

# RELIGION, PUBLIC LAW, AND THE REFUGE OF FORMALISM

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## 1. Introduction

We discover ourselves through encounter with others.<sup>1</sup> We tell various stories about ourselves, about our essential character or identity, but it is only when we are drawn into relationship with another that the adequacy of these accounts is tested. If we are paying attention, we invariably learn that aspects of our self-accounts include features that are idealized, incompletely realized, or positively false, and that other important parts of who we are were less apparent to ourselves.<sup>2</sup> In particular, in the most difficult, complex, and fraught encounters with others it is not necessarily our most valued or noble traits and habits that emerge, it is, rather, the ones that most serve us.<sup>3</sup>

In this article we indulge a legal anthropomorphism by following the intuition that something like this process occurs within legal systems and the development of public law traditions. We accept the dangers of so doing because of its heuristic upside: we think that it helps us see something both interesting and true about the encounter between state law and religious legal traditions, and about contemporary Canadian public law. There are precedents for this kind of argument in the literature on law and religion and in constitutional theory. There is Harold Berman's work, which demonstrates, in magisterial detail, that state authority learned the shape and character

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<sup>1</sup> On the dialogical nature of identity, see Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism* (Princeton: Princeton University Press, 1992).

<sup>2</sup> On the deep difficulty of telling these stories about ourselves, see Judith Butler, *Giving an Account of Oneself* (New York: Fordham University Press, 2005).

<sup>3</sup> This is one of the essential insights of the psychoanalytic tradition. See e.g. Adam Phillips, *Terrors and Experts* (Cambridge, Mass: Harvard University Press, 1996).

of a modern legal order from engagement and struggle with religious legal traditions.<sup>4</sup> And in the field of constitutional theory, one might think also of Robert Cover. Following Kenneth Burke's claim that "Constitutions are agonistic instruments," in that "they establish a normative world on the basis of their opposition to other worlds,"<sup>5</sup> Cover exposed the violence at the heart of constitutional interpretation.<sup>6</sup> *Nomos and Narrative*<sup>7</sup> was, famously, an application of this insight to the interaction of state public law and religion.

Our inquiry is less historical and dramatic than either Berman's or Cover's, but it follows a sympathetic path. We look to two recent cases from the Supreme Court of Canada, *Wall*<sup>8</sup> and *Aga*,<sup>9</sup> as a springboard or occasion for suggesting that the encounter with religious legal traditions has surfaced a distinct vein of formalism in Canadian public law, discernable across the Court's law and religion jurisprudence. Otherwise put, one effect on Canadian public law of its interaction with the complexity, challenge, and unruliness<sup>10</sup> of religion has been to rediscover the virtues of, and reengage with, formalist tools of public law analysis. This is so despite the centrality of substantive analysis in the account that contemporary Canadian public law gives of itself. This avowed aversion to formalist analysis is apparent across a variety of areas and doctrines of constitutional and public law. The symbolic heartland of this commitment to substantive analysis is, of course, the jurisprudence interpreting the *Charter* equality guarantee, in which the embrace of "substantive equality [as] the 'animating norm'"<sup>11</sup> and "philosophical premise"<sup>12</sup> of s. 15(1) serves as a near synecdoche for the movement from pre- to post-*Charter* public law.<sup>13</sup> The (until recent)<sup>14</sup> embrace of purposive interpretation<sup>15</sup> is another expression of this

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<sup>4</sup> Harold Joseph Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983). See also Harold Joseph Berman, *The Interaction of Law and Religion* (Nashville: Abingdon Press, 1974).

<sup>5</sup> Cited in Robert M Cover, "The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role" (1985) 20 Ga L Rev 815 at 816.

<sup>6</sup> Cover, *supra* note 5; Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601.

<sup>7</sup> Robert M Cover, "The Supreme Court 1982 Term — Foreword: Nomos and Narrative" (1983) 97 Harv L Rev 4.

<sup>8</sup> *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [*Wall*].

<sup>9</sup> *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga*, 2021 SCC 22 [*Aga*].

<sup>10</sup> Benjamin L Berger, "Liberal Constitutionalism and the Unsettling of the Secular" in Rex Ahdar, ed, *Research Handbook on Law and Religion* (Northampton, Mass: Edward Elgar, 2018) 198 at 214.

<sup>11</sup> *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 42 [*Fraser*].

<sup>12</sup> *Ibid* at para 40.

<sup>13</sup> This is so despite the push-back on substantive equality found in the dissenting judgment of Brown and Rowe JJ in *Fraser*.

<sup>14</sup> *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32.

<sup>15</sup> See Vanessa MacDonnell, "The Enduring Wisdom of the Purposive Approach to Charter Interpretation" (2022), online: <<https://papers.ssrn.com/abstract=4032661>>.

commitment to substantive engagement, as is the (again, until recent)<sup>16</sup> general movement away from categorical analysis in the law governing judicial review of administrative action.<sup>17</sup>

Further afield, an echo of this substantive posture can be found in the contemporary law of evidence, which has been defined by the so-called “principled revolution.” This revolution is a response to the “blind and empty formalism”<sup>18</sup> of categorical rules of admissibility, preferring engagement with the contextual application of the principles and concerns that animate these historical rules. And yet this example drawn from the law of evidence is instructive (as are, perhaps, the counter-trends noted parenthetically above). Even in thrall to this “revolutionary” story, the virtues of formal categories are never far from mind. So, we see in the law of evidence that when met with particularly knotty problems or deep complexity generated by the principled approach, the Courts have returned to the shed to recover their formalist tools.<sup>19</sup>

We tell a similar story here, one impelled by the distinctive challenges of encounter with religious legal traditions. The Court has variously described the nature and source of these challenges. It has emphasized the role that religion plays in the lives of individuals and communities, noting the connection between religion and human dignity,<sup>20</sup> and its integral link “to one’s self-definition and spiritual fulfilment.”<sup>21</sup> It has traced the “particular challenge”<sup>22</sup> that religion poses for law and the state to the breadth and variety of religious beliefs,<sup>23</sup> as well as their legal inscrutability<sup>24</sup> and alleged obstinacy.<sup>25</sup> But underlying these practical and conceptual legal challenges—both real and imagined—are fundamental questions of sovereignty and pluralism that have defined the interaction of law, religion, and state over the

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<sup>16</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

<sup>17</sup> The selection of a standard of review in administrative previously relied on the balancing of contextual factors rather than the current more categorical approach: *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 1998 CanLII 778 (SCC); *Dunsmuir v New Brunswick*, 2008 SCC 9.

<sup>18</sup> *R v Vetrovec*, [1982] 1 SCR 811 at 823, 1982 CanLII 20 (SCC).

<sup>19</sup> A telling example is the reintroduction of more categorical, formal analysis into the very field of evidence law that generated the “blind and empty formalism” critique, the law of corroboration. See *R v Khela*, 2009 SCC 4.

<sup>20</sup> *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 94, 1985 CanLII 69 (SCC).

<sup>21</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 39 [*Amselem*].

<sup>22</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 36 [*Wilson Colony*].

<sup>23</sup> *Ibid*: “Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief.”

<sup>24</sup> *Ibid* at para 89: “There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture.”

<sup>25</sup> *Ibid* at para 61: “Freedom of religion cases may often present this ‘all or nothing’ dilemma. Compromising religious beliefs is something adherents may understandably be unwilling to do.”

*longue durée*.<sup>26</sup> We argue here that these abiding sovereignty and pluralism problems presented by the law-religion encounter has led Canadian public law to rediscover its formalist habits, and the comfort that they bring.<sup>27</sup>

In what follows, we bring more precision to how we understand “formalism” for the purpose of this article (Part 2), then turn to the *Wall* and *Aga* cases, drawing out the formalist moves that, in our view, define these cases (Part 3). We then look to the law and religion jurisprudence more generally, pointing to various echoes of this use of formalism to manage the complexity and risks raised by engagement with religious difference (Part 4). Having made the case that this phenomenon is not idiosyncratic to *Wall* and *Aga* but, rather, a pattern endemic in the encounter between liberal legal orders and religious pluralism, we seek to explain both the appeal (Part 5) and challenges (Part 6) presented by this resort to formalist tools.

We do not offer this as a complete, nor even a wholly consistent, story of what is occurring across the law and religion jurisprudence in Canada. It is one, however, suggested by this corner of the law and worth thinking with. Nor do we offer this by way of critique, though the prevailing normative valence of the labels “substantive” and “formalist” might give that impression to a casual reader. Instead, we are interested in showing this element of Canadian public law’s “personality,” drawn less to assessing if it is the right approach to these issues than to understanding how it serves state law.

## 2. What We Talk About When We Talk About Formalism

The charge of formalism is often denigrating<sup>28</sup> and can sometimes lack precision. We want to avoid both these alternatives here. The label “formalism” sometimes describes the mechanistic application of rules without the consideration of their purposes.<sup>29</sup> Other times self-avowed formalists focus on a rigorous separation of law and politics.<sup>30</sup> Though there are echoes of these themes in our use of the term here, we are more precisely concerned with the generation of legal conclusions through the reliance on categories rather than a deep engagement with particular facts and contexts. Of course, categories are unavoidable in legal analysis: one of the virtues of law is that it provides a mediated, organizing system of ideas through which we can gather greater clarity on complex matters. In this, categories can play an important role. However, it is always

<sup>26</sup> See e.g. Berger, “Unsettling of the Secular,” *supra* note 10.

<sup>27</sup> Benjamin L Berger tells a different but sympathetic story in “The Virtues of Law in the Politics of Religious Freedom” (2014) 29:3 JL & Religion 378. He argues that some of the features of legal processes, including their proceduralism, allow law “to serve as a tool of adhesion, rather than ultimate decision, and a temporary relief from the hyper-realism of the politics of religious difference” (395).

<sup>28</sup> Ernest J Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97:6 Yale LJ 949 at 950.

<sup>29</sup> See Lawrence B Solum, “The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights” (2006) 9:1 U Pa J Const L 155.

<sup>30</sup> Weinrib, “Legal Formalism”, *supra* note 28 at 952.

possible to call on courts to engage in a detailed consideration of facts and context (a more substantive engagement), or to limit their analysis by recourse to a more categorical approach (a more formal analysis). In this latter mode, the finding that an issue falls into a particular category predisposes or even determines an outcome.

This is the sort of formalism we will examine in this article. Our posture here is diagnostic, not normative. We seek to uncover and display the way that formalist patterns appear in *Wall* and *Aga*, and then trace the way that this reflects a broader tendency in Canadian public law's treatment of religion. As in equality rights, constitutional interpretation, and the law of evidence, whether formalist tools are normatively attractive or offensive ultimately turns on understanding the "work" that they're doing — that is, the reasons they are appealing and the risks that they present. That is the purpose of this piece and the diagnostic path begins with *Wall* and *Aga*.

### 3. Formalism in *Wall* and *Aga*

A signal that the Court is headed down a formalist path appears in the way it tells the story of *Wall*. The details that courts include or exclude from the narratives they tell shape the paths of necessary and available reasoning and, with this, the ultimate conclusions. The story told by the SCC in *Wall* is notable for its scant detail and terseness. The Court tells us: "Randy Wall became a member of the Congregation in 1980. He remained a member of the Congregation until he was disfellowshipped by the Judicial Committee."<sup>31</sup> We learn very little about the circumstances of his disfellowship. Instead, the Court draws our focus to the formal characteristics of the congregation:

The Congregation is a voluntary association. It is not incorporated and has no articles of association or by-laws. It has no statutory foundation. It does not own property. No member of the Congregation receives any salary or pecuniary benefit from membership. Congregational activities and spiritual guidance are provided on a volunteer basis by a group of elders.<sup>32</sup>

Compare this with the narrative told by the Alberta Court of Appeal, which held that the court had jurisdiction to hear the case. In this telling, Mr Wall "was directed by letter to appear before the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, a four-person committee of elders." The letter said little other than that the "alleged wrongdoing involves drunkenness."<sup>33</sup> Mr. Wall admitted to two episodes of drunkenness and the associated verbal abuse of his wife. He explained, however, that "the wrongdoing related to the previous expulsion by the Congregation of his 15-year old daughter."<sup>34</sup> The church had ordered "that the entire

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<sup>31</sup> *Wall*, *supra* note 8 at para 6.

<sup>32</sup> *Ibid* at para 3.

<sup>33</sup> *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 at para 4 [*Wall ABCA*].

<sup>34</sup> *Ibid* at para 5.

family shun aspects of their relationship with her,” which “pressured the family to evict their daughter from the family home.”<sup>35</sup> The message of the missing (and perhaps compelling) details and the focus on legal form in the Supreme Court’s narrative is that it is more concerned with categories than context in this case.<sup>36</sup>

The formalism we see in *Wall* and *Aga* is an instance of the categorical formalism described in Part 2. In both cases, the Court draws conclusions from the form of the organizations before the Court rather than the substance of the dispute between the parties, with its necessarily religious character. In *Wall*, what matters is that the congregation is neither a public body nor an incorporated entity, and thus not subject to judicial review.<sup>37</sup> In *Aga*, likewise, it matters that the congregation was not incorporated under any statute,<sup>38</sup> so there was no statutory basis upon which the court could assume jurisdiction. The form of these organizations—unincorporated voluntary associations—leads the court to determine their legal character and to state that the legal consequences that follow are generic to any group that has the same form.<sup>39</sup> Even if we have the sense that the disputes are in important ways about religion and religious communities (more on this in Part 6), this generic logic allows the Court to sidestep any thorny questions specific to religion-state relations, as the reasoning applies to any similarly organized groups. The Court need not ask whether the organization’s leadership is acting on the basis of sincerely held religious beliefs, whether interference with the leadership’s decisions would be inconsistent with the *Charter* value of religious freedom or a principle of the “freedom of the church,”<sup>40</sup> or whether the expelled parties have some other compelling interest that would justify such interference.

This formalist logic takes more precise shape in three analytical moves in *Wall* and *Aga*, and these moves more specifically disclose the formalist posture that the Court assumes in these cases. The first move is the easy disposal of *Wall* based on its placement in the public/private divide. The second is the move to determine that, as no pre-existing legal right existed, the court had no jurisdiction to hear the case. The third move arises in *Aga*, where the court’s analysis of contract law demonstrates the

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<sup>35</sup> *Ibid.*

<sup>36</sup> Admittedly, the factual background in *Aga* contains more detail, but this is arguably necessitated by the existence of the Constitution and Bylaw relied on by the expelled members.

<sup>37</sup> *Wall*, *supra* note 8 at para 22.

<sup>38</sup> *Aga*, *supra* note 9 at paras 5, 39.

<sup>39</sup> Weinrib, “Legal Formalism”, *supra* note 28 at 959–60.

<sup>40</sup> Though the concept of “freedom of the church” has not gained traction yet in Canada, it has been given extensive elaboration by American legal academics. See e.g. Richard W Garnett, “‘The Freedom of the Church’: (Towards) an Exposition, Translation, and Defense” (2013) 21 J Contemp Legal Issues 33; Ira C Lupu & Robert W Tuttle, “Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders Church Autonomy Conference” (2009) 7:1 Geo JL & Pub Pol’y 119; Douglas Laycock, “Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy” (1981) 81:7 Colum L Rev 1373.

salience of the category of “religious obligations,” interpreting its presence as a sign that parties do not intend to create legal relations. We deal with each of these in turn.

### 3.1 Move 1: The Public/Private Divide

One of the challenges Mr. Wall faced was the form of litigation he pursued at the Court of Queen’s Bench. Rather than launching a private action, he applied for judicial review, a form used when a litigant asks a court to review the decision of a government actor or delegate. This placed the burden on Mr. Wall to show that his was the right sort of case for this kind of application. The Supreme Court held that it was not: “Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character.”<sup>41</sup> The Court draws the distinction between “‘public’ in a generic sense and ‘public’ in a public law sense,” which latter refers more specifically to “questions about the rule of law and the limits of an administrative decision maker’s exercise of power... the legality of state decision making.”<sup>42</sup>

We do not suggest that the religious congregation in *Wall* should have been considered a public body, and therefore subject to judicial review. Indeed, *Wall*’s guidance on the scope of availability for judicial review was likely overdue in administrative law.<sup>43</sup> What is telling, however, is the ease with which the Court moves from “this is not a public body” to “there is no jurisdiction.” The Alberta Court of Appeal held that “a court has jurisdiction to review the decision of a religious organization when a breach of the rules of natural justice is alleged.”<sup>44</sup> The point here is that the decision to disclaim jurisdiction is a choice, but is not explained in this way. Instead, the Court rests on a stark distinction between public and private, as though drawing that distinction is simple, wholly effacing the juridical policy choice that lies at the heart of questions of jurisdiction.

The stability and sharpness of the public/private divide is particularly fraught in matters involving religion, especially once we start asking about the degree to which individuals can draw on religious ideas and principles in public decision-making.<sup>45</sup> But even absent religious issues, what qualifies as “public” is not as clear-cut as the *Wall* Court makes it seem. As Paul Daly has argued, while statements in *Wall* may be correct, “they are unhelpful, question-begging formulations. One is driven to ask: *what*

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<sup>41</sup> *Wall*, *supra* note 8 at para 14.

<sup>42</sup> *Ibid* at para 20.

<sup>43</sup> See *Air Canada v Toronto Port Authority Et Al*, [2013] 3 FCR 605 at para 56, 2011 FCA 347 (CanLII).

<sup>44</sup> *Wall ABCA*, *supra* note 33 at para 22.

<sup>45</sup> See *Chamberlain v Surrey School District No 36*, 2002 SCC 86. For scholarly discussion of this point, see Richard Moon & Benjamin L Berger, “Introduction: Religious Neutrality and the Exercise of Public Authority” in Benjamin L Berger & Richard Moon, eds, *Religion and the Exercise of Public Authority* (Oxford and Portland: Hart Publishing, 2016) 1. See also Howard Kislowicz, “Judging Religion and Judges’ Religions” (2018) 33:1 *Journal of Law and Religion* 42 for a discussion of the complexities of the influence of religion on judicial decisions.

is the state?”<sup>46</sup> Here, again, we see the kind of formalism identified above. The statement of the category “public/private” leads inexorably to the conclusion that judicial review is unavailable, without acknowledging either the complexity of defining what “sufficiently public” means or the choice inherent in restricting judicial review to public decisions.<sup>47</sup> Though courts source the constitutional authority for their powers of judicial review in the text of the Constitution,<sup>48</sup> it is ultimately the courts themselves that name the limits of their own jurisdiction. But here, the court does not tell us precisely why it is choosing to limit its jurisdiction in this way.

### 3.2 Move 2: No Legal Right

Another formalist move we see in *Wall* and *Aga* lies in how the Court distinguishes these cases from previous cases in which it had intervened in the affairs of voluntary associations. The leading case is *Lakeside Colony*,<sup>49</sup> in which the court required a Hutterite community to observe the rules of natural justice before expelling one of its members. The Supreme Court held in *Wall* that *Lakeside Colony* differed because a “legal right” was at stake – either a property right of the colony to exclude people from its land or a contractual right of the member to remain subject to certain conditions. “Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated.”<sup>50</sup> There is not, according to the SCC, a “free-standing right to procedural fairness.”<sup>51</sup>

There is a compelling logic to this argument. It implicitly relies on several bodies of precedent that establish when the conditions are met for a private law action. It uses a generic form – the legal right – to assert the court’s independence from the politics that inhere in the assumption of jurisdiction over religious minority groups.<sup>52</sup> The decision not to assume jurisdiction is presented as the inexorable and mechanistic

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<sup>46</sup> Paul Daly, “Right and Wrong on the Scope of Judicial Review: Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall, 2018 SCC 26”, online: *Administrative Law Matters* <<https://www.administrativelawmatters.com/blog/2018/06/03/right-and-wrong-on-the-scope-of-judicial-review-highwood-congregation-of-jehovahs-witnesses-judicial-committee-v-wall-2018-scc-26/>> (emphasis in original).

<sup>47</sup> As Gerald Heckman et al note, what cases centred on whether a decision is “sufficiently public... reveal most clearly are policy choices behind technical issues.” Gerald Heckman et al, *Administrative Law: Cases, Text, and Materials, 8th Edition* (Toronto, Canada: Emond, 2022) at 817.

<sup>48</sup> *Dunsmuir v New Brunswick*, *supra* note 17 at para 31.

<sup>49</sup> *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165, 1992 CanLII 37 (SCC).

<sup>50</sup> *Wall*, *supra* note 8 at para 24.

<sup>51</sup> *Ibid* at para 25; For a thorough analysis of the difference between jurisdiction and justiciability in this case, see Kathryn Chan, “Lakeside Colony of Hutterian v Hofer: Jurisdiction, Justiciability and Religious Law” in Renae Barker, Paul T Babie & Neil Foster, eds, *Law and Religion in the Commonwealth: The Evolution of Case Law* (Oxford: Hart Publishing, 2022) 211.

<sup>52</sup> Weinrib, “Legal Formalism”, *supra* note 28 at 986.



application of neutral principles (no legal right = no jurisdiction).<sup>53</sup> What it does not mention, however, is that the courts, particularly the Supreme Court, are the very actors who decide when and whether to recognize a new legal right. Just as the prior move treated public/private as natural categories, to be discovered, not constructed, by courts, here the Court treats a “legal right” as something ontologically independent of judicial decision-making, which of course it is not.

Indeed, there is an interesting slippage in the *Wall* reasoning, which starts by saying that private law “claims must be founded on a valid cause of action, for example, contract, tort or restitution,”<sup>54</sup> but later focuses almost exclusively on questions of property and contract. Similarly, in *Aga*, the Court notes that the legal rights that can ground jurisdiction include “rights in property, contract, tort or unjust enrichment... and statutory causes of action,”<sup>55</sup> but the entire analysis is framed by the contractual argument, due to how the parties argued their cases.<sup>56</sup> Jurisdiction based in tort disappears from the discussion, but the category reminds us that courts have often found legal rights to exist even where no property or contract is involved.

Consider, for example, the tort of defamation: the common law has created an enforceable legal right to be compensated when one’s reputation is damaged by a published statement.<sup>57</sup> Of course, there are many factors to be considered when a particular action is commenced, but the point for present purposes is that the law has something to say about how people speak about one another in the absence of a pre-existing legal relationship. Courts have deemed the interest individuals have in their reputation sufficient to ground a legal right. So while we have a legal right not to be defamed because the precedents say so, those precedents justify the creation of the legal right by reference to the importance of reputation.

Interestingly, this focus on the importance of the underlying interest seems also to have motivated the Court in *Lakeside*: “the question is not so much whether this is a property right or a contractual right, but whether it is of sufficient importance to deserve the intervention of the court and whether the remedy sought is susceptible of enforcement by the court.”<sup>58</sup> This is precisely the style of reasoning absent in *Wall* and *Aga*. One might reply that the *Lakeside* Court merely meant that, from the perspective of either party, a legal right was in play: the colony’s property right or the member’s contractual right. This is true, but it does not answer the question of why there is not a sufficient interest on the facts of *Wall* or *Aga* capable of grounding a new legal right or, in the alternative, why the Court chose to break from its earlier, more

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<sup>53</sup> See Frederick Schauer, “Formalism” (1988) 97:4 Yale LJ 509 at 511–13.

<sup>54</sup> *Wall*, *supra* note 8 at para 13.

<sup>55</sup> *Aga*, *supra* note 9 at para 29.

<sup>56</sup> *Ibid* at para 32.

<sup>57</sup> For an empirical account of how defamation litigation has shifted over time, see Hilary Young, “The Canadian Defamation Action: An Empirical Study” (2017) 95:3 Can B Rev 591.

<sup>58</sup> *Lakeside Colony of Hutterian Brethren v Hofer*, *supra* note 49 at 175.

substantive approach. Creating such a right would require extensive justification, but the choice not to pursue the argument is still a choice. The Alberta Court of Appeal in *Wall* was prepared to entertain the argument,<sup>59</sup> and the SCC's explanation for why it was not rests on a formalist logic: this claim does not belong to a recognized category, so it cannot proceed.<sup>60</sup>

### 3.3 Move 3: “No Intention to Create Legal Relations”

The third instance of formalism at play in these cases is both somewhat different than the other two and perhaps the most vivid. In respect of the previous two examples, the formalist reasoning works by suppressing the salience of religion in the analysis. The public/private and legal right categories present the issues as, in essence, not meaningfully about religion, thereby eliminating the need for substantive wrestling with the complex and unruly nature of religion and the theological issues and relationships at work in *Wall* and *Aga*. In this final example, an inversion takes place. Substantive engagement with the particular documents, relationships, and structures of authority at play in *Aga* is avoided by emphasizing and exploiting the religious context—by stressing, without examining, the salience of religion. In this instance, the formal category that enables the disengagement of secular and religious legal traditions is “religion” itself. Put briefly, the Court in *Aga* takes the occasion to generate a new presumption in the law of contracts: unlike most other forms of agreement, a “religious” agreement—even in the presence of the other elements of a binding contract—is presumed not to be contractual and is therefore unenforceable by the courts.<sup>61</sup>

As discussed above, the central question in *Aga* was whether a legal right existed such that the Court had the jurisdiction over the issues raised, and the Court's focus was on whether such a right was generated by the law of contract. Was there a valid contract in *Aga*? In answering this question in the negative, the Court might have had recourse to the rules of offer and acceptance or to the doctrine of consideration, the essential elements of contract formation.<sup>62</sup> Indeed, it seems plausible that, were it interested solely in dispensing with the case before it, the argument that there was no offer and acceptance would have had purchase, given that the claimants appeared to have no knowledge, prior to this dispute, of the constitution that formed the substance of the alleged contract. Instead, the Court seized on the requirement that parties that enter into an agreement have the intention to create legal relations—otherwise put, an expectation that the agreement will be enforceable in the courts.

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<sup>59</sup> *Wall*, *supra* note 8 at para 25.

<sup>60</sup> *Ibid* at para 31.

<sup>61</sup> For an example of a case where a commitment to provide a religious divorce was successfully transformed into a civil obligation, see *Bruker v Marcovitz*, 2007 SCC 54; for a compelling analysis of this case arguing that the conclusion is consistent with Quebec civil law, but also only part of the picture for religious individuals, see Rosalie Jukier & Shauna Van Praagh, “Civil Law and Religion in the Supreme Court of Canada: What should we get out of *Bruker v. Marcovitz*?” (2008) 43 SCLR (2d) 381.

<sup>62</sup> See generally John McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020).

This doctrine, like offer and acceptance and consideration, is “one of a cluster of doctrines designed to isolate from the universe of promising behaviour those promises and agreements that are appropriately subject to legal enforcement.”<sup>63</sup> But it normally operates as a kind of negative category: in respect of commercial arrangements, it is generally presumed that, with offer, acceptance, and consideration, there is also an intention that the agreement will be enforceable and a defendant would have to adduce evidence of the absence of such an intention.<sup>64</sup> There are, however, certain narrow categories of agreement in which the presumption is reversed. The strongest example is that of agreements made in a family setting:<sup>65</sup> in such cases, it is presumed that the parties to such agreements did not intend to create a legally enforceable contract and it falls to the plaintiff to provide evidence that legal relations were intended.

More than concluding that there was no contract in the case before it, the Court in *Aga* creates a new and general presumption that agreements made “in the religious context”—like those made in the context of family relations—are not intended to be enforceable. Justice Rowe explains that “[t]he local stamp club or bridge night might have rules, but without more, nobody would suppose that the members intend them to be legally enforceable.”<sup>66</sup> So, too, with religion: “While an objective intention to enter into legal relations is possible in a religious context,”<sup>67</sup> particularly in cases in which property or employment is at stake,<sup>68</sup> “courts should not be too quick to characterize religious commitments as legally binding”.<sup>69</sup> It is reasonably clear that this outcome is not just a product of the *Aga* case being about a voluntary association,

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<sup>63</sup> *Ibid* at 169.

<sup>64</sup> See e.g. *Edwards v Ksyrwys Ltd*, [1964] 1 All ER 494 (QB).

<sup>65</sup> See *Balfour v Balfour*, [1919] 2 KB 571 (CA).

<sup>66</sup> *Aga*, *supra* note 9 at para 39. In Richard Moon, “Bruker v Marcovitz: Divorce and the Marriage of Law and Religion” (2008) 42 SCLR (2d) 37, Moon anticipates this equation of contracting in the family and religious settings, and the reasoning that motivates it. Canvassing reasons why courts might be reluctant to enforce religious contracts, he explains, at 46–47, that “[a] religious contract is based on norms that are often faith-based and deeply held and that bind the members of the religious community. When entering an agreement or ‘contract’ the parties may not understand themselves as creating legal obligations. They may consider themselves bound not by secular law but by the spiritual norms of the community—by higher law—and by their commitment to each other as members of a spiritual community.” We raise, below, the question of why we would begin with an assumption that these expectations and intentions are mutually exclusive.

<sup>67</sup> *Aga*, *supra* note 9 at para 41. Justice Rowe’s frequent emphasis on the objective nature of the test (e.g., para 37) might be misleading. It is only if a plaintiff subjectively intended to create legal relations and thought that was a shared intention, and the defendant contests this, that one turns to the objective test, namely an assessment of what the conduct of the defendant would suggest to a reasonable person. In this sense, the subjective intentions of the plaintiff matter a great deal: if a plaintiff did not subjectively intend that the agreement be enforceable, they will not prevail, irrespective of what a third party observer might infer from the conduct of the parties.

<sup>68</sup> *Ibid* at para 39.

<sup>69</sup> *Ibid* at para 42.

thereby applicable to all such associations. It's the religion that is doing the work here, as the emphasis in the original makes clear:

becoming a member of a *religious* voluntary association — and even agreeing to be bound by certain rules in that religious voluntary association — does not, without more, evince an objective intention to enter into a legal contract enforceable by the courts. Members of a religious voluntary association may undertake religious obligations without undertaking legal ones.<sup>70</sup>

Justice Rowe thus creates a new categorical presumption applicable to “agreements made in a religious context”: such agreements, even in the presence of the other indicia of legal enforceability, are presumptively not contracts.<sup>71</sup>

Much of interest is going on here. What, precisely, constitutes a “religious context,” and one of a sort sufficient to trigger this presumption, is far from clear, particularly when one considers the many ways in which religion and commerce (the classic zone of presumptive intention to create legal relations) can intermingle. In this respect, the Court's equation of the of religious organizations and their multifaceted activities with stamp clubs and bridge nights seems willfully jejune. Similarly, Justice Rowe's explanation of why this presumption should be installed in the law of contract—that parties are likely intending to undertake religious obligations *rather than* legal ones—is a curious response to the legal pluralism at work here. Why would we not assume an intention to do both, in the absence of evidence to the contrary? The absence of detail and the thinness of principled explanation all point to the strength of the pull to formalism. In the hands of Justice Rowe in *Aga*, “religious” becomes a formal category, the function of which is to distance the law of contract (and with it the Courts) from the domain of religion.<sup>72</sup>

#### 4. The Formalism of Religious Freedom

The *Wall* and *Aga* decisions evidence a decided turn to, or re-engagement with, formalism as a response to public law being called upon to engage with religious legal traditions. And yet this pattern does not appear “suddenly” from these two cases, vivid though they make it. Nor is this formalism contained to the distinctive presentation of the law and religion encounter that *Wall* and *Aga* admittedly represent. Rather, sensitized to this move or tendency by *Wall* and *Aga*, we now see it across various,

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<sup>70</sup> *Ibid* at para 51.

<sup>71</sup> That this is a genuine presumption is clear from the Court's observation that, on the record in *Aga*, “there is no evidence of an objective intention to enter into legal relations.” This is a failure to discharge a persuasive burden that is “fatal to the respondents' claim.” (para 52)

<sup>72</sup> It is notable that, post-*Aga*, familial and religious agreements now generate similar exceptional presumptions. This tracks the traditional liberal treatment of both the family and religion as quintessentially private domains. See Paul W Kahn, *Putting Liberalism in Its Place* (Princeton: Princeton University Press, 2004) at 130; Benjamin L Berger, “Law's Religion: Rendering Culture” (2007) 45:2 *Osgoode Hall LJ* 277 at 291.

and central, features of the law and religion jurisprudence in Canada. In this section of the article, we therefore turn to elements of the Supreme Court's religion jurisprudence that share the formalist features or sensibilities of the sort that we see on display in *Wall* and *Aga*. We identify and discuss three important examples below. The resulting picture is of the Court consistently, repeatedly reaching toward the formal as a means of managing the complexity and risks involved in the legal engagement with religion. This comforting repossession of formalism is one of the notable effects on public law of its encounter with religion.

#### 4.1 The Subjective Sincerity Test

A hallmark of the Canadian approach to the constitutional protection of religious freedom is the subjective sincerity test adopted by the court in *Syndicat Northcrest v Amselem*.<sup>73</sup> This aspect of the analysis of s 2(a) holds that, in assessing a claim that the state has interfered with religious freedom, a court ought not "to rule on the validity or veracity of any given religious practice or belief, or to choose among various interpretations of belief."<sup>74</sup> Instead, it limits itself to assessing whether the claimant "sincerely believes in a practice or belief that has a nexus with religion"<sup>75</sup> (and whether the state has interfered in the claimant's ability to act in accordance with that belief in a more than trivial fashion). This approach to analyzing s 2(a) claims has several justifications and virtues.<sup>76</sup> It is also, effectively, a formalist evasion (or deferral) of engagement.

For Justice Iacobucci, this approach flowed naturally, even necessarily, from the very nature of the right.<sup>77</sup> The subjective sincerity test does, indeed, map the individualist, autonomy-based understanding of freedom of religion that so defines the jurisprudence. This approach also effectively removes the risk of having to pronounce on the "authentic" character or doctrines of a given religion, a danger very much on the mind of the Court in *Amselem*, which was being asked to select as between interpretations of Judaism. Instead, a court need only rule on the effects of state action on religion as sincerely understood and practiced by the claimant.

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<sup>73</sup> 2004 SCC 47 [*Amselem*]. For a helpful discussion of *Amselem* and the subjective sincerity test (and of much of the historical jurisprudence on freedom of religion) see Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014).

<sup>74</sup> *Amselem*, *supra* note 73 at para 51.

<sup>75</sup> Most recently articulated in this way in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 63 [*TWU (LSBC)*].

<sup>76</sup> For a helpful discussion, see Lori Beaman, "Is Religious Freedom Impossible in Canada" (2010) 8(2) *L Culture & Humanities* 266.

<sup>77</sup> He explained the subjective sincerity test as honouring "a personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right" (*Amselem*, *supra* note 73 at para 42).

But for present purposes it bears noting that these virtues are obtained by resort to a tool for substantive disengagement from the more unruly and fraught aspects of religion. It may be somewhat arresting to see the association of “subjectivity” with “formalism.” One usually thinks of subjectivism as a methodology that requires close engagement with an individual. But the “subjective sincerity” test ultimately amounts to a credibility assessment and referring issues to the category of “a matter of credibility” is one of the great tools of redirection available to the law. Something is a question of credibility rather than some other kind of question. In the analysis of religious freedom, the adoption of a subjective sincerity test is the choice to judge credibility about religion rather than engaging in the risky business of judging religion, more richly understood. The anxiety about engagement with religion to which the subjective sincerity test in part responded was overt: “Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.”<sup>78</sup> Distance from religion is secured through the particular species of close engagement with the individual required by a credibility assessment.

In the end, this evasion is not wholly successful and often serves more as a fig leaf. The nature of the s 1 analysis means that evaluation of the history, theology, and spiritual infrastructure of religion is inexorable.<sup>79</sup> To assess proportionality, one must get the measure, somehow, of the substantive effect of a limit on religious freedom. Subjective sincerity is, however, a tool that, among the many things it does, achieves at least rhetorical distance from judicial engagement with the most disruptive features of religious pluralism.

## 4.2 Limits on Religious Freedom

Until recently, the analytical “thinness” of s 2(a) was a product not only of the subjective sincerity methodology but the absence of any recognized internal limit to the scope of freedom of religion. This capaciousness left most of the hard work (and deeper engagement with religion) to be done at the s. 1 stage. This changed in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*.<sup>80</sup> The Ktunaxa objected to a ski resort development in an area the Ktunaxa call Qat’muk, known to the state as the Jumbo Valley in British Columbia. They claimed that the development would cause Grizzly Bear Spirit to leave the territory, thereby seriously interfering with their religious beliefs and practices. On the strength of the law to that point, the claim looked promising: there was no real question of the subjective sincerity of the Ktunaxa<sup>81</sup> and, with that accepted, it seemed clear that the approval of this development would be a more than trivial interference, thereby satisfying the s

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<sup>78</sup> *Amselem*, *supra* note 73 at para 50.

<sup>79</sup> Berger, “Unsettling of the Secular,” *supra* note 10 at 207.

<sup>80</sup> 2017 SCC 54 [*Ktunaxa*].

<sup>81</sup> *Ibid* at paras 30, 34–36 (in which there is arguably some subtext casting doubt on the sincerity of the claim).

2(a) test and putting the government in the unenviable position of having to justify the limit in the name of a ski resort. But the disruptive implications of a successful claim for government use of land, given the close ties between land and Indigenous spirituality,<sup>82</sup> were also apparent to all.

The majority's solution was to reject the s 2(a) claim on the basis of a newly installed limit within the right: Chief Justice McLachlin and Justice Rowe explained that s 2(a) protects freedom to hold and act on religious beliefs, but that "[t]he state's duty under s 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit."<sup>83</sup> The *Ktunaxa*, the majority concludes, remain free to believe what they wish and engage in such practices as they prefer; that the ski resort might affect the significance and meaning of those beliefs and actions is not a matter that engages freedom of religion. This analytic manoeuvre requires delicate ontological work—splitting subject, action, and object in this fashion—and there is deep awkwardness in the Court using the occasion of its first analysis of an Indigenous nation's s 2(a) claim to install a new and highly specific limit on the right. But for present purposes what is most arresting about the majority's decision is the unapologetic embrace of a notably formalist analysis. The decision expressly carves the "spiritual meaning"<sup>84</sup> derived from religious belief and actions out of the ambit of s 2(a)'s concern.

This is the gravamen of the minority's objection, penned by Justice Moldaver. To him, "where a belief or practice is rendered devoid of spiritual significance, there is obviously an interference with the ability to act in accordance with that *religious* belief or practice."<sup>85</sup> Though he would ultimately (and perhaps even more troublingly given his conclusion on s 2(a)) justify the limit under s 1, he condemns the majority's approach as amounting "to protecting empty gestures and hollow rituals"<sup>86</sup>—a kind of "blind and empty formalism," one might say. Met with a case in which the complexity and unsettling potential of religious difference was keenly felt, the majority's management strategy leaned on a quintessentially formal pattern of reasoning, carving off meaning and significance in favour of the outward forms of religious life.

If *Ktunaxa* offers evidence of formalism in the setting of internal limits on the scope freedom of religion, *Wilson Colony*<sup>87</sup> suggests similar tendencies in the s 1

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<sup>82</sup> John Borrows, "Living Law on a Living Earth: Religion, Law, and the Constitution" in *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) 239.

<sup>83</sup> *Ktunaxa*, *supra* note 80 at para 71. For an extended critique of this development, see Howard Kislowicz & Senwung Luk, "Recontextualizing *Ktunaxa Nation v. British Columbia*: Crown Land, History and Indigenous Religious Freedom" (2019) 88:1 SCLR (2d) 205.

<sup>84</sup> *Ktunaxa*, *supra* note 80 at para 71.

<sup>85</sup> *Ibid* at para 130.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Wilson Colony*].

assessment of state-imposed limitations on the right. This expression of the habit takes the form of the Court's use of an abstract and substantively thin conception of choice.

The small Hutterite community of Wilson Colony refused, on grounds of religious freedom, to comply with the Government of Alberta's universal photograph requirement for driver's licences. This objection (which had been accommodated by the government in the past) flowed from the Hutterites' interpretation of the Second Commandment. The subjective sincerity of the religious beliefs and the non-trivial interference of the photograph requirement was uncontested in the proceedings and the case focused on whether the government had established a s 1 justification. The majority of the Supreme Court, in a judgment written by Chief Justice McLachlin, concluded that it had.

The result in *Wilson Colony* has been widely critiqued, including on grounds of being too deferential to the government's view of whether the small number of exemptions involved would truly threaten the policy goals of the regulations, and being insufficiently sensitive to the communal religious life of the members of Wilson Colony, which emphasized self-sufficiency.<sup>88</sup> Of central interest in this article is the majority's analysis of the deleterious effects of the limit and, in particular, the way in which it deploys the concept of choice as a means of responding to the complexity and difficulty of engaging with religion. As she embarks on her s 1 analysis, Chief Justice McLachlin makes several claims about what makes freedom of religion such a difficult right. She notes that the potential scope of conflict between religious beliefs and the regulatory state,<sup>89</sup> as well as the high-stakes and (to her mind) often non-negotiable nature of religious commitments.<sup>90</sup> But central to the challenge, she explains, is the complexity of religious beliefs and practices and the consequential challenge of gauging the impact of a state measure on religious life:

There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.<sup>91</sup>

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<sup>88</sup> See e.g. Richard Moon, "Accommodation Without Compromise: Comment on *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 SCLR 95; Howard Kislowicz, Richard Haigh & Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom" (2011) 48:3 Alberta L Rev 679; Benjamin L Berger, "Section 1, Constitutional Reasoning, and Cultural Difference: Assessing the Impacts of *Alberta v Hutterian Brethren of Wilson Colony*" (2010) 51 SCLR (2d) 25; Sara Weinrib, "An Exemption for Sincere Believers: The Challenge of *Alberta v Hutterian Brethren of Wilson Colony*" (2010) 56 McGill LJ 719.

<sup>89</sup> *Wilson Colony*, *supra* note 87 at para 36.

<sup>90</sup> *Ibid* at para 61.

<sup>91</sup> *Ibid* at para 89.



Met with this contextual, substantive complexity, what is a court to do? The category of choice comes in aid and is installed as the litmus test for s 1 analyses of limits of religious freedom: the ultimate question in the overall balancing stage “is whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices.”<sup>92</sup> Here, Chief Justice McLachlin posits that the community could hire non-member drivers or otherwise arrange third-party transport. This would impose non-trivial costs on the community, but on the evidence before the Court, she concludes that “[t]hey do not negate the choice that lies at the heart of freedom of religion.”<sup>93</sup>

The formal presence of choice is a salve for the complexity of religion. It is a stand-in for the “magic barometer” of the Court’s imaginings. In *Wilson Colony*, resort to “choice” seems to relieve the Court of closer scrutiny of government purposes and the scope of possible accommodations, as well as the substantive character of the choice being offered, as shaped by both broader social facts (like economics and community relations) and the architecture of the religious beliefs and practices of the community.

Deployments of simultaneously abstract and muscular conceptions of choice have been recognized as the enemy of substantive justice in other contexts, from the law governing police powers<sup>94</sup> to the analysis of equality under s 15(1).<sup>95</sup> The point is vividly displayed in Chief Justice McLachlin’s summary of her conclusion on s 1: the Colony members were not deprived of a meaningful choice to honour their religious commitments; after all, “[t]he law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver’s licence must permit a photo to be taken for the photo identification data bank.”<sup>96</sup> This style of reasoning seems more at home in our pre-*Charter* jurisprudence than anything we would expect in a world of substantive equality, an observation that points to our final “echo” of the formalism in *Wall* and *Aga*.

### 4.3 Avoidance of Section 15(1) Analysis

The marginality of s 15(1) in the religious freedom cases is a final and telling reflection of the formalist tendencies in this arena. Being the symbolic heart of Canadian law’s commitment to substantive justice, the lack of influence of s 15(1) on the field of law and religion is revealing. One might begin by pointing to the surprising fact that, despite the presence of religion as a listed characteristic in s 15(1), there has never

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<sup>92</sup> *Ibid* at para 88.

<sup>93</sup> *Ibid* at para 99.

<sup>94</sup> *R v Grant*, 2009 SCC 32; *R v Spencer*, 2014 SCC 43.

<sup>95</sup> See e.g. Diana Majury, “Women are Themselves to Blame: Choice as a Justification for Unequal Treatment” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 209.

<sup>96</sup> *Wilson Colony*, *supra* note 87 at para 98.

been a *Charter* religion case decided by the Supreme Court under that section.<sup>97</sup> When it is raised by claimants, the pattern has been to claim that the substance of the s 15(1) claim added nothing to, or was adequately addressed by, the s 2(a) analysis.<sup>98</sup> This means that, as an empirical matter, courts have not brought the specific tools of s 15 analysis to the problem of state interactions with religion. One might seek to explain this by noting the references to s 15 and equality in the foundational s 2(a) case, *Big M*,<sup>99</sup> made necessary because s 15(1) was not yet in force when *Big M* worked its way through the Courts. The thought here would be that the logic of substantive equality has been meaningfully absorbed into s 2(a). But that seems not to be true.<sup>100</sup>

In various ways the cases deploy concepts and reasoning in notable tension with the logic of substantive equality. Indeed, another way of describing the reasoning in both *Ktunaxa* and *Wilson Colony* is that both decisions stand as evidence of the notable failure of substantive equality thinking to penetrate the borders of freedom of religion. The characterization of the regulations in *Wilson Colony* as not compelling the taking of a photograph, merely requiring one for the purpose of driving, is the kind of formal, *Bliss*-like<sup>101</sup> analysis of the effects of a law that the Court sought to break from in its *Charter* approach to equality. The contemporary s 15(1) analysis insists that an individual's treatment and choices before the law are assessed in a contextual, subtle way that is focused on how, given their "enumerated or analogous" identity characteristic, state treatment affects their life. Although the extent to which the Court, in a given decision, gives satisfying effect to this substantive equality commitment is always up for debate, the presence of that commitment is never really at issue.

The spirit of substantive equality is similarly absent in the *Ktunaxa* case, with the new limit imposed by the Court—that s 2(a) does not protect the "object" of one's beliefs—presented as though it is an internal limit of universal applicability to all religions. It is presented as a matter of abstract and structural logic when, in fact, it has a substantively disparate impact on Indigenous religion and spirituality. Briefly put, there are no other religious traditions for which the link between *this land* over which the State purports to have authority and exercises control is also so intimately linked with the metaphysical architecture of the religion.<sup>102</sup> Justice Moldaver recognizes this

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<sup>97</sup> For a reimagining of *Hutterian Brethren* in which the s 15(1) rights of the colony members are analyzed and vindicated, see Jennifer Koshan & Jonnette Watson Hamilton, "*Alberta v Hutterian Brethren of Wilson Colony*" (2018) 30:2 Can J Women & L 292.

<sup>98</sup> See e.g. *Wilson Colony*, *supra* note 87.

<sup>99</sup> *R v Big M Drug Mart*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC) [*Big M*].

<sup>100</sup> See *contra* Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto; Buffalo; London: University of Toronto Press, 2014). Concerned that the early cases like *Big M* and *Zylberberg*, which focused on the discriminatory or exclusionary messages sent by the practices or legislation at issue, set the s 2(a) jurisprudence "off on the wrong foot," Waldron objects that equality concerns have played too-significant a role in the courts' analysis of religious freedom claims.

<sup>101</sup> *Bliss v Attorney General of Canada*, [1979] 1 SCR 183, 1978 CanLII 25 (SCC).

<sup>102</sup> See 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.

in his separate reasons in *Ktunaxa*, noting that the majority fails to take into account the “inextricable link between spirituality and land in Indigenous religious traditions,”<sup>103</sup> having earlier observed that “[t]o ensure that all religions are afforded the same level of protection under s 2(a), courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion’s beliefs or practices.”<sup>104</sup> This is an objection in the register of substantive equality.

Indeed, the very concept in ascendancy as the Court’s framework for thinking about the interaction of law and religion—state neutrality—is in awkward relationship with substantive notions of equality. As developed in *Saguenay*,<sup>105</sup> the Court describes the state’s duty of religious neutrality as requiring both that the state “abstain from taking a position on religious questions”<sup>106</sup> and that it be evenhanded as among various systems of belief and being: “[t]his neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief.”<sup>107</sup> Evenhandedness can, of course, take a more formal or substantive character, but the overall tenor of the cases thus far suggests an approach to neutrality focused on an assessment of state treatment that leans in the formal direction. When, for example, one thinks of the appropriate contemporary treatment of Indigenous religion in light of both the historical use and suppression of religion in service of colonialism, “neutrality” does not seem to capture what one would ask of the state.<sup>108</sup>

There are other examples. The durable reliance on the public/private divide as a tool for carving up a much more phenomenologically messy world is one.<sup>109</sup> Another is the presumed divisibility of belief and action, identity and behaviour, another mainstay of s 2(a) analysis that sounds uncomfortably in a substantive equality register and has been the sustained target of academic critique in other domains.<sup>110</sup> The point is that it would be much more difficult to engage in any of these patterns of analysis, all of which have a formal character or texture, within a s 15(1) framework.

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<sup>103</sup> *Ktunaxa*, *supra* note 80 at para 131.

<sup>104</sup> *Ibid* at para 128.

<sup>105</sup> *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 [*Saguenay*].

<sup>106</sup> *Ibid* at para 132.

<sup>107</sup> *Ibid* at para 72.

<sup>108</sup> See Benjamin L Berger, “Is State Neutrality Bad for Indigenous Religious Freedom?” (1 July 2019) in Jeffrey Hewitt, Beverly Jacobs, and Richard Moon, eds, *Indigenous Spirituality and Religious Freedom* (Toronto: University of Toronto Press, Forthcoming), Osgoode Legal Studies Research Paper, Available at SSRN: <<https://ssrn.com/abstract=3508967>>. See also *Servatius v Alberni School District No. 70*, 2020 BCSC 15, in which the Court’s conclusion that the exposure of public school children to Indigenous spiritual rituals and prayer was acceptably neutral does not seem descriptive of why we might regard such learning as important.

<sup>109</sup> See e.g. Moon & Berger, *supra* note 45.

<sup>110</sup> See e.g. Lori G Beaman, “Is Religious Freedom Impossible in Canada?” (2012) 8:2 L Culture & Humanities 266 at 281–84.

The avoidance of s 15(1) is thus another finger pointed suggestively to the role of formalism and formalist tools in public law's engagement with religious traditions. And this brings us to the next natural questions: what, precisely, is the appeal of formalism, and what are its virtues and risks?

## 5. Formalism's Appeal in Response to Religion

Though, as noted above, the label of formalism is often used pejoratively, we might hold this normative judgment in abeyance and instead consider what it is about religious freedom cases that drives the court to adopt a formalist position. In the cases we have discussed, there is a sense that, while religious practices and differences drove the disputes, the Court's response has been to retreat from substantive engagement. How can we explain the impulse towards a formalist response to state-religion relations? The Court gives a hint in its finding in *Wall* that "courts have neither legitimacy nor institutional capacity to deal with [issues of religious doctrine]."<sup>111</sup> In framing the justiciability question, the Court relies on the writings of Lorne Sossin. Sossin writes that the questions of legitimacy and institutional capacity are answered by considering whether

the matter before the court would be an economical and efficient investment of judicial resources to resolve, [whether] there is a sufficient factual and evidentiary basis for the claim, [whether] there would be an adequate adversarial presentation of the parties' positions and [whether] no other administrative or political body has been given prior jurisdiction of the matter by statute.<sup>112</sup>

Interestingly, none of these considerations figure in the *Wall* Court's analysis. Instead, it focuses on whether the court will be unjustifiably entangled in religious matters.<sup>113</sup>

Through this emphasis, the legitimacy/institutional capacity question is tied directly to the religious elements of the dispute, rather than to a more generic concern about efficient use of judicial resources or the sufficiency of evidence and argument. But the Court does not explain precisely what the institutional capacity limitation is, nor why it would be illegitimate for a court to intervene in these kinds of religious disputes. We think the institutional capacity question is something of a red herring, or at least a proxy for a more foundational concern. "Institutional capacity" might refer simply to knowledge and expertise. There is no institutional requirement for judges in Canada to have familiarity with any religious tradition, so one might say the court, as an institution, lacks expertise on these matters. But the same could be said of many subjects. In *Amsalem*, for example, expert testimony was produced about religious

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<sup>111</sup> *Wall*, *supra* note 8 at para 36.

<sup>112</sup> Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 7, as cited in *ibid* at para 34.

<sup>113</sup> *Ibid* at para 36.

obligations, but also about architecture and engineering.<sup>114</sup> Though the courts have no institutional expertise in these latter fields, they do not hesitate to select the expert testimony that is more convincing on these matters.<sup>115</sup> We think that the point in *Wall* about institutional capacity can therefore be folded into a broader concern about legitimacy, with “capacity” really standing for a prudential judgment about what a court ought to be deciding in order to preserve its legitimacy in a particular historical and political configuration of religion and state.

We can thus get to the heart of the legitimacy question: why would it be illegitimate for the court to answer questions of religious doctrine, where resolution of a legal issue in a given case calls upon it to do so? Why is it that courts can be *unjustifiably* entangled in religion, but not architecture? While some might point to the existence of a *Charter* right of religious freedom to account for the distinction, and that might have some formal explanatory force, it is also a kind of question-begging. Why do limits on the scope of legitimate state involvement in religion reflected in s 2(a) bind the courts’ reasoning, resulting in a similar reticence to engage with religion, even when it is faced with matters not subject to the *Charter*, for example where corporate or contractual documents refer to religious matters?<sup>116</sup>

This concern with legitimacy appears sourced in a kind of anxiety. One dimension of this anxiety is practical: if courts make rulings that an increasing number of legal subjects and law enforcement agents see as illegitimate, perhaps the people the court depends upon will stop doing the work of turning judicial words into action.<sup>117</sup> In this framing, the main reason courts do not want to involve themselves in religious disputes is that they sense that people would not abide by their pronouncements, and perhaps that law enforcement agents may not enforce them. The worry is that a single instance in which law enforcement refuses to comply could lead to others, and this might begin to make courts’ claims to authority less credible.

But this anxiety could also be cast in a more inchoate fashion, which is perhaps how it is felt, even if “subconsciously,” by courts. The history of the development of modern liberal legal orders is one that has been in conversation and sometimes direct competition with religious authority.<sup>118</sup> That story is not just one of

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<sup>114</sup> *Syndicat Northcrest c Amselem*, [1998] RJQ 1892 at para 20, 1998 CanLII 11688 (QC CS).

<sup>115</sup> Thanks to Jean-François Gaudreault-Desbiens for raising this point in conversation.

<sup>116</sup> *Wall*, *supra* note 8 at para 38; see also *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101; *Gill v Kalgidhar Darbar Sahib Society*, 2017 BCSC 1423; *Lutz v Faith Lutheran Church of Kelowna*, 2009 BCSC 59.

<sup>117</sup> Austin Sarat & Thomas Kearns, eds, *Law’s Violence* (Ann Arbor, MI: University of Michigan Press, 1992) at 248; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 30-32: “courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments.”; see also Robert Cover, “The Bonds of Constitutional Interpretation: Of the World, the Deed, and the Role” (1986) 20 Ga L Rev 815.

<sup>118</sup> See e.g. Berman, *supra* note 4.

boundary-setting, but also about mutual influence, as one can see, for example, in the historical impact of the law of equity on modern common law.<sup>119</sup> Yet one moral of the story for modern secular courts has been that “theological matters” are uniquely dangerous, messy, and generally inappropriate issues with which to engage.<sup>120</sup> The sense is that the public and secular character of law is threatened by even adjudicative proximity to religion. Becoming entangled with religious matters—even if those matters are no more private, complex, or unruly than other issues with which courts habitually deal—thus presents as a risk it is uniquely important to avoid. Formalism (be it in the ways seen in *Aga* and *Wall*, the subjective sincerity test, or a formal approach to neutrality and equality) is a technique to achieve distance.

It is possible that this anxiety co-exists with, or could be more positively framed as, a juridical acknowledgement of legal pluralism and the use of formalist tools to ensure room for non-state normative and legal orders to operate. Some element of courts’ desire for distance, expressed through formalism, may flow from a recognition that citizens see themselves as participating in multiple normative (even legal) orders, each of which makes claims over how they behave. And in some of its expressions, the use of formal postures and tools to ensure that law does not “weigh in” on religion does, indeed, secure forms of religious autonomy and self-direction/self-definition. This is the effect of the subjective sincerity test, at least before s 1 enters the picture. One can see this effect in the posture taken in *Wall* and *Aga* very clearly, too: in *Wall* and *Aga*, the formalism becomes a “substantive interpretive abstention”<sup>121</sup> as religious norms are non-justiciable. It does not matter what the particular norm is, which community invokes it, or what its consequences are for members. If no (previously established) legal rights are affected, the court will not adjudicate, leaving to community leadership the ability to sort through disagreements.<sup>122</sup> In these modes, formalism can be seen instead as a way to use the language of law to modestly<sup>123</sup> limit the extent of the state’s dominion and respect alternative sources of authority.

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<sup>119</sup> For an engaging account of this, see Debora Shuger, *Political Theologies in Shakespeare’s England: The Sacred and the State in Measure for Measure* (New York: Palgrave Macmillan, 2001).

<sup>120</sup> See Natasha Bakht, “Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective” (2005) 40th Anniversary Ottawa L Rev 67 at 74–75.

<sup>121</sup> Perry Dane, “The Varieties of Religious Autonomy” in Gerhard Robbers, ed, *Church Autonomy: A Comparative Survey* (Frankfurt am Main: Peter Lang, 2001) at 13 of PDF.

<sup>122</sup> On the gendered impact of religious institutional autonomy, see Kathryn Chan, “Religious Institutionalism: A Feminist Response” (2021) 71:4 U of T LJ 443. Interestingly, however, the approach allows for individuals to convert their religious obligations into legally enforceable ones. The clearest way to do this is to make the religious obligations the subject of a civil contract (See *Bruker v Marcovitz*, *supra* note 61; *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728) or perhaps to adopt a corporate form under state law that allows corporate constitutions and bylaws to have legal force.

<sup>123</sup> Schauer, *supra* note 53 at 543. For a different analysis of “humility” as a judicial virtue, see e.g., Benjamin L Berger, “What Humility Isn’t: Responsibility and the Judicial Role” in Marcus Moore &

## 6. Challenges of Formalism

While formalism holds various forms of appeal, it can also bring with it significant challenges. At a general level, formalism is designed to remove at least some measure of discretion from decision-makers (in our case, trial and appellate judges). This can create inconsistencies in the treatment of substantively similar cases. For instance, there is a strangeness to how the non-justiciability of religious doctrine works in practice. Contracts or corporate bylaws that refer to religious sources directly (such as the Book of Matthew)<sup>124</sup> are not justiciable, but those that spell out the same obligations sanitized of their religious origins would likely be.<sup>125</sup> This seems both artificial and fragile: the enforceability of a contract or corporate bylaw is determined by its technical wording rather than a larger appreciation of context, allowing parties to do indirectly what they cannot do directly.

These pretensions and logical frailties can ultimately undermine legitimacy, which is itself a risk associated with the formalist posture. Formalism can inhibit courts from making some of their reasons for decision explicit, damaging the transparency that is essential to structures of legitimacy. In *Wall* and *Aga*, for instance, the formal bases for the rulings in both cases make the religious nature of the organizations involved legally irrelevant. Yet, in both cases, State-religion relations were a major preoccupation of the parties before the SCC,<sup>126</sup> and it would be hard to believe that that the Court would have granted leave to appeal for a dispute over a member's expulsion from a bridge night, stamp club, or soccer association.<sup>127</sup> Further, despite making only oblique reference to the *Charter* right or value of religious freedom,<sup>128</sup> there are signals in both decisions that what motivates the decision is a particular sensitivity to courts' oversight of *religious* organizations. Though *Wall* could have been disposed of on the question of jurisdiction alone,<sup>129</sup> the Court nonetheless offers commentary on the question of the justiciability of religious matters.<sup>130</sup> We see this as

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Daniel Jutras, eds, *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership* (Toronto: LexisNexis, 2018) 569.

<sup>124</sup> *Wall*, *supra* note 8 at para 38.

<sup>125</sup> Bruce Ryder notes a similar dynamic in the incorporation of religious norms into marriage contracts and separation agreements: Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87 at 105.

<sup>126</sup> Of the 10 interveners in *Wall*, seven had religious affiliations, and the remaining three were civil liberties-oriented organizations. In *Aga*, seven of 10 interveners had religious affiliations, one was a Humanist association, and the remaining two were civil liberties-oriented organizations.

<sup>127</sup> These examples figure in the analogies and case law drawn upon by the Court: *Wall*, *supra* note 8 at paras 19, 35; *Aga*, *supra* note 9 at para 39.

<sup>128</sup> *Wall*, *supra* note 8 at para 39.

<sup>129</sup> *Ibid* at para 32.

<sup>130</sup> *Ibid* at paras 36-39.

well in the special consideration that the Court gives to religion in *Aga* in its evaluation of whether the parties had an intention to create legal relations.<sup>131</sup>

There is a sense here that religion is simultaneously of decisive importance and also not worthy of attention. Though Dane speaks of such “double-coding” as a virtue,<sup>132</sup> it can come to be seen as a poor fit with the “culture of justification”<sup>133</sup> that the Court has encouraged in administrative decision-making and public law more generally. The risk is that such double-coding might undermine the court’s credibility. When legal subjects have the sense that cases are actually decided on a basis other than the rules relied on in the cases, the mismatch of motivations and rules may come to be seen as a lack of candor.

Ultimately, the foundational concern with a commitment to formalism is that it can prevent courts from remedying injustices that do not fit the pre-defined categories. The worry is always that the virtues of formalism are secured in the coin of injustice. Injustices that are dependent on understanding context and history, or that elude the categories recognized by law, are left unaddressed. This is the concern that led to the principled revolution in the law of evidence: that formalism was getting in the way of principled justice.<sup>134</sup> And it is partly for this reason that Canadian jurisdictions have moved away from the formal requirements of prerogative writs in administrative law.<sup>135</sup> Likewise, all Canadian jurisdictions have adopted the “oppression remedy” into their business corporation legislation,<sup>136</sup> and several into

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<sup>131</sup> *Aga*, *supra* note 9 at paras 31, 41, 42.

<sup>132</sup> Perry Dane, “Master Metaphors and Double-Coding in the Encounters of Religion and State” (2016) 53 *San Diego L Rev* 53 at 76–81.

<sup>133</sup> *Canada (Minister of Citizenship and Immigration) v Alexander Vavilov*, 2019 SCC 65 at paras 2, 14; see also Paul Daly, “Vavilov and the Culture of Justification in Administrative Law”, (20 April 2020), online: *Administrative Law Matters* <<https://www.administrativelawmatters.com/blog/2020/04/20/vavilov-and-the-culture-of-justification-in-administrative-law/>>.

<sup>134</sup> See e.g. *R v Khan*, [1990] 2 SCR 531, 1990 CanLII 77 (SCC). This basis for the “principled revolution,” or purposive approach, to evidence law is discussed in David M Paciocco, Palma Paciocco & Lee Steusser, *The Law of Evidence*, 8<sup>th</sup> ed (Toronto: Irwin Law, 2020) at 11–13.

<sup>135</sup> See Cristie Ford, “What People Want, What They Get, and the Administrative State” in Coleen M Flood & Paul Daly, eds, *Administrative Law in Context* (Toronto: Emond Montgomery Publications Limited, 2022) 39 at 63.

<sup>136</sup> *Canada Business Corporations Act*, RSC 1985 c C-44, s 241; *Business Corporations Act*, RSA 2000 c B-9, s 242; *Business Corporations Act*, SBC 2002, c 57, s 227; *The Corporations Act*, CCSM c C225, s 234; *Business Corporations Act*, SNB 1981, c B-9.1, s 166; *Corporations Act*, RSNL 1990, c C-36, s 371; *Business Corporations Act*, SNWT 1996, c 19 s 243; *Companies Act*, RSNS 1989, c 81, s 135A, Third Schedule s 5; *Business Corporations Act*, SNWT (Nu) 1996, c 19, s 243; *Business Corporations Act*, RSPEI 1988, c B-6.01, s 194; *Business Corporations Act*, CQLR c S-31.1, s 450; *Business Corporations Act*, RSY 2002, c 20, s 243.



their statutes governing not-for-profit entities.<sup>137</sup> The oppression remedy allows courts wide discretion to redress behaviour that is technically valid but oppressive or unfair,<sup>138</sup> signalling that meeting technical requirements is not the same as behaving fairly.<sup>139</sup> In our context, this risk of substantive injustice occasioned by formalism is realized in courts' tendency to avoid s 15(1) analysis where religion is concerned, as well as in its adoption of state neutrality as a governing framework for thinking through the interactions between the state and religion. And it appears vividly in *Ktunaxa*, with the adoption of a categorical limit on religious freedom that excludes central elements of Indigenous spirituality from the scope of s 2(a).

## 7. Conclusion

This article has diagnosed something about the character—the habits of behaviour and tendencies of thought—of Canadian public law by watching how it behaves in relationship with religion and religious legal traditions. When confronted with the often-messy realities of the religious lives of its subjects, it frequently adopts categorical postures and tools. We have suggested that this impulse might stem from an anxiety over its identity as secular, its claims to authority, from a respect for the multiple sources of authority that guide people's lives, or perhaps some combination of these. This habit may, thus, serve public law rather well in a variety of ways, including shoring up legitimacy, encouraging certainty, manifesting a commitment to secular neutrality, or honouring a complicated past with religion. All of these effects are ultimately traceable to avoiding the kind of complex entanglement with religion that a more substantive and evaluative mode of encounter would risk. Reaching for the formal is a protective and comforting instinct.

The pathologies that can flow from this tendency are also readily identifiable. The formalist move is always fragile, continuously stumbling on its own artifice. It suppresses, rather than addresses, conflict and complexity, and as with any pattern of distancing behaviour, it risks resolving into a kind of alienation, in this case between subject and legal order. Most immediately concerning, adhering to formalism involves detaching from forms of justice that turn on context and the particular, which is precisely where the meaning and significance of so much of religious life is found. We have seen this danger materialize in cases like *Ktunaxa* and *Wilson Colony*.

The pattern here is a characteristic of law, not a domain-specific reaction to religion: law is constantly positioning itself between the relative virtues and risks of formal and substantive analysis. As we noted by way of example at the outset of this piece, we have watched that pattern at work over the last 20 years in the fields of administrative law and the law of evidence. Our purpose here, provoked by our

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<sup>137</sup> *The Non-profit Corporations Act*, 1995, SS 1995, c N-4.2, s 225(1); *Societies Act*, SBC 2015, c 18, s102. But see *Canada Not-For-Profit Corporations Act*, SC 2009, c 23, s 253, which includes an oppression remedy but makes it unavailable where conduct was “reasonably” based on a “tenet of faith.”

<sup>138</sup> See e.g. *Canada Business Corporations Act*, RSC 1985, c C-44, s 241.

<sup>139</sup> *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 58.

reaction to reading *Wall* and *Aga*, which ultimately took us to the religion jurisprudence at large, was to show the particular causes, dangers, and jurisprudential shape that this habit assumes in the interaction of law and religion. Seeing both this particularity and how it channels an essential feature of a legal order, in this piece we have sought to facilitate self-awareness about this tendency in public law's encounter with religion. Alive to the propensity, we ought to be monitoring the relative weight of its gifts and harms, hopeful that the desire for comfort does not overtake the need for true engagement in doing justice, though our sense is that this may currently be happening.