious Freedom and Communities*** edited by **Dwight Newman** (2016).

Contents

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1. Introduction

The freedom of religion is protected in section 2(a) of the *Canadian Charter of Rights and Freedoms*, which affords everyone the fundamental freedom of conscience and religion.[1] Historically, the courts have understood this right in individual terms and as a matter of personal autonomy and choice, although they have acknowledged there is some protection for the collective dimension of religious experience expressed in a community of believers.[2] Several recent books have critically addressed this jurisprudence and, in particular, the status of the so-called "community, corporate and institutional aspects of religious freedom."[3] This essay looks at four contributions in this regard: Richard Moon's *Freedom of Conscious and Religion* (2014), Mary Waldron's *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (2013), Benjamin Berger's *Law's Religion: Religious Difference and the Claims of Constitutionalism* (2015), and *Religious Freedom and Communities* edited by Dwight Newman (2016).[4] With a few exceptions, these texts argue Canada's current religious freedom framework is too focussed on individual autonomy and should be expanded and/or adjusted in ways that allow collectivities such as organizations and institutions to claim religious freedom. Some of the challenges facing such conceptions of collective religious freedom have just begun to be addressed, such as impacts on third parties (non-believers), so-called "internal dissenters," and Indigenous spiritualities.

2. Who Can Claim Religious Freedom?

At present, the jurisprudence on religious freedom in Canada seems to lack a coherent theory as to why some collective 2(a) claims succeed while others

1 *Canadian Charter of Rights and Freedoms*, s 2(a), Part 1 of the *Constitution Act, 1982,* being schedule B to the *Canada Acct 1982* (UK), 1982, c 11:

> Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

2 Kathryn Chan, "Identifying the Institutional Religious Freedom Claimant" (2017) 95:3 Can Bar Rev 707; Victor Muñiz-Fraticelli & Lawrence David, "Religious Institutionalism in a Canadian Context" (2015) 52:3 Osgoode Hall LJ 1049 [Muñiz-Fraticelli & David].

3 Dwight Newman, "Ties that Bind: Religious Freedom and Communities", in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 3 at 4.

4 Benjamin Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015); Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law Inc, 2014); Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013).

fail.[5] One reason this has persisted could be that religious freedom cases with collective claims often involve organizational entities joined by individual complainants. For example, in *Trinity Western University* (2018) the complainants were a private Christian university and an individual graduate of TWU who wished to attend its proposed law school.[6] Such a combination is not uncommon and gives the courts a way to avoid dealing with the question of collective religious freedom by proceeding on the basis of the individual claim and bypassing questions about the status of the organizational/institutional entity.[7] Religious freedom is characterized in individual terms, and when religious communities are given recognition they tend to be characterized as groups of individuals pursuing common ends.[8] Therefore, while some decisions of the Supreme Court have gone some way to addressing collective religious freedom there is still no clear sense of which forms of collective expression are included in the Court's conception and which are not.

Each of the texts discussed below attempts to clarify and develop this jurisprudence, particularly with regard to collective religious freedom and the status of organizational entities under section 2(a). All the authors agree that the courts have for the most part framed religious freedom as an individual right. Most of them also suggest this may be too narrow and that the courts' use of conceptual tools derived from individual religious freedom cases has overly limited collective religious freedom.[9] With a few notable exceptions, they argue the current framework should be expanded to encompass religious collectivities in the form of organizations and institutions. A commonality across these

5 Amy Swiffen, "Collective Religious Freedom as Associational Action: How Sociological Concepts Can Help Clarify the Jurisprudence" CJLS [forthcoming].

6 Trinity Western University's proposed law school was controversial due to TWU's Community Covenant — a behavioural contract students and staff must sign containing provisions discriminating against LGBT individuals. The law societies in British Columbia, Ontario, and Nova Scotia refused to recognise TWU's proposed law school because of the Covenant. TWU appealed these decisions and was joined by an individual who wanted to attend the proposed law school. The Supreme Court heard these cases in 2018, and found the law societies met their duty to balance the religious freedom with the public's interest in equal access to the legal profession. TWU announced on August 8, 2019, that the Covenant would not be mandatory for students attending TWU's proposed law school: *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 (CanLII); *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (CanLII).

7 Chan, *supra* note 2; Swiffen, *supra* note 5; See also Muñiz-Fraticelli & David, *supra* note 2.

8 Richard Moon, "The Accreditation of TWU's Law Program" (2015) Summer 40:2 Law Matters (CBA, Alberta Branch) 25 at 25.

9 Howard Kislowicz, "The Court and Freedom of Religion" (2017) 78 SCLR (2nd) 221 at 227; Berger, *supra* note 4 at 62-105; Moon, *ibid*; Natasha Bakht & Lynda Collins, "'The Earth is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 777.

varied arguments is the reliance on assumptions about the nature of community and its processes as a basis for legal arguments.

3. Religious Freedom as Principled and Pragmatic

Richard Moon's book is a good way to begin because he provides a broad overview of the religious freedom jurisprudence while highlighting various legal issues and tensions related to the idea of collective religious freedom. Moon's contribution is notable in that it is one of the only texts reviewed that does not reject the individual autonomy approach to understanding religious freedom. Rather, he attempts to add clarity to the Court's jurisprudence on the status of collective religious freedom by showing there are two different ways the Court has understood religious belief and religious freedom. In some instances, the Court conceives religion as an expression of individual autonomy, and in others as a cultural identity. Moon refers to *Syndicat Northwest v Amselem*, *Multani v Commission Scholaire Marguerite-Bourgeoys*, and *Grant v Canada (Attorney General)*, among others to show how the courts see religion as "an identity rather than a choice."[10] In such cases, they do not use an individual autonomy-based understanding of religious freedom but instead see it as a matter of equality among religious groups.[11]

Moon concludes that the Court opts for these different ways of understanding religion depending on the context of a case. If religious belief is understood as an identity, a state action that suggests the beliefs and practices of one group are less important or correct than another may be perceived not simply as a position taken on a public policy issue, but as a denial of the equal worth of some religious communities. In these cases, the Court's tendency is to take an ameliorative approach and to focus on the issue of equitable relations between the state and religious groups. The way the Court will understand religious freedom in a given instance will depend on how the religious expression in question intersects with the limits of a democratic society. Thus, when the Court understands religion as an identity it captures aspects of collective religious freedom. Moon suggests this makes sense in relation to religious minorities that are "often undervalued in the political process" and at risk of becoming socially marginalized.[12] Moon argues the Court's oscillation between

10 Moon, *supra* note 4 at 131.

11 Moon refers to *SL v Commission scolaire des Chenes* as an example, where Deschamps J. stated that "Canadian courts have held that state sponsorship of one religious tradition amounts to discrimination against others." *Ibid* at 29.

12 *Ibid* at 131. See also Richard Moon, "Freedom of Religion under the Charter of Rights: The Limits of State Neutrality" (2012) 45:2 UBC L Rev 497.

identity and individual rights makes sense as a practical matter because only some aspects of religious expression can be protected in a democracy. He concludes that the foundations of religious freedom in Canada "are both principled and pragmatic."[13] Through this lens the religious freedom jurisprudence is less confusing even if it is not fully coherent. It suggests the Court's approach to religious freedom will necessarily be unpredictable to some extent, as it will variously be concerned with protecting individual autonomy or with equality for religious groups.

4. Religious Freedom as Equality

Other texts reflect a different perspective on the Court's equality approach and ultimately on the meaning of religious freedom in a democratic society. Mary Waldron agrees with Moon that the courts do address collective religious expression when they understand religion as an identity rather than a matter of individual autonomy. However, she disagrees strongly with the use of ameliorative reasoning associated with equality rights to define the religious freedom that flows from that identity. Waldron refers to *R v Big M Drug Mart* along with subsequent decisions to illustrate the point.[14] In *Big M*, a store owner was charged under the Lord's Day Act for doing business on a Sunday. The Supreme Court held that the Act had a religious purpose in compelling the observance of the Christian Sabbath and was therefore unconstitutional. The Court determined that a law that compels compliance in order to serve a religious purpose is a violation of religious freedom because it favours one religious group over others. That is, it does not treat all religious groups equally.

Waldron argues the Court's reasoning fails to take account of the religious freedom of majorities. In *Big M* the Court should have seen the Lord's Day Act as an expression of the religious freedom of the Christian majority. Rendering it invalid from this perspective curtailed the religious freedom of the majority — specifically the freedom to see a supported religious purpose pursued via law. Waldron writes, the Court "completely failed to elucidate how that purpose limited or abrogated the freedom of religion of non-Sunday observers."[15] In other words, the Court's focus on equality led to the conclusion that a state action with a religious purpose does not treat all religious groups equally, and is thus a violation of religious freedom. Instead, Waldron argues that cases where a state action with a purely religious purpose that reflects majoritarian religious beliefs,

13 Moon, *supra* note 4 at 199.
14 *R v Big M Drug Mart,* 1985 CanLII 69 (SCC), [1985] 1 SCR 295.
15 Waldron, *supra* note 4 at 35.

conflicts with other rights should not be seen through an equality lens. In this regard, she contests the Court's assumption that a state action that prohibiting "otherwise harmless acts because of their religious significance to others" is an infringement of the religious freedom of non-believers.[16] The courts, she suggests, must also consider the religious freedom of the majority and seek to find a common space where they can both be exercised without significantly interfering with each other. However, if the competing rights cannot be reconciled with religious freedom, the religious expression should take priority. In other words, religious expression should be given priority over other rights and freedoms.

Indeed, Waldron characterizes religious freedom as a fundamental right unto itself that should not be conflated with equality. The basis for privileging religious expression in this way is the idea that the purpose of religious freedom is protecting free belief in a democratic society. Based on this idea that the purpose of religious freedom is the absolute protection of free belief, Waldron proposes an approach to section 2(a) that includes religious belief when expressed in collective form with public effects. The argument is compelling, but in embracing the idea that religious expression should receive absolute protection it does not address the role of equality in making a democratic community possible. Nor does it reconcile the fact that such expressions may have the potential to undermine the democratic sphere itself. If the rationale for thinking of religious freedom as an absolute right is the promotion of a democratic community, concerns about how the expression of religious belief may undermine the vitality of that community should also be addressed.

5. Religious and Legal Cultures

Benjamin Berger analyzes religious freedom from a unique angle, which could be described as a cultural turn. Instead of using legal categories as a starting point — e.g., the idea that religious freedom protects belief and practice — he starts with a concept of culture articulated by anthropologist Mary Douglas, which she defined as "the public, standardized views of a community."[17] From this perspective, culture is manifested in formal organizations and structures of authority. Berger suggests both religion and Canadian constitutional law can be understood as distinct cultures in this sense. The culture of constitutional law reflects liberal conceptions of individual freedom and autonomy. Berger suggests religions often have a different culture that does not centre individual autonomy to the same degree. Since legal culture has more power than religious

16 *Ibid*

17 Berger, *supra* note 4 at 37.

cultures, however, what Berger calls law's "rendering" of religion takes place through its own "cultural system."[18] His criticism of this situation is based on the idea that this cultural rendering leaves out aspects of religious experience that do not centre individual rights.[19] For example, when a group's beliefs include the idea that otherwise harmless actions by third parties have spiritual consequences, the courts tend to see religion as a private matter that should not be imposed on non-believers.[20]

Berger is critical of how religion only has "constitutional relevance" when "it is an expression of human autonomy and choice."[21] He writes, "religion has force in the eyes of the law" only to the extent that it is aligned with individual rights.[22] When the law limits religious freedom to the private sphere it tacitly refutes religious beliefs that have political implications.[23] He refers to Robert Cover's notion of jurispathic legal interpretation to suggest that if such religious beliefs are not protected by the state they are essentially being killed.[24] Against this, Berger frames the purpose of section 2(a) as protecting religion itself. For example, he writes that religious freedom cases are about the "force of *religion's claim*" and "the constitutional protection *religion enjoys*."[25] Elsewhere he writes that the Court in *Big M* assessed the conditions under which "*religion is to be protected*" and when "*religion has a claim* within the law."[26] These phrasings position religion itself as the legal subject, as opposed to the individual. In this sense, Berger advances a position similar to Waldron's, though the prioritization of religious expression over equality is less extreme and he does not claim religious expression as an absolute right. Rather, Berger advocates the courts use of a form of "translation" when interpreting religious freedom, which involves aiming to represent accurately as much of the religious experience as possible within the limits of constitutional cognizability.[27]

18 *Ibid* at 17.

19 Berger writes how "in many cases, "choice" has served as a stopping point or limit principle in the analysis of equality claims", *ibid* at 87. The reference is to an area of feminist criminology and legal research on how criminal violence by males against women is justified by reference victim's choices (i.e. blaming the victim).

20 Benjamin Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall LJ 277 at 309-10.

21 *Ibid* at 299, 301.

22 *Ibid*.

23 Berger, *supra* note 4 at 12.

24 *Ibid* at 103.

25 *Ibid* at 86, emphasis mine.

26 *Ibid* at 98.

27 A similar idea of "translation" exists in Aboriginal law and was proposed by McLaughlin C.J. in Marshall/Bernard in regards to Indigenous land title. It has been characterized by Brian Slattery as an exercise of hierarchical extinguishment because it falls short of recognizing the jurisdiction of Indigenous legalities.

6. Institutional and Organizational Religious Freedom

In the introduction to the edited collection *Religious Freedom and Communities,* Dwight Newman is explicit that the book is interested in advancing rights for religious organizations and institutions. He argues the "social aspects of religious freedom" have not been adequately recognized by the courts and notes that the "emerging view" among legal scholars is that section 2(a) includes rights for "autonomous communities of faith."[28] Most of the essays in the collection converge on this point and argue in different ways that "religious institutions should themselves be recognized as holders of the right to freedom of religion," though there are some exceptions discussed below.[29] These arguments tend to invert the Court's current approach where religious freedom for religious organizations is based on the individual rights of community members. Instead, individual religious freedom is understood as dependent on a more fundamental collective right that flows from group status.

One exemplary essay in this regard, by Alvin Esau, argues that religious institutions (what the author calls "the church") are entitled to sovereignty independent of the state. Esau argues that because some churches are not creations of the modern state but antecedent to it, they have their own inherent constitutional jurisdiction. The purpose of religious freedom is protecting this right of religious groups to create a "different law."[30] Section 2(a) should be interpreted as an assertion of the existence of an "ecclesiastical government" that "the state cannot interfere with."[31] Esau bases these arguments on the idea of the "freedom of the church," which is derived from Catholic political theology of the eleventh century. This idea originated in a particular historical context that differs markedly from our current situation of religious pluralism (the doctrine envisioned just one church). Esau offers no account of how to bridge this gap, or why a seemingly anachronistic idea with theological origins should be central to the contemporary interpretation of religious freedom.[32] Other issues include how the concept of a "church" is to be defined and how it relates to forms of spirituality that do not manifest through a formal institution.[33]

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28 Newman, *supra* note 3 at 1.

29 Alvin Esau, "Collective Freedom of Religion" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 77 at 79.

30 *Ibid* at 78.

31 *Ibid* at 103.

32 Richard Schragger & Micah Schwartzman, "Against Religious Institutionalism" (2013) 99:5 Va L Rev 917 at 933.

33 *Ibid* at 935: The authors note how the freedom of the church also involved "vast assertions of power by the Church (and later by other churches)." Schragger and Schwartzman continue: "Freedom of the

Other texts in Newman's collection make arguments for organizational religious freedom based on similar presumptions related to the meaning of religion in human communities. For instance, Faisal Bhabha declares that "enforcing in-group conformity is a necessary element of group preservation."[34] Based on this, he argues that religious freedom includes "the right to defend the solidarity and communal sense of the majority of the community."[35] Similarly, Dolevy, Feehan, and Bowal declare that adequately protecting "the individual's right to freedom of religion" requires "protecting the community's aggregated right to protect that freedom from internal dissent."[36] Religious freedom must include "the right to defend the solidarity and communal sense of the majority of the community."[37] The authors argue that such "preservationist" action deserves deference from the courts "in the name of group survival."[38] In these accounts, communities are understood in much the same way that Berger understands cultures insofar as they are assumed to be based on a "normative order."[39] Religious freedom is seen to flow from the idea that organizations and institutions are manifestations of this underlying order upon which community survival depends.

7. Religious Freedom and Community

There is a tendency in the arguments discussed above to invoke sociological ideas about the nature of community. However, it must be acknowledged that there are likely no schools of sociology or anthropology that would agree with the assumptions regarding community, culture, and law that are deployed in the books under review. Interpretivist sociologists would suggest that the basic elements of society are individual subjective meanings, and that institutions and organizations are forms of social relationships that need to be understood by looking at their meaning for the individuals involved. Such social relationships cannot be detached from individual volition because they represent meaningful orientations of individual social action. In contrast, Marxist understandings

church also entailed the pope's power to depose kings and emperors. In effect, the Church claimed a veto power — an absolute right to dethrone any secular ruler who contravened its commands. This was an implicit or "indirect" theocratic claim, putting the emperor ultimately at the service of the pope."

34 Faisal Bhabha, "Hanging in the Balance: The Rights of Religious Minorities" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 265 at 271.

35 JK Donlevy, Kevin P. Feehan & Peter Bowal, "A Community's Right to Freedom of Religion: Loyola High School v Quebec" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 163 at 177.

36 *Ibid*.

37 *Ibid*.

38 Bhabha, *supra* note 35 at 276.

39 Esau, *supra* note 29 at 81.

would put the emphasis on structural aspects of society that exceed individual autonomy. Yet, they would also challenge the assumptions about communities being defined by normative orders that need to be protected. For Marxist sociologists, religions are ideological apparatuses that reinforce the economic base of society. Churches and other social institutions have an ideological function in helping to reproduce the mode of production. From this perspective, an account of religious freedom that presumes such institutions represent the best interests of the community actually represents a reification of the social relations of production.

Similar cautions could be voiced with regard to Berger's choice to use the concept of culture articulated in Mary Douglas' early work.[40] Berger's goal is to avoid the "abstraction"[41] of legal analysis that flattens the complexity of social relations by centering the "experience of law"[42] and using "the experience of laws as an analytical starting point."[43] Yet, Berger characterizes Canadian constitutional law and religion as cultures in a parallel sense. The difficulty with this is that the former refers to a particular body of case law and jurisprudence, while "religion" does not refer to any particularity. It is more of an empty category that signifies all particular religions. Thus, the category of "religion" subsumes particulars while "Canadian constitutional law" is a particular or at least an intermediary concept. The two cannot be invoked as cultures in a parallel sense without flattening out this difference.

The issue can be seen in an ambiguity over how religion and constitutional law are positioned in relation to each other in Berger's analysis. Berger describes them both as "cultures" and as "cultural forms."[44] The shift from noun to adjective signals a different sociological connotation. There can be multiple cultural forms within a more general cultural horizon. For example, constitutional law and various Christian religious denominations could possibly be understood as cultural forms within a horizon of European politics, philosophy, and history.[45] Similarly, modern universities, settler colonial legal orders, capitalist economies, etc. could be understood as cultural forms within this horizon. At the same time, Berger invokes a more radical notion of cultural difference that suggests

40 Berger, *supra* note 4 at 37.

41 He acknowledges that starting from a theoretical concept such as "culture" poses a similar risk when it is used as an "ideal theory." *Ibid* at 31.

42 *Ibid* at 11.

43 *Ibid* at 36.

44 *Ibid* at 173.

45 There is work in the area of political theology that identifies links between contemporary legal and political categories and theological ones (Agamben, Santner). From this perspective, there are many links between the cultural forms of religion and law that Berger presents as opposed.

constitutional law and religion are different cultures *tout court*. One example of this is Berger's references to settler colonialism and the relationship between constitutional law and Indigenous spiritualities. In this case, the culture clash is not between legal and religious cultural forms, but rather between different cultural horizons, each with their own cultural forms of religion and law.[46] Berger does not distinguish these modes of culture clash and cultural relation, which are both captured and at times conflated by his use of the concept of culture.

At the same time, while Douglas was an anthropologist, her original conception carries significant baggage relevant to the issues at hand. She developed the concept that Berger cites in the 1960s and this original formulation has been critiqued by ensuing generations of anthropologists. In particular, while it has been highly influential, Douglas' early work was criticized for taking culture as if it were "a monolithic thing"[47] that was "stable and representable."[48] As Hetherington writes, Douglas' early approach takes "the category of social order … in advance of [the] analysis."[49] This concept of culture missed "the ongoing way in which order is made by uncertain process."[50] Douglas herself acknowledged these issues later in her career, explaining that her initial understanding of culture was influenced by "conservative social commitments" and a "kindly feeling for hierarchy,"[51] which resulted in an analysis "praising structure and control."[52] It is problematic that Berger does not make reference to these debates or explain the choice of using Douglas' original formulation of culture as a starting point for analysis.

The tendency to assume under theorized understandings of community is evident across the several texts under review here. For example, Van Praagh's essay in Newman's book states that communities as well as individuals "*feel* the consequences of any [judicial] decision"[53] on religion freedom. Of course, com-

46 This deeper cultural clash is evident when Berger speaks positively of the courts' uptake of oral history as a form of evidence. While he frames this as an example of religious experience being integrated into legal reasoning, Indigenous legal scholars have pointed out the stories are interpreted merely as evidence and not as a source of legality in their own right.

47 Valerio Valeri, *The Forest of Taboos: Morality, Hunting, and Identity among the Huaulu of the Moluccas* (Madison, Wisconsin: University of Wisconsin Press, 1999) at 71.

48 Kevin Hetherington, "Secondhandedness: Consumption, Disposal, and Absent Presence" (2004) 22:1 Environment and Planning D: Society and Space 157 at 163.

49 *Ibid*.

50 *Ibid*.

51 Robbie Duschinsky, Simone Schnall & Daniel H. Weiss, eds, *Purity and Danger Now: New Perspectives* (London: Routledge, 2017).

52 *Ibid*.

53 Shauna Van Praagh, "Welcome to the Neighbourhood: Religion, Law and Living Together" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 63 at 65.

munities do not literally feel. The personifying language is a way of conveying the idea that other people in a religious community are impacted by judicial decisions on religious freedom beyond those individuals directly involved in a case. However, the personification bypasses many questions, such as, what types of impacts are considered collective? How are the impacts measured? How many and/or who must be impacted for it to count as a community feeling?

Van Praagh's contribution to Newman's book is focussed on making the point that religious communities are not monolithic entities but rather dynamic pluralities. She illustrates this with reference to the Chasidic Jewish community in Montreal, where her research has shown that "the autonomous existence of communities is traced not only from top down, but from bottom up … the links between the individual members and the communities to which they belong can change in ways not anticipated or approved by community leaders."[54] In this context, the assertion of the religious freedom of institutions and organizations "may or may not capture the diversity of perspective and practices" of a community of believers.[55] This is a "complicated reality," she says, that "formal collective rights discourse can hide from view."[56] Van Praagh's caution points to how privileging organizations and institutions against individual autonomy presents risks that may not be immediately intuitive but become apparent from a more sociological perspective. For instance, the identity of interests between organizational entities and the community is simply assumed in most of the legal arguments, yet Van Praagh makes the point that these formal entities may or may not represent the interests of members, and this changes over time. When the law protects formal organizations it is advancing the interests of certain individuals and segments within a community.

Van Praagh's contribution highlights the possibility that law may hinder the vitality of communities when it takes particular organizations or institutions as representing an assumed "normative order." As seen above, the essays that allude to this issue simply avow the power of majorities over minorities. However, what if internal dynamism turns out to be an integral aspect of community vitality? There is a chance the law may inadvertently stifle the religious communities it is trying to protect. This is important, because even if formal organizations are not oppressive or discriminatory they still are not immediate manifestations of collective interests. Collective religious freedom arguments

54 *Ibid* at 74.

55 *Ibid* at 73. As an example, Van Praagh notes collective religious freedom protection could limit oversight by agencies such as child protective services.

56 *Ibid* at 74.

should take into account how these interests may be limited through empowering "preservationist" actions of organizations and institutions. As Van Praagh suggests, communities are internally differentiating and dynamic entities.

8. Indigenous Religious Freedom

Sarah Morales' essay is another outlier in Newman's collection in that it looks closely at the meaning of community vitality in the context of Indigenous spiritualities. In discussing the *Ktunaxa Nation* case,[57] Morales points out how the judicial reasoning assumed an idea of religion derived from a Christian religious culture, which is not consistent with the Indigenous spiritualities engaged in the case.[58] As a result, "Indigenous relationships with the land and associated spiritual beliefs are not captured within the fundamental rights and freedoms protected by the *Charter*."[59] In assessing how conceptions of collective religious freedom could redress this, Morales argues the courts should focus on defining community vitality contextually. She illustrates this by drawing on the *Lafontaine* case (2004) involving a group of Jehovah's Witnesses who purchased land in an area that was not zoned for places of worship.[60] The group asked the municipality to change the bylaw so they could build a Kingdom Hall. The town refused and the group argued this was a violation of its freedom of religion. The JH lost on the grounds there were other locations available in the town where they could build their church and the state had no duty to facilitate their religious worship.[61]

Morales focusses on a discussion *in obiter* which asks whether the same zoning bylaw would infringe section 2(a) if there had been no alternative building locations available. Label J finds that it would, since the construction of a

57 Ktunaxa Nation *v.* British, 2017 SCC 54, [2017] 2 S.C.R. 386. The Ktunaxa Nation had appealed the province of B.C's decision to approve a ski resort in an area known as Qat'muk. The Ktunaxa claim the area as part of their traditional territory, while British Columbia characterizes it as Crown land. The Ktunaxa cited their belief a Grizzly Bear Spirit lives on the mountain and will leave if the resort is built. The Ktunaxa argued the province's decision to allow the resort infringes its freedom of religion. The Court characterized the claim as seeking protection for "the spiritual focal point of worship." In other words, the Court characterized the claim as seeking to protect the Grizzly Bear Spirit itself, not the community's right to believe in it. Morales argues this idea of religion as involving a dietetic focal point is culturally specific.

58 Morales' essay is responding to the BCCA decision in the Ktunaxa Nation case but her intervention can be easily transposed to the Supreme Court's ruling.

59 Sarah Morales, "Qat'muk: Ktunaxa and the Religious Freedom of Indigenous Canadians" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 287 at 296.

60 Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine *v* Lafontaine (Village), 2004 SCC 48 (CanLII).

61 *Ibid.*

Kingdom Hall is "necessary to the manifestation" of the JH religious faith.[62] The hypothetical situation captures how the same state action can have different impacts based on what religious freedom means in a given context. Morales links this reasoning to the concept of community vitality. She argues a similar approach should prevail in collective religious freedom cases. Courts should aim to protect the vitality of a religious community in its own terms. In this light, Morales considers the significance of Indigenous difference for *Charter* interpretation. While other texts reviewed either do not address this issue or collapse Indigenous spiritualities into a more general category of religion, Morales argues a contextual approach must take into account section 35 and other Aboriginal rights. This means when a 2(a) *Charter* claim involves an Indigenous community the courts must consider what religious freedom means from the Indigenous perspective, as well as the state's fiduciary duty to Indigenous peoples.[63] Thus, Morales argues the Court should not treat Indigenous groups the same as any other claimants in religious freedom cases. The constitutional status of Indigenous difference should shape how religious freedom is defined in the first place and courts must develop an approach that includes the Indigenous perspective on community vitality.

Morales' conclusions are in tension with Newman's argument in the same section in the collection, which puts forward the opposite position: cases involving Indigenous claimants should be understood as being about religious freedom generally, not as specific to Indigenous peoples.[64] Following this, Newman frames the central issue in the *Ktunana Nation* case differently from Morales. Rather than viewing it as a case about community vitality, Newman sees *Ktunana Nation* as a case about the impact of religious freedom on third parties. That is, he suggests the case is about whether and to what degree religious freedom protects actions that impinge on non-believers. Newman argues that *Ktunaxa Nation* shows how such impacts should not "automatically diminish" religious freedom, but should at times take second priority, such as in cases where the impacts do not involve constitutional rights but only other interests.[65] In cases where religious freedom does clash with the constitutional rights of others, Newman suggests the courts must find a reconciliation that preserves religious freedom, even if this reconciliation comes at the expense of third parties. Thus, while Morales does not argue for more robust collective

62 *Ibid* at para 74.

63 Morales, *supra* note 60 at 305.

64 Dwight Newman, "Implication of the Ktunaxa Nation/Jumbo Valley Case for Religious Freedom Jurisprudence" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 309 at 310.

65 *Ibid* at 317.

religious freedom protection per se as a method of encompassing Indigenous religious freedom, Newman collapses Indigenous difference into religion generally and attributes the jurisdictional aspect of the Ktunaxa claim to religious communities and disconnects it from Indigeneity and section 35.[66]

9. Conclusion

Overall, there are many tensions and unresolved issues in the religious freedom jurisprudence in Canada and these are evident in the various arguments regarding collective religious freedom reviewed above. Richard Moon offers the least prescriptive analysis and sees religious freedom as something the courts must approach pragmatically in light of the limits of a democratic community. This account is grounded in the recognition of the practical limits of democracy and does not invoke sociological assumptions about the nature of community. Moon is also one of the few who does not reject a conception of religious freedom based on individual autonomy. The essays by Van Praagh and Morales are also distinguished for surfacing some of the complex issues that follow from conceptions of collective religious freedom that de-centre individual rights, such as the risk of stifling the vitality of communities in different ways.

However, Newman seems to be right that the emerging view is that religious freedom should be expanded to include stronger and/or broader protection for religious collectivities. Most of the texts reviewed here consider the current collective religious freedom framework to be too narrowly focussed on individual autonomy. Berger presents the case in the most sustained way by continuously circling back to how the Court's individualized lens excludes aspects of religious culture. Waldron and most of the essays in Newman's collection put forward possible alternatives to the current approach, mostly based on variants of the idea that religion occupies a special status in the community and even a sovereign sphere. However, if the import of community is going to ground legal arguments, it is relevant to consider whether the assumptions about community that are being invoked are sociologically responsive. Otherwise, the law risks harming the communities it is trying to protect.

66 As it turned out, the Supreme Court's decision in Ktunaxa Nation (2017) agreed with Newman contra Morales that the Indigenous status of claimants is not relevant to characterizing religious freedom. The concurring minority did agree with Morales that the scope of section 2(a) included community vitality, however, it did not draw on section 35 jurisprudence or argue for taking into account the Indigenous perspective in defining it.