Business Corporations as Religious Freedom Claimants in Canada

Howard Kislowicz[*]

Les entreprises en tant que revendicatrices de liberté de religion au Canada

Las empresas comerciales como demandantes del derecho a la libertad religiosa en Canadá

Empresas como Peticionárias de Liberdade Religiosa no Canadá

商业公司作为宗教自由权利的原告：以加拿大法为例

Résumé

À quelques reprises, des membres de la Cour suprême du Canada ont suggéré qu'il était impossible pour une entreprise de présenter une demande fondée sur le droit à la liberté de religion et de conscience. La Cour d'appel de Victoria, en Australie, est quant à elle arrivée à cette conclusion plus directement. En revanche, la Cour suprême des États-Unis a décidé qu'une entreprise pouvait être, à tout le moins dans certaines circonstances, un requérant en matière de liberté de religion. L'argu-

Abstract

On a few occasions, members of the Supreme Court of Canada have suggested a business corporation could not initiate a claim based on the right to religious and conscientious freedom. The Victorian Court of Appeal in Australia has come to this conclusion more directly. On the other hand, the US Supreme Court has held that, in at least some circumstances, a business corporation can be an appropriate religious freedom claimant. The argument

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ment évoqué pour refuser catégoriquement les requêtes d'une entreprise en matière de liberté religieuse repose habituellement sur une conception de ce qu'est l'entreprise : en tant que personne fictive, elle ne peut tout simplement pas détenir la croyance religieuse ou la conscience requise pour justifier une telle revendication. Le but poursuivi par cet article est de fournir deux motifs au support de la réflexion sur l'incapacité des entreprises d'affirmer leurs revendications en matière de liberté religieuse au Canada. Premièrement, nous soumettons que l'attribution d'une croyance religieuse à une entreprise est conforme à la manière dont le droit canadien attribue à cette dernière d'autres types d'états intentionnels. Bien que le droit canadien, plus largement, se fonde sur la théorie selon laquelle l'entreprise est une fiction juridique, il s'agit d'une fiction qui tient compte de la capacité de celle-ci de prévoir les conséquences de ses actions à des fins juridiques. Deuxièmement, nous soutenons que les tribunaux pourraient aborder la liberté religieuse d'une manière analogue à celle dont la Cour suprême a interprété d'autres droits constitutionnels, tels que la liberté d'expression. Lorsque la Cour entend des réclamations en matière de liberté d'expression ayant trait à une entreprise, elle adopte une approche qui ne porte pas sur la nature de celle-ci, mais bien sur la meilleure façon de servir les objectifs qui sous-tendent ce droit. Une telle approche pourrait aider les entreprises à présenter des requêtes en matière de liberté religieuse, tout en laissant ouverte la possibilité que toute atteinte constatée puisse être justifiée au sens de l'article premier de la Charte.

for categorically denying a corporation's religious freedom claims usually rests on a conception of what the corporation is: as an artificial person, a corporation simply cannot hold the requisite religious or conscientious belief to ground such a claim. The purpose of this article is to provide two bases upon which business corporations' incapacity to assert religious freedom claims in Canada might be rethought. First, this article argues that attributing a religious belief to a corporation is consistent with the way that Canadian law attributes other sorts of intentional states to corporations. Though Canadian law in general holds to a theory that the corporation is a legal fiction, it is a fiction that includes the capacity to intend the consequences of its actions for legal purposes. Second, it argues that the courts might approach religious freedom in a manner analogous to how the Supreme Court has approached other constitutional rights, such as expressive freedom. When faced with claims by corporations, this approach focuses not on the nature of a corporation but on how to best serve the purposes underlying the right. Such an approach could support allowing business corporations to make religious freedom claims, while leaving open the possibility that any infringement proven could be justified under s 1 of the Charter.

Resumen

En algunas ocasiones, los miembros de la Corte Suprema de Canadá han sugerido que una empresa comercial no podría interponer una demanda basada en el derecho a la libertad de religión y conciencia. La Corte de Apelaciones de Victoria en Australia ha llegado directamente a esta conclusión. Por otro lado, la Corte Suprema de los Estados Unidos ha sostenido que, al menos en algunas circunstancias, una empresa comercial puede estar legitimada para reclamar el derecho a la libertad religiosa. El argumento para negar categóricamente a una empresa las demandas concernientes a la libertad religiosa usualmente reposan en la concepción de lo que una empresa es: como persona jurídica, una organización de este tipo simplemente no puede cumplir con el requisito de creencia religiosa o de conciencia para fundamentar tal demanda. El propósito de este artículo es proporcionar dos argumentos con los cuales se puede reconsiderar la incapacidad de las empresas comerciales para ejercer sus derechos de libertad religiosa en Canadá. Primero, este artículo sostiene que atribuir una creencia religiosa a una empresa es consistente con la forma en que el derecho canadiense atribuye otros tipos de estados intencionales a estas entidades. Aunque el derecho canadiense, en general, sostiene la teoría que considera la empresa como una ficción legal, es una ficción que incluye la capacidad de prever las consecuencias de sus acciones con fines legales. En segundo lugar, afirma que los tribunales podrían abordar el tema de la libertad religiosa de manera análoga a cómo la Corte Suprema ha abordado otros derechos constitucionales, como la libertad de expresión. Al

Resumo

Em algumas ocasiões, membros da Corte Suprema do Canadá sugeriram que uma empresa não pode iniciar um processo fundado no direito à liberdade religiosa e de consciência. A Corte de Apelação de Victoria na Austrália chegou a essa conclusão mais diretamente. Por outro lado, a Suprema Corte dos EUA sustentou que, pelo menos em algumas circunstâncias, empresas podem ser peticionárias de liberdade religiosa. O argumento para negar categoricamente processos de liberdade religiosa às empresas costuma repousar em uma concepção do que a empresa *é*: como uma pessoa artificial, a empresa não pode ter uma crença religiosa ou de consciência, que é um requisito para fundamentar tal pedido. O objetivo deste artigo é oferecer duas bases sobre as quais a incapacidade das empresas de propor processos de liberdade religiosa no Canadá podem ser repensadas. Primeiro, este artigo argumenta que atribuir uma crença religiosa a uma empresa é coerente com a maneira como a lei canadense atribui outros tipos de intenções a empresas. Apesar de a lei canadense, em geral, prender-se à teoria de que as empresas são uma ficção legal, é uma ficção que inclui a capacidade de pretender as consequências de suas ações para fins legais. Segundo, argumenta que as cortes podem abordar a liberdade religiosa de uma maneira análoga àquela pela qual a Suprema Corte abordou outros direitos constitucionais, como a liberdade de expressão. Quando em face a pedidos de empresas, esta abordagem foca não na natureza da empresa, mas em como melhor servir os objetivos subjacentes ao direito. Tal abordagem

hacer frente a estas reclamaciones por parte de las empresas, esta aproximación se enfoca no en la naturaleza de la organización, sino en cómo servir mejor a los propósitos subyacentes al derecho. Tal enfoque permitiría a las empresas comerciales invocar el derecho a la libertad religiosa, dejando abierta la posibilidad de que cualquier infracción probada pueda ser justificada en virtud de la sección 1 de la *Carta de Derechos y Libertades*.

pode servir de apoio para permitir que empresas proponham ações de liberdade religiosa, enquanto deixa aberta a possibilidade para que qualquer violação provada possa ser justificada sob a seção 1 da *Carta*.

摘要

加拿大最高法院的法院在一些案例中建议，商业公司不能以宗教权利和良心自由为由提起诉讼。澳大利亚维多利亚州上诉法院得出这一结论来得更为直接。另一方面，美国最高法院认为，至少在某些情况下，商业公司可以是合格的宗教自由原告。断然拒绝公司的宗教自由请求的论据通常诉诸于公司“是”什么的概念：作为法人，公司无非没有必不可少的宗教或良心信仰来作为该等请求的理由。本文的宗旨在于提供两项商业公司在加拿大无资格主张宗教自由请求可能需要重新考虑的依据。第一，本文试图论证，赋予公司宗教信仰与加拿大法律赋予公司其他类型的意志相符。尽管加拿大法律总体上坚持的理论是公司是一种法律拟制，是一种有能力为自己出于合法目的的行动打算后果的拟制。第二，本文试图论证，法院可以采用与最高法院对待其他宪法权利如言论自由相类似的方法来对待宗教自由。在面临公司主张宗教自由的时候，这一方法不关注公司的性质，而关注如何最好地实现作为权利基础的目的。这种方法一方面可以支持商业公司提出宗教自由请求，另一方面也留有余地，即任何证实的侵权可依据《宪章》第1条被证明有理。

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Imagine you are a lawyer in a small municipality in Canada. The municipal government has been debating how to revitalize the economy on Main Street. One of the challenges is the limited space available for development. Some city councilors have begun exploring a licensing scheme for retail stores on Main Street. They say that given the limited space on Main Street and the need to maximize the local economy, one condition of the license should be that stores open at least eight hours per day, seven days per week (aside from statutory holidays).

Judah Goldrecords comes to your office. He has been planning for some time to open a record store on Main Street. He has some of his own savings to invest in the project and he has attracted the support of a few other investors. His plan is that he, his daughter, and his son, each of whom has expertise in music and record collecting, will staff the store. He has heard the chatter about the proposed licensing scheme. He is concerned because he and his children are Orthodox Jews whose religious beliefs prevent them from transacting business from Friday evening to Saturday evening every week; they believe the business should be closed during that time.

Judah knows he will not be able to meet the conditions of the proposed license. He would like to go ahead with his dream of opening his record store and then challenge the licensing scheme on the basis of his constitutional right of religious freedom, as he understands some companies have successfully challenged Sunday closing legislation in the past. His more pressing question is whether he should set up his business as a sole proprietorship or as a corporation. The latter presents several financial advantages: his liability for the business's debts would be limited, he would have more flexibility regarding how the money made in the business would be taxed, and it may also give him more advantageous options for estate planning in the long term. The corporate form would also make his business more attractive to his investors. He is seeking advice on whether his choice to incorporate will later limit his ability to assert a religious freedom right against his municipality if the proposed licensing scheme is adopted as a bylaw.

In answering Judah, you would likely come across several statements made in passing in Supreme Court of Canada (SCC) decisions suggesting that business corporations cannot assert a right to religious freedom on their own behalf. In *Edwards Books*, for instance, Chief Justice Dickson

had "no hesitation in remarking that a business corporation cannot possess religious beliefs."[1] On the other hand, the SCC has never ruled directly on the question. When such rights have been asserted by organizations, the Court has found alternate ways to hold that religious freedom has been infringed.[2]

Moreover, courts in other jurisdictions have recently come to diverging conclusions on this question. Most notably, perhaps, the majority of the US Supreme Court held in *Hobby Lobby*[3] that a closely held private corporation could assert rights of religious freedom under the federal *Religious Freedom Restoration Act*.[4] At issue in that case was whether the federal government could require corporations to provide health insurance for their employees that would cover certain forms of contraception to which the owners and managers of the corporations objected on religious grounds. In framing the question, Justice Alito noted the concern that underlies the hypothetical facts outlined above. He said the government "would put merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefit, available to their competitors, of operating as corporations."[5] The *Hobby Lobby* case raises thorny questions about the effects of the corporation's religious rights on third parties, but the hypothetical facts above, which arguably do not, might help to highlight more simply what is at stake for the religious business owner. For some such individuals "faith and work are integrated and one's faith is expressed through one's work."[6]

Courts in other jurisdictions have adopted alternative approaches. In *Exmoor Coast Boat Cruises Ltd v Commissioners for Her Majesty's Revenue & Customs*, the United Kingdom's First-Tier Tribunal (Tax Chamber) held that a "company has human rights if and to the extent it is the alter

1 *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 784.

2 This is discussed in more detail below in Section IV. C.

3 *Burwell v Hobby Lobby*, [2014] 573 US.

4 42 USC §2000bb *et seq*.

5 *Burwell v. Hobby Lobby*, *supra* note 3 at 17; see also Elizabeth Pollman, "Corporate Law and Theory in Hobby Lobby" in Micah Schwartzman, Chad Flanders & Zoë Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2015) 149 at 156.

6 Rex Ahdar, "Companies as Religious Liberty Claimants" (2016) 5 Oxf J Law Relig 1 at 3-4.

ego of a person (or, potentially, a group of people)."[7] In contrast, the Victorian Court of Appeal in Australia held in *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* that corporations cannot make religious freedom claims because, as artificial persons with "neither soul nor body," corporations cannot hold religious beliefs.[8]

These conflicting results rely on opposing views of what corporations are, what corporations are for, and the kind of trade-offs individuals should be expected to make in electing to carry on their businesses as corporations. While the SCC has raised the question of whether business corporations can make religious freedom claims, the question has never received sustained analysis by that Court. The purpose of this article is to provide two bases in Canadian law to support the argument that business corporations can assert religious freedom claims on their own behalf. First, this article argues that attributing a religious belief to a corporation is consistent with the way that Canadian law attributes other sorts of intentional states to corporations. Though Canadian law in general holds to a theory that the corporation is a legal fiction, it is a fiction that includes the capacity to intend the consequences of its actions for legal purposes. Second, it argues the courts might approach religious freedom in a manner analogous to how the SCC has approached other constitutional rights, such as expressive freedom.[9] When faced with claims by corporations, this approach focuses not on the nature of a corporation but on how to best serve the purposes underlying such right. Such an approach could support allowing business corporations to make religious freedom claims, while leaving open the possibility that any proven infringement could be justified under s 1 of the Charter.

The article proceeds as follows. Section I provides a more detailed description of how Canadian courts have responded to religious freedom claims by corporations. Because these findings are based on a sometimes-unarticulated theory of what a corporation is, Section II lays out the rivaling conceptions of the corporation, including views that the corporation is

7 *Exmoor Coast Boat Cruises Ltd v Revenue & Customs*, [2014] UKFTT 1103 (TC) at para 71.

8 *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd*, [2014] 2014 VSCA 75; Ahdar, *supra* note 6 at 17-20.

9 See Section IV. B. below for a discussion of such cases including *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927; *Canada (Attorney General) v JTI-Macdonald Corp*, [2007] 2 SCR 610 (SCC).

a legal fiction, a concession of the state, a real entity, an aggregate of interests, and a nexus of contracts. Section III argues that the choice of a theory of the corporation suggests but does not necessarily lead to a particular result in the religious freedom context. Section IV inquires into Canadian law's theory of the corporation. In non-constitutional fields, I conclude that Canadian law generally treats the corporation as a legal fiction that can bear intentions, and suggest that there is therefore little reason why a corporation should not also be able to bear religious beliefs for legal purposes. In constitutional litigation, the SCC has adopted two alternate approaches, sometimes emphasizing what corporations can and cannot do, but other times avoiding the question altogether in favour of an analysis of the societal interests served by allowing corporations to assert constitutional rights. This section concludes that the non-constitutional cases and a subset of the constitutional cases provide good bases upon which to argue that business corporations should be entitled to assert religious freedom rights. Section V considers the "mechanics" or practical elements of a corporation establishing its religious beliefs, focusing on both organizational and ownership indicators.

I. Corporate Religious Freedom Claimants: The Current State of Canadian Law

Whether business corporations can claim religious freedom rights in Canada is not a novel question. It arose in the first religious freedom case to reach the SCC under the Canadian Charter, *R. v. Big M Drug Mart*.[10] At issue was whether a corporation could be fined for carrying on business on a Sunday in contravention of the federal *Lord's Day Act*.[11] At first instance, Provincial Court Judge Stevenson held that the Charter right of religious freedom extends to corporations. As Wallace Rozéfort noted around that time, the Alberta Court of Appeal concurred "and, furthermore, suggested that, given a corporation may have the *mens rea* of its officers, it could also have their religion."[12] The majority of the Supreme Court, however, declined to answer the question, holding instead that

[10] [1985] 1 SCR 295 (SCC).

[11] RSC 1970, c L-13, s 4.

[12] Wallace Rozéfort, "Are Corporations Entitled to Freedom of Religion under the Canadian Charter of Rights and Freedoms? " (1985-1986) 15 Man LJ 199 at 200–201.

> Whether a corporation can enjoy or exercise freedom of religion is… irrelevant…. [I]f the law impairs freedom of religion it does not matter whether the company can possess religious belief…. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s 2(a)… and it matters not whether the [claimant] is… an individual or a corporation.[13]

Another case about Sunday closing legislation, this time Ontario's *Retail Business Holidays Act*,[14] attracted further comment from the courts. Commenting on the Ontario Court of Appeal's decision in the case, Rozéfort noted that the court "attributed to the accused corporation the religion of its officers, although the Court did not reveal the rationale that was followed in so doing."[15] At the Supreme Court, as noted above, Chief Justice Dickson remarked for the majority that he had "no hesitation in remarking that a business corporation cannot possess religious beliefs,"[16] which seems at first blush to close the door to business corporations' religious freedom claims.[17] However, he went on to raise questions that might provide an alternate basis on which a corporation could vindicate a religious freedom claim:

> A more difficult question is whether a corporate entity ought to be deemed in certain circumstances to possess the religious values of specified natural persons. If so, should the religion of the directors or shareholders or even employees be adopted as the appropriate test? What if there is a divergence of religious beliefs within the corporation? [18]

Dickson CJ declined to answer these questions because the legislation was upheld as a reasonable infringement of religious freedom and no remedy was necessary. When the question arose in another case a few years later, the case was dismissed for lack of standing and evidence, and the Court offered no guidance on the question.[19]

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13 *R v Big M Drug Mart*, *supra* note 10 at paras 40-41; see Victor M Muñiz-Fraticelli & Lawrence David, "Religious Institutionalism in a Canadian Context" (2015) 52 Osgoode Hall LJ 1049 at 1084-1085.

14 RSO 1980, c 453.

15 Rozéfort, *supra* note 12 at 201.

16 *R v Edwards Books and Art Ltd*, *supra* note 1 at para 153.

17 This is how the Québec Superior Court interpreted the case in *Québec (Procureur général) v Club Price Canada Inc*, [1991] RJQ 475.

18 *R v Edwards Books and Art Ltd*, *supra* note 1 at para 153.

19 *Hy and Zel's Inc v Ontario (Attorney General); Paul Magder Furs Ltd v Ontario (Attorney General)*, [1993] 3 SCR 675 at 693; Muñiz-Fraticelli & David, *supra* note 13 at 1086.

The most recent discussion of corporate religious freedom at the SCC came in a minority concurring opinion in *Loyola High School v. Quebec (Attorney General)*.[20] Chief Justice McLachlin and Justice Rothstein, in an opinion joined by Justice Moldaver, set out a framework for determining when a religious organization can, on its own behalf, make a religious freedom claim. In so doing, the minority opinion seems to accept that a business corporation would not fit within this framework, citing the above-quoted passage from *Edwards Books*.

There is also some older authority supporting the proposition that business corporations cannot hold rights of religious freedom. In 1905, the Superior Court of Québec was faced with an action by the Syndics de Saint-Paul de Montréal, which was authorized by statute to collect a levy from the "franc-tenanciers catholiques" in its parish. One of the property holders in the parish was a corporation, and sought to avoid paying the levy on the grounds that a corporation cannot be Catholic. The Superior Court accepted this argument:

> La défenderesse est une corporation, une personne morale, une entité juridique. Son existence quoique réelle aux yeux de la loi et de ceux qui en tirent profit, est fictive à tous les autres points de vue. Elle n'a de facultés que celles que lui confère la loi. Il ne viendra à l'esprit de personne qu'on puisse y découvrir celle de croire aux dogmes ou de professer un culte. Une corporation ne peut pas avoir de religion… La distinction qu'on voudrait faire entre les corporations dont la majorité des actionnaires est catholique, et les autres, est sans portée. Une corporation comme personne fictive ou morale a une existence absolument distincte de celle des actionnaires ou des personnes qui la

[20] 2015 SCC 12. The question of institutional religious freedom remains a matter of debate in the ongoing litigation surround Trinity Western University's proposed law school. See *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423 leave to appeal to SCC granted, 2017 CanLII 8574; *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 leave to appeal to SCC granted, 2017 CanLII 8575. See especially the factums of Trinity Western University in the Upper Canada appeal at 16, as well as the factums of the interveners the British Columbia Humanist Association at 2-6, the Canadian Secular Alliance at 7-8, the Canadian Council of Christian Charities at 6-10, the Faith, the Fealty & Creed Society at 5-10, the Internation Coalition of Professors of Law at 7-10, the National Association of Catholic School Trustees at 7-10, and the Roman Catholic Archdiocese of Vancouver et al at 3-4.

> composent, et la religion de ceux-ci, ou de la majorité d'entre eux, ne peut lui imprimer aucun caractère religieux.[21]

Some 40 years later, Chief Justice Rinfret of the SCC cited this reasoning with approval in his decision in *Pollack v. Comité Paritaire du Commerce de Détail à Québec*. A decree of the Lieutenant-Governor in Council provided that employees had to be paid on certain listed days when stores are closed ("New Year's Day, the day after New Year's Day, Epiphany, Good-Friday till 12.00 (noon), Ascension Day, St. John the Baptist's Day, Labour Day, All Saints Day, Immaculate Conception Day, Christmas Day and *any other day the employer keeps his establishment closed to respect his religion*").[22] It further provided that all work performed "on the days mentioned in [that] subsection… shall be paid double time with respect to the regular wages of the said employee."[23] At issue was whether a corporate employer owed its employees additional wages for working during Jewish holidays when the business was closed to the public. The Court's decision was principally based in its interpretation of the decree. It held that, in referring to the days "mentioned in subsection (e)," the decree only applied to those holidays specifically named, and not to additional holidays specific to each employer, as was the case with the Jewish holidays in *Pollack*. In a concurring opinion joined by Justice Taschereau, Chief Justice Rinfret also noted that a business corporation "ne peut professer une religion ni lui appartenir."[24]

Apart from the case law, leading Canadian constitutional law scholar Peter Hogg writes that freedom of conscience and religion does not apply to a corporation "because a corporation cannot hold a religious belief or any other belief."[25] He thinks it "unlikely that a Canadian court would follow the surprising American case of *Burwell v Hobby Lobby*."[26] As Muñiz-Fraticelli and David argue, however, Hogg allows that churches organized

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21 *Syndics de Saint-Paul de Montréal (Paroisse) v Cie des Terrains de la Banlieue de Montréal*, [1903] 28 CS 493; Rozéfort, *supra* note 12 at 209.

22 As cited in *Pollack v Comité Paritaire du Commerce de Détail à Québec*, [1946] SCR 343 at 348 [emphasis added].

23 As cited in *ibid*.

24 *Ibid* at 347; Muñiz-Fraticelli & David, *supra* note 13 at 1086; Rozéfort, *supra* note 12 at 209-210.

25 Peter W Hogg, *Constitutional Law of Canada: 2016 Student Edition* (Toronto: Thomson Reuters Canada Limited, 2016) at 37-2.

26 *Ibid*.

as corporations could "no doubt"[27] invoke s. 2(*a*) of the Charter, but "does not make clear whether religious freedom would inhere in the corporation itself or rather in the individual congregants constituting the religious community."[28] In other words, it is not clear which theory of the corporation underlies Hogg's reasoning as regards the distinction between religious organizations and business corporations.

In sum, while the SCC has never directly relied on the proposition that business corporations cannot hold religious beliefs and therefore cannot invoke the right of religious freedom, there is fairly good support in the case law and commentary for this argument. All of this, however, relies on sometimes unstated theories of what corporations are and what they do. The next section, therefore, explores the various competing theories on this question.

II. What is a Corporation in Theory? The Legal Fiction, State Concession, Aggregate, Real Entity, and Nexus of Contracts Theories

The main questions that motivate debates about the nature of the corporation are (1) whether the corporation is a legal fiction created by the state or a real entity that is merely recognized by the state,[29] and (2) whether the corporation is a distinct entity or the aggregation of individual stakeholders.

"The fiction theory dominated English and American corporate law for the first part of the nineteenth century."[30] One of the proponents of the fiction theory was 19th Century German legal theorist Friedrich Carl von Savigny. As Martin Petrin explains,

> [Savigny] argued that legal persons only have recognized rights and duties as a consequence of an act of the state, which meant that they were purely artificial or fictitious in nature… Savigny contended that given their artificial per-

27 *Ibid.*

28 Muñiz-Fraticelli & Lawrence, *supra* note 13 at 1087-1088.

29 David Millon, "Theories of the Corporation" (1990) 85 Duke LJ 201 at 201.

30 Martin Petrin, "A Balancing Approach to Corporate Rights and Duties" in Barnali Choudhury & Martin Petrin, eds, *Understanding the Company: Corporate Governance and Theory* (Cambridge: Cambridge University Press, 2017) 232 at 233.

> sonality, these entities could only bear a limited set of rights and duties, which mostly related to property. Furthermore, apart from instances of strict liability, legal entities – in contrast to the individuals acting for them – could not incur civil or criminal liability. Given their artificial nature, they were perceived as being incapable of developing the requisite state of mind, such as negligence or intent. [31]

The fiction theory in this account overlaps with the theory that corporations exist only as concessions of the state. Indeed, some scholars treat the fiction and concession theories as European and American versions of the same idea.[32] In an influential article from the 1920s, however, John Dewey noted that the concession theory had a different origin than the fiction theory.[33] Dewey argued that the concession theory was an assertion of state power over "religious congregations and organizations of feudal origin (communes and guilds) [who] were rivals of the claim of the national state to complete sovereignty."[34] Imagining the corporation as a "concession" treats the state as the ultimate authority. In the English context, this view is reflected in practices of incorporation where, until the late 19th century, "the granting of corporate status was a royal prerogative," and early corporations were most often created by Royal Charter.[35] Likewise, the view of the corporation as created by the state is consistent with American practices in the 19th century, which required "a special act of the state legislature for each instance of incorporation."[36] Even as this requirement was replaced in the second half the 19th century with general incorporation statutes, "the requirement of a state-granted charter continued to reinforce the idea that corporations (in contrast to unincorporated business associations such as general partnerships) were artificial creations of the state."[37]

In Dewey's view, it was not clear whether the concession or fiction theory gave corporations the better deal. Despite the concession theory's

31 *Ibid* at 234.

32 Martin Petrin, "Reconceptualizing the Theory of the Firm - From Nature to Function" (2013) 118 Penn State L Rev 1 at 9; see also Jean-Philippe Gervais, "Les Personnes Morales et la Charte Canadienne des Droits et Libertés" (1992) 38 McGill LJ 263 at 271-272.

33 John Dewey, "The History of Corporate Legal Personality" (1926) 35 Yale LJ 665 at 666.

34 *Ibid*.

35 Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016) at 36.

36 Millon, *supra* note 29 at 206.

37 *Ibid*.

formal insistence on the state's authority, it is in some respects "more favorable to expanded power of corporations; a charter of broad powers might be granted and the courts might construe its terms liberally."[38] The fiction theory, however, is less compatible with intentionality and associated forms of liability, giving corporations "considerable room in which to manoeuvre."[39] What they have in common is the view that the corporation is not a real entity that exists independent of state action.

Proponents of the state concession view sometimes argue that "the corporation is not strictly private; it is tinged with a public purpose."[40] The state creates corporations because they are understood as "promoting the general welfare."[41] On this view, the corporation is "distinct from each of the individuals that happens to fill the social roles that its internal rules and culture define."[42] Further, this view sees the corporation as "capable of bearing legal *and* moral obligations," because it must operate for the public good.[43] As William Allen notes, however, "law and economics scholars… [see] this model [as] barely coherent and dangerously wrong."[44]

In the 19th century United States, the fiction and concession theories "competed with the 'aggregate' or 'contractualist' theory, [which] asserted that corporations and other legal entities were aggregations of human individuals whose relationships were structured by way of mutual agreements."[45] This view may have been supported by the spread of general incorporation statutes; once incorporators no longer needed a special legislative act to obtain their charter, the concession theory was easier to displace.[46] The aggregate theory is associated with influential American theorists Berle and Means, who understood the corporation as "an aggregation composed of shareholders and management, the latter confined to labor for the interests of shareholders by standard principles of property

38 Dewey, *supra* note 33 at 667–668.
39 *Ibid.*
40 William T Allen, "Our Schizophrenic Conception of the Business Corporation" (1992) 14 Cardozo L Rev 261 at 265.
41 *Ibid.*
42 *Ibid.*
43 *Ibid.*
44 *Ibid.*
45 *Ibid* at 264-265.
46 Gervais, *supra* note 32 at 274.

and trust law."[47] This view "underscored the necessity of human action in both forming and running corporations. Corporations were no longer artificial entities tightly controlled by states; they were now aggregate entities whose rights were extensions of their human creators' rights."[48] The implications of this theory were that the "legal entity's legal rights and duties were often seen, in an indirect or derivative manner, as simply those of its shareholders or other individuals that made up the entity."[49]

In Germany, the real entity theory emerged as a response to perceived shortcomings of the fiction theory. The fiction theory's "limits on corporate liability… proved increasingly difficult to reconcile with the needs of modern society."[50] In the real entity theory, "[l]egal entities were not seen as fictions, but rather as 'real' beings that represented 'social organisms with heads and extremities'."[51] Writing in the late 1990s, Peter Nobel suggested that this view of the corporation still dominated among "European corporate legal theorists [who] tend to view the corporation as a social reality rather than a mere legal fiction."[52] Millon argues that, in the US, the late 19th and early 20th centuries brought "phenomenal growth in the size of corporations… [that] offered support for the view that successful corporations are the product of a combination of entrepreneurial initiative and the natural, impersonal forces of market competition."[53] Consequently, corporate theory focused less on corporations as state-created entities that required specialized and specific regulation and instead "tended to assimilate corporate persons to the status of natural persons."[54] According to Petrin, this has impacted American constitutional law, as the US Supreme Court has held "that a corporation was akin to a real person and therefore entitled to constitutional rights such as commercial speech, protections against unreasonable searches and seizures, and freedom of the press, among others."[55] Petrin also notes that the real entity theory has the benefit of allowing the tortious and criminal conduct of high ranking officers or

47 Millon, *supra* note 29 at 222-223.
48 Jason Iuliano, "Do Corporations Have Religious Beliefs? " (2015) 90 Ind LJ 47 at 56.
49 Petrin, *supra* note 30 at 234.
50 *Ibid* at 235.
51 *Ibid*.
52 Peter Nobel, "Social Responsibility of Corporations" (1998) 84 Cornell L Rev 1255 at 1258.
53 Millon, *supra* note 29 at 213.
54 *Ibid*.
55 Petrin, *supra* note 30 at 238.

board to be imputed to the corporation, meaning an extension of the corporation's liability. By the same token "the real entity theory contended that these entities could have any right that they were capable of exercising, which was usually defined in the negative as rights that did not require human qualities," such as those associated with parenthood.[56]

Yet another view of the corporation emerged in the 1970s and 80s "explicitly grounded on neoclassical economics."[57] This view understood the corporation as a nexus of contracts. Some theorists of this view "reject the utility of the conception of shareholders as 'owners' of the corporation, preferring instead to describe shareholders as only one among the various suppliers of 'inputs,' whose rights are determined by the interrelation of the various contracts that define and constitute the corporate enterprise."[58] Petrin argues that this view is distinguishable from the older aggregate and fiction theories, but "contains elements of both."[59] This theory portrays the corporation "as a construct of various explicit and implicit contracts between a firm's constituencies."[60] It characterizes the corporation as an "aggregate of various inputs acting together to produce goods or services," while embracing "the view that firms are legal fictions, with the fiction forming the nexus that is at the center of a complex web of explicit and implicit contracts."[61] The continued reliance on the fiction theory becomes apparent when one considers that "the nexus itself as a mere web of contractually connected individuals could not bear any rights or be liable."[62] There must be some new legal entity created that can enter into contracts, hold property, and incur liability if the corporation is to have any legal meaning. Bruce Welling puts a finer point on the critique of the nexus of contracts theory of the firm:

> [It] may be right in economic theory. [It makes] no sense in *legal* theory about corporations created under Canadian statutes… A [*Canadian Business Corporations Act*] corporation… is a legal person, it has a special place in our legal system… nothing at all like a 'nexus of contracts' or any other set of

56 *Ibid* at 235.
57 Millon, *supra* note 29 at 229.
58 *Ibid*.
59 Petrin, *supra* note 30 at 236.
60 *Ibid*.
61 *Ibid* at 237.
62 *Ibid*.

relationships. Nothing of *legal* consequence about that corporation can be explained by that kind of terminology.[63]

Often, debates about the theory of the coprporation are pitched around the question of to whom directors and officers of a corporation owe duties, or what it means to act in the "best interests of the corporation" as corporate statutes require. The main question is whether directors and officers must only be concerned with maximizing shareholder wealth or whether they may owe duties to other actors such as employees or other stakeholders in the corporation's actions. Robert Yalden says the main competing views of the firm in this regard are, on the one hand, those that see the corporation as the property of its shareholders[64] or as a nexus of contracts,[65] and, on the other hand, "pluralist" models that emphasize the social function of the corporation.[66] The former views are associated with the shareholder primacy view, and the latter with theories emphasizing broader duties to additional stakeholders. Theorists of corporate social responsibility advocate broader stakeholder duties, but sometimes on the basis that this will ultimately redound in greater wealth maximization to the corporation.[67]

The shareholder primacy view fits together neatly with the view of the corporation as an aggregate of shareholder interests.[68] If the corporation is a variation on the partnership, then the only relevant interests for the

63 Bruce Welling, *Corporate Law in Canada: The Governing Principles* (London, ON: Scribblers Publishing, 2006) at 110-111.

64 Robert Yalden, "Competing Theories of the Corporation and Their Role in Canadian Business Law" in Anita I Anand & William F Flanagan, eds, *The Corporation in the 21st Century* (Kingston: Queen's Annual Business Law Symposium, 2003) at 3; Yalden associates this view with the influential work of Adolf A Berle et al, *The Modern Corporation and Private Property* (New York: Macmillan, 1933).

65 Yalden associates this view with Ronald H Coase, "The Nature of the Firm" (1937) 4: 16 Economica 386.

66 Yalden associates this view with E Merrick Dodd, "For Whom Are Corporate Managers Trustees? " (1932) 45: 7 Harv L Rev 1145; Jeffrey MacIntosh argues that "neither the contractian nor the property paradigms either dictate shareholder primacy or rule it out": Jeffrey G MacIntosh, "The End of Corporate Existence: Should Boards Act as Mediating Hierarchs? A Comment on Yalden" in Anita I Anand & William F Flanagan, eds, *The Corporation in the 21st Century* (Kingston: Queen's Annual Business Law Symposium, 2003) at 63.

67 See Elisabet Garriga & Domènec Melé, "Corporate Social Responsibility Theories: Mapping the Territory" (2004) 53: 1/2 J Bus Ethics 51.

68 See Millon, *supra* note 29 at 213–214.

corporation are those of its "owners." This said, a commitment to shareholder primacy could be equally consistent with other theories of what a corporation is. One might believe that the corporation is a legal fiction and also represents the aggregate interests of shareholders, or that the terms on which the state grants the right to incorporate include the principle of shareholder primacy. One might also believe that the corporation is a nexus of contracts, and the fiduciary duties of directors exist to address the issue that, unlike others who contract with a corporation, shareholders' claims on the corporation are not fixed by contract, but are residual in nature.[69]

On the other hand, believing that the corporation is a real entity suggests that its interests, rights, and obligations are distinct from its shareholders',[70] making pluralist views of director/officer obligations compatible with real entity theory. But one might equally hold that the corporation is a fiction or a concession and that directors and officers owe a wide range of duties. Millon argues that even the aggregate or nexus of contracts theories could lead to a duty on directors to consider non-shareholder interests:

> Thinking about the corporation in terms of the collection of all the individuals who contribute to production suggests a potentially broad conception of the corporation, including management and lower level employees, as well as holders of equity and debt securities. After all, to describe the corporation as a nexus of contracts is to suggest far more than the vision of the corporation as simply shareholders and their agent-managers.[71]

In short, the shareholder primacy debate is not strongly determinative of a particular ontological view of the corporation, and so is of limited assistance on that score. It is, however, relevant in the present context in another way. If shareholder primacy is the law applicable to for-profit corporations, they can only have shareholder wealth maximization purposes, which means they can only have religious purposes to the extent that these coincide with shareholder wealth maximization.[72] The SCC has recently settled on a relatively pluralist theory of directors' duties, which permits

69 Thanks to Gail Henderson for this point.

70 Rex Ahdar organizes the competing views as (1) the artificial entity theory, (2) the aggregate entity theory, and (3) the real entity theory: Ahdar, *supra* note 6 at 2.

71 Millon, *supra* note 29 at 236; see Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85 Va Law Rev 247.

72 Brett H McDonnell, "The Liberal Case for Hobby Lobby" (2015) 57 Ariz L Rev 777 at 792-794.

(though may not require)[73] them to consider "the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment"[74] in evaluating the best interests of the corporation.[75] This approach is consistent with allowing business corporations a wide array of goals that may not maximize shareholder profit. At the same time, however, directors still have a duty to act in the best interests of the corporation.[76]

In sum, there are several competing and sometimes overlapping theories – fiction, concession, aggregate, real entity, nexus of contracts – as to what a corporation is in its essence. Each model has had periods of popularity because of the legal consequences that follow from adopting one or the other and the particular challenges of the day. Having identified the competing theories of the corporation, I now explore the implications of each theory for business corporations' capacity to make religious freedom claims.

III. Theories of the Corporation and Religious Freedom Claims

As a starting point, one might reason that if the corporation is a *legal fiction*, then the corporation cannot make a religious freedom claim in its own right. On this view, an artificial entity cannot hold a religious belief,

73 Carol Liao, "A Critical Canadian Perspective on the Benefit Corporation" (2016) 40 Seattle Univ L Rev 683 at 702: "It is simply unclear from the decision whether this is a mandatory duty, as some parts of the judgment indicate that it is permissive and others imply that it is required."

74 *Peoples Department Stores Inc (Trustee of) v Wise*, [2004] 3 SCR 461 at para 42; *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560 at para 39. For critiques of these decisions, see Jeffrey G MacIntosh, "BCE and the Peoples' Corporate Law: Learning to Live on Quicksand Symposium on the Supreme Court's BCE Judgment" (2009) 48 Can Bus LJ 255 at 256–257: "the yardstick selected by the Supreme Court can only give dishonest directors more freedom to misbehave… the standard is an open invitation for both directors and judges to indulge their political preferences"; Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48 Can Bus LJ 232 at 237–238: "The Supreme Court has created an indeterminate duty rather than one that is merely difficult to apply… What the court has done is to create a duty that fails to offer guidance to directors and enforcers alike."

75 Liao, *supra* note 73 at 695: "Shareholders are important stakeholders in any corporation, and their interests are certainly not ones that boards should take lightly, but Canadian law is clear that the board's primary duties are to the corporation."

76 See Section IV. A. 1. below for further discussion.

and therefore cannot assert a right that requires as a condition for its exercise a sincere belief that a practice has a nexus with religion.[77] If one subscribes to the legal fiction view but insists more strongly that a corporation is a *concession* of the state, then it has the rights the state allows it to have. Its ability to make religious freedom claims, therefore, will depend on whether the state so permits.

If, in contrast, the corporation is a *real entity* capable of forming its own intentions, then it might more easily be said to have beliefs, some of which may be religious. As Iuliano notes, "theorists who advanced the real entity theory were heavily influenced by philosophical accounts of ontological emergence, the idea that a superordinate being springs forth when individuals form a collective."[78] Taking the example of the *Hobby Lobby* litigation in the US, Iuliano suggests that it is possible that the executives of a corporation with a particular religious identity believe, as individuals, that the corporation should not violate the government mandate to provide health insurance with contraceptive coverage, "but as group members, the executives believe that the corporation should violate the mandate." From this, Iuliano concludes that, "[b]ecause the corporation will adopt the latter position – one with which no executive actually agrees – it is again reasonable to conceive of the corporation as having an independent intentional state."[79]

If the corporation is an *aggregate* of its stakeholders' interests, we might expect the religious freedom interests of stakeholders to carry through to the corporation, and allow the corporation to assert religious freedom rights on behalf of its stakeholders. Arguably, this was the approach taken by the US Supreme Court in *Hobby Lobby*.[80]

Finally, if the corporation is a *nexus of contracts*, either result may follow. As noted above, this theory contains elements of both the fiction and aggregate theories of the corporation. One might come to the view that a collection of agreements, implicit and explicit, cannot do anything on its own. On the other hand, the nexus of contracts brings into being a new

77 See *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551.

78 Iuliano, *supra* note 48 at 61–62.

79 *Ibid* at 93.

80 Elizabeth Sepper, "Healthcare Exemptions and the Future of Corporate Religious Liberty" in Micah Schwartzman, Chad Flanders & Zoë Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2015) 305 at 307-308.

juridical entity that can, at least, own property and enter into contracts on behalf of the contracting parties. If it can represent the aggregate of contracting parties in this way, one might also imagine that it can represent their religious interests when the contracts so allow.

When courts have wrestled with such claims, sometimes these expectations are borne out. The statements of Canadian courts discussed above in Section I largely rely on the overlapping fiction and concession theories of the corporation. They maintain, principally, that as a fictional person the corporation cannot hold a religious belief and therefore cannot satisfy a basic condition of exercising a religious freedom right. Alternatively, some of the older decisions[81] emphasize that a corporation can only do what the state allows it to do, and if the state does not allow it to hold a religious freedom right, then it cannot hold such a right.

The one major exception to Canadian courts' reliance on the fiction or concession theories relates to how courts have addressed the claims of religious institutions organized as corporations. The recent jurisprudence of the SCC is quite receptive to the claim that religious freedom can have collective aspects.[82] Further, there are many religious freedom cases in which religious organizations are the named litigants,[83] though this may simply be because the corporate religious freedom point was not in dispute between the parties. In *Loyola*, when Québec's Attorney General argued that a Catholic school could not, itself, bear the right of religious freedom, the majority of the Court deliberately avoided answering the question.[84] As discussed above, a concurring minority would have distinguished between religious organizations set up as corporations and business corporations, allowing only the former to advance religious freedom claims in some circumstances. This way of distinguishing between religious and business

81 *Syndics de Saint-Paul de Montréal (Paroisse) v. Cie des Terrains de la Banlieue de Montréal*, *supra* note 21; *Pollack v. Comité Paritaire du Commerce de Détail à Québec*, *supra* note 22.

82 See Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis Canada Inc., 2016).

83 See eg *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567; *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772 (SCC). Other cases have understood denominational schools to have cognizable religious freedom interests: *Caldwell et al v Stuart et al*, [1984] 2 SCR 603; see also *Daly v Attorney General of Ontario*, [1999] 44 OR (3d) 349 (CA).

84 *Loyola*, *supra* note 20 at para 34. See Section IV. C. below.

corporations can be explained in one of three ways: (1) it rejects the idea that there should be a single theory for all corporations, (2) it assumes that because the main preoccupation of a business corporation is conducting business, it could never prove it held a sincere religious belief, or (3) it is driven mainly by unexplained policy considerations.

Similar to the dominant approach in Canada, Australia's Victorian Court of Appeal in *Cobaw* relied on the fiction theory, and held that artificial persons with "neither soul nor body" cannot hold religious beliefs.[85] Other decisions have come to different results, either by relying on no explicit theory of the corporation or by relying on combinations of those theories. In *Exmoor Coast Boat Cruises Ltd v Commissioners for Her Majesty's Revenue & Customs*, for example, the United Kingdom's First-Tier Tribunal (Tax Chamber) held that a "company has human rights if and to the extent it is the alter ego of a person (or, potentially, a group of people)."[86] This seems to represent the aggregate theory, but only when the corporation is closely held.

The European Commission of Human Rights has opined that a corporation, in this case the Church of Scientology, could initiate a religious freedom claim founded on Article 9(1) of the European Convention on Human rights. It departed from its previously expressed view that "a corporation being a legal and not a natural person is incapable of having or exercising the rights mentioned in Article 9(1) of the Convention." It held instead that "[w]hen a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9 (1) in its own capacity as a representative of its members."[87] In Rozéfort's view, the holding is "somewhat ambiguous" as it "seems to say on the one hand that the religious corporation has rights in and of itself, but on the other hand, that it is the rights of its members that it assumes in reality."[88] The ambiguity is resolved, however, if one views the holding as relying on the aggregate theory of the corporation, i.e. that a corporation really is the aggregate of its shareholders' or stakeholders'

85 *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd*, *supra* note 8; Ahdar, *supra* note 6 at 17-20.

86 *Exmoor Coast Boat Cruises Ltd v Revenue & Customs*, *supra* note 7 at para 71.

87 [1979] Yearbook of the European Convention on Human Rights 244.

88 Rozéfort, *supra* note 12 at 214.

interests. Similar to the minority holding in *Loyola*, the Commission only applies this reasoning to church bodies, without explaining why the reasoning does not apply to other corporations.

The *Hobby Lobby* decision by the US Supreme Court has received the most extensive commentary. As Petrin notes, the Court referred to corporations as legal fictions, but "relied most heavily on the aggregate theory."[89] It reasoned that a "corporation is simply a form of organization used by human beings to achieve desired ends."[90] Accordingly, in this case, the Court allowed for the religious interests of "humans who own and control"[91] corporations to be asserted by the corporations themselves "on a derivative basis."[92] In Elizabeth Pollman's view, this holding "downplayed the separate legal identity of the corporation and its public and institutional characteristics."[93]

Despite a seemingly clear reliance on the aggregate theory of the corporation (though employing the language of the fiction theory at points), Petrin argues that "*Hobby Lobby* leads to more questions than it answers."[94] In his view, "it is not clear why the Court found that the established separation between the legal entity and individuals should not apply when it comes to corporate rights."[95] If religious beliefs of owner-controllers can be imputed to the corporation, it might also be the case that "the legal obligations of corporations" can "be imputed to those who control them, meaning that shareholders (or directors, officers, employees) could become liable for their firm's debts and other obligations."[96] The Court does not wrestle with this distinction. Further, as Pollman adds, "the Court gives little insight into why the people who count in the derivative analysis are only those who own and control the corporations."[97]

The critiques of *Hobby Lobby* and the exceptions drawn for alter ego and religious corporations suggest that the outcome of adopting one

89 Petrin, *supra* note 30 at 240.
90 *Burwell v. Hobby Lobby*, *supra* note 3 at 18.
91 *Ibid.*
92 Pollman, *supra* note 5 at 157.
93 *Ibid* at 156.
94 Petrin, *supra* note 30 at 240.
95 *Ibid.*
96 *Ibid.*
97 Pollman, *supra* note 5 at 157.

theory or another is less certain than it might initially appear. Some have even claimed that rights of religious freedom for corporations "can be affirmed or denied no matter which ontological theory we choose."[98] Adopting the aggregate theory may allow for some individuals' beliefs to be considered the corporation's beliefs, but does not conclusively identify whose beliefs will be relevant and in which circumstances. Adopting the fiction theory, on the other hand, does not identify what kinds of human intentions will nevertheless be ascribed to corporations in order, for example, to hold them liable for criminal conduct.[99] In the face of such indeterminacy, Richard Schragger and Micah Schwartzman suggest avoiding the ontological questions altogether. "Instead of asking 'What is a Group?,' we should be asking 'How would giving this group legal rights and duties affect our social relations? '"[100]

Other scholars have responded by arguing that a better approach is to generally disallow corporations from making religious freedom claims. Insisting on the distinction between the legal entity and the shareholder, Shawn Rajanayagam and Carolyn Evans argue that the mechanism that allows shareholders to avoid personal liability for a corporation's obligations should act as a bar, in general, for corporate religious freedom claims.[101] This, they say, "would not unduly burden most religiously motivated individuals or exclude religious bodies from bringing cases on behalf of their members," because legislatures could alter it by a statute "stipulating a rule by which the beliefs of the shareholders may be attributed to the corporation."[102] They allow, however, for some exceptions. Where a corporation's *raison d'être* is religious, it "may be the appropriate party in a case that seeks to defend the religious freedom rights of individuals."[103] This view is more firmly grounded in the view that the corporation is a legal fiction. Most of the time, the aggregate religious interests will be irrel-

98 Richard Schragger & Micah Schwartzman, "Some Realism about Corporate Rights" in Micah Schwartzman, Chad Flanders & Zoë Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2015) 345 at 361.

99 See Section IV. A. below for how Canadian law ascribes intentional states to corporations.

100 Schragger & Schwartzman, *supra* note 98 at 360.

101 Shawn Rajanayagam & Carolyn Evans, "Corporations and Freedom of Religion: Australia and the United States Compared" (2015) 37: 3 Syd Law Rev 329 at 349.

102 *Ibid* at 332.

103 *Ibid* at 332–333. Usually such corporations will be set up in a not-for-profit model, but Rajanayagam and Evans prefer a functional analysis: 349-350.

evant, and the corporation has no real beliefs of its own. The inability for shareholders to claim religious freedom rights through the corporation is simply part of the price for the limitation of their liability, which is the essence of the legal fiction. Only when the fiction is set up principally to further a religious purpose will it be able to assert a religious freedom claim on behalf of the shareholders or members. This last, however, requires either a departure from traditional fiction theory, which holds that corporations cannot have beliefs, or a modification of religious freedom doctrine, which requires belief as a condition for claiming the right.

Petrin's approach is more self-aware in its departure from the main theories of the corporation explored above, though it might yield similar results to Rajanayagam and Evans's proposal. Petrin says the better way would be to take a "balancing approach," through which corporations' rights and duties should be assigned not on the basis of any particular theory of the corporation, but rather "by reference to corporations' social and economic function, purpose, and effects."[104] His approach thus offers a more developed rationale for allowing some corporations to make religious freedom claims but not others.

In what follows, I argue that Canadian law's general approach to corporations suggests that corporations should be entitled to advance religious freedom claims where the facts support such a claim. As will be seen, though Canadian law hews closely to a fiction/concession theory, the law is nevertheless comfortable with ascribing intentional mental states to corporations for legal purposes. What's more, allowing corporations to assert religious freedom claims, while allowing governments to justify infringements in context, allows for case-specific balancing without the downside of filtering out potentially meritorious claims. Before developing these arguments, however, I lay out in more detail how Canadian law ascribes intention to corporations, thereby expanding the fiction of the corporate person beyond its traditional boundaries.

IV. What is a Corporation in Canadian Law?

Section I showed that, on a few occasions, justices of the SCC have opined that corporations cannot hold religious beliefs and therefore can-

104 Petrin, *supra* note 30 at 232.

not assert religious freedom claims on their own behalf (though arguably these holdings have all been *obiter dicta*). Section II inquired into how the various competing theories of the firm line up with the question whether business corporations can advance religious freedom claims. This Section will argue that, in non-constitutional jurisprudence, Canadian courts have found ways to impute mental states to a corporation in order to ascribe liability under contract, tort, and criminal law. The theory of the corporation at work in these cases can perhaps best be described as a combination of the concession and legal fiction theories, with courts being prepared to embellish the legal fiction to solve the liability problems it creates. In the constitutional cases, the SCC has shown two tendencies. Sometimes, it identifies a limit of the legal fiction. For instance, it will not say that a corporation has life, liberty, or security of the person interests, or can be considered a witness who might benefit from rights against self-incrimination. At other times, the Court avoids the question of the corporation's nature, allowing corporations to assert constitutional rights because of the greater societal interests in things like free expression, reasonably timely trials, and protection from unreasonable search and seizure.

A. An Expansive Fiction: The Corporation in Non-Constitutional Case Law

The predominant contemporary understanding of corporations in Canadian law likely has its roots in *Salomon*, an 1897 decision of the House of Lords.[105] The central holdings of that case are so common as to seem trite: corporations are separate legal persons and shareholders are not liable for the corporation's debts. The former is our predominant concern here. The same insistence on the separate legal personality of the corporation is reflected in contemporary corporate statutes. The *Canada Business Corporations Act*, for example, provides that a "corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person."[106] According to Welling, this means that a corporation "must, as far as possible, be treated by analogy to an individual… Nearly all Canadian corporate statutes enact similar provisions."[107] Québec's *Companies*

105 *Salomon v A Salomon and Company Limited*, [1897] AC 22 (Eng HL).

106 *Canada Business Corporations Act,* RSC 1985, c C-44, s 15(1) [*CBCA*].

107 Welling, *supra* note 63 at 84. There is an exception for the small number of companies established by a special act of a legislature, whose purposes and limits may be more

Act, has a different formulation, providing that "[a] company has the full enjoyment of civil rights in Québec and outside Québec, except respecting what is proper to the human person and subject to the laws applicable in any particular case."[108] The *Civil Code of Québec* similarly states that a corporation has "full enjoyment of civil rights" but also saying that a corporation's ability to exercise those rights must be "adapted as required."[109] Paul Martel identifies a number of rights and obligations outlined in the Civil Code of Québec that require such adaptation:

> …we need only think, for example, of the provisions of the Civil Code of Québec respecting the family, minors, tutorship and curatorship to the person, the registers of civil status, rights to integrity of the person, respect for the body after death, etc. Other than these obvious qualifications, a corporation is subject to the same civil law system as any other person.[110]

The basic rule, then, in both civil and common law Canadian jurisdictions is that in law corporations should be treated as a natural person for as many purposes as possible. This, however, leaves open the question of which purposes are possible, for which we might need a clearer view of what a corporation is and how it differs from an individual. Canadian corporate statutes and case law have not explicitly adopted either a legal fiction, real entity, aggregate, or nexus of contracts theory that might shed some light on this question. Paul Martel, however, argues that the real entity theory rests on the supposition that a group of individuals coming together in coordinated action generates the new entity of the corporation. Martel reasons that a corporation "does not necessarily require a group of individuals. It may… have a sole director and shareholder." He concludes that the corporation is therefore "pure fiction."[111] For further support, he notes "the broad discretion the Civil Code of Québec grants to courts with respect to legal personality: they may retroactively confer personality on a legal person, not take such personality into account when it does exist, or act as if it exists when it does not. The fiction has become extraordinarily

clearly spelled out in the incorporating statute: *ibid* at 98.

108 CQLR c C-38, s 123.16.

109 Arts 301, 303 CCQ; Paul Martel, *Business Corporations in Canada: Legal and Practical Aspects*, looseleaf ed (Toronto: Carswell) at 9-1.

110 *Ibid* at 1–3. Martel lists additional provisions of the Civil Code that apply only to natural persons. These depend, for example, on familial relationships, being a worker, or being a consumer.

111 *Ibid* at 1-7.

flexible."[112] Moreover, in Québec, the term legal person refers only to corporations, not partnerships, which Martel says sounds "the death knell of the [real entity] theory."[113] Unsurprisingly, these observations align just as strongly with the concession theory, which overlaps significantly with the fiction theory.[114] The view that a corporation is whatever the legislature says it is explains why a group of individuals is not needed to give rise to a corporate personality. As Welling notes:

> The fiction and realist theories give different and incompatible accounts of *why* a corporation is to be regarded as a person. Apart from a few exceptions, Canadian courts tend to ignore these theories… A corporation's capacity, rights, powers and privileges are pretty much the same as an individual's, because the legislature said so.[115]

If, in general, the concession and fiction theories form the dominant underlying assumptions of Canadian corporate law, and most corporate statutes give broad capacity, rights, powers, privileges to corporations, the question becomes whether the analogy to individuals is possible in the religious freedom context. Can a corporation hold a sincere belief that a practice or line of conduct has a nexus with religion? [116]

While the SCC's jurisprudence on corporate law is not particularly helpful in setting out the nature of the corporation, other parts of the common law have easily accepted that a corporation can develop an intention. It is beyond question that a corporation can enter a contract, which requires an intention to create legal relations with another party. In the employment context, the SCC has even penalized a corporation for "bad faith" conduct when it made a "*conscious decision* to 'play hardball'" with an employee it dismissed.[117] Though tortious conduct is usually attributed to a corporation through the doctrine of vicarious liability (which does not require a corporation to demonstrate an intention), at least one Canadian appellate court has held that a corporation can be found liable of intentional torts "if the person committing the tort is not merely an employee

112 *Ibid*.
113 *Ibid* at 1-8.
114 See Section II above.
115 Welling, *supra* note 63 at 114.
116 *Amselem*, *supra* note 77 at para 56.
117 *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 108 (emphasis added).

but can be considered the directing mind of the corporation."[118] In *Nelitz v Dyck*, the Ontario Court of Appeal held that "[w]hile a corporation cannot itself commit battery, because it cannot physically touch an individual… it can be liable for battery directly by using an individual to commit the act."[119] In Québec, corporations can similarly be liable for extra-contractual faults, with the director who had the power to cause the corporation to commit a fault being "jointly and severally liable for the extra-contractual faults of the company."[120]

This approach to tortious/extra-contractual liability mirrors the Canadian common law approach to corporate criminal liability. Long prior to *Criminal Code* amendments in 2004 that set out the conditions under which corporations can be criminally liable,[121] Canadian courts held corporations liable for offences requiring *mens rea* on the "identification theory." Rozéfort locates the Canadian origins of this approach in *R v Fane Robinson*,[122] a 1941 decision of the Alberta Supreme Court, Appellate Division, which "introduced the notion of 'primary corporate liability' to conclude that a corporation could be convicted for a crime requiring *mens rea*."[123] The theory was later taken up and expanded in English[124] and other Canadian decisions,[125] and was addressed by the SCC in the 1985 decision of *Canadian Dredge*. In that case, the Court explained that initially corporations were not liable at common law for a criminal offence because of "the abhorrence of the common law for vicarious liability in criminal law, and from the doctrine of *ultra vires*, which regarded criminal activities by corporate agents as beyond their authority and beyond corporate

118 J Anthony VanDuzer, *The Law of Partnerships and Corporations*, 3d ed (Toronto: Irwin Law Inc., 2009) at 207.

119 *Nelitz v Dyck* (2001), 52 OR (3d) 458 (Ont CA) at para 33.

120 Martel, *supra* note 109 at 1–67.

121 VanDuzer, *supra* note 118 at 200–205; *Criminal Code,* RSC 1985, c C-46, [*Criminal Code*] at ss 22–22.2.

122 [1941] 3 DLR 409.

123 Rozéfort, *supra* note 12 at 211.

124 *Ibid*.

125 See *Canadian Dredge & Dock Co v The Queen*, [1985] 1 SCR 662 at paras 19-20; *R v J J Beamish Construction Co Ltd (and eleven other corporations)*, [1966] 2 OR 867 (Ont HCJ); *Regina v St Lawrence Corp Ltd (and nineteen other corporations)*, [1969] 2 OR 305 (Ont CA).

capacity."[126] In *Canadian Dredge*, the Court adopted the identification theory of corporate criminal liability, according to which

> …criminal conduct, including the state of mind, of employees and agents of the corporation is attributed to the corporation so as to render the corporation criminally liable so long as the employee or agent in question is of such a position in the organization and activity of the corporation that he or she represents its *de facto* directing mind, will, centre, brain area or ego so that the corporation is identified with the act of that individual.[127]

Martel describes this approach as treating the corporation as the "*alter ego*" of the relevant individual.[128]

The Court was careful to note, however, that the identification theory "is but a legal fiction invented for pragmatic reasons."[129] Rozéfort echoes this view, writing that the identification theory was "conceived strictly to solve problems of corporate criminal liability" and "was not intended to go beyond the field of criminal law because by doing so an erosion of the specific identity of the company would be inevitable."[130] This view adopts the legal fiction theory of the corporation, but recognizes that this fiction gives rise to problems that require an additional fiction (the identification theory) to solve them. "It is not an exception to the principle of the separate entity," according to Rozéfort, "it is only an operation designed to complete the corporate personality and it is only legitimate to the extent required by the activities of the corporation."[131]

Welling frames the identification theory differently than Rozéfort. He argues that "if a corporation is a legal person it must think. Lacking a physical skull to house its brain, the corporation rents whatever skulls… it

126 *Canadian Dredge & Dock Co. v. The Queen*, *supra* note 125 at para 13.

127 *Ibid.* On the distinction between direct and vicarious liability in this context, see para 21.

128 Martel, *supra* note 109 at 1-70 Martel notes that this theory has been used to impose liability on the corporation, but also on the individual. It has been used in "civil and tax liability matters" in order "to identify the corporation with its shareholder, to the point of creating a legal relationship between the latter and third parties transacting with the corporation."

129 *Canadian Dredge & Dock Co. v. The Queen*, *supra* note 125 at para 13.

130 Rozéfort, *supra* note 12 at 211.

131 *Ibid.*

needs from time to time."[132] This view is more consistent with the law's pattern of attributing intention to a corporation in the private law context. When the law requires a particular state of mind in order for legal consequences to follow, the acts of the human beings are taken to demonstrate (or not) that state of mind. As Welling helpfully puts it, when "a witness sees a vote by the directors, or a salesman's handshake" these are "the physical manifestation of a corporate commitment. They are acts *by* the corporation."[133] Arguably, this conclusion is reached in both the private and criminal law contexts on an implicit legal fiction theory of the corporation. However, this version of the legal fiction accommodates the view that, even as a fiction, the corporation can have a state of mind and intend the consequences of its actions as a matter of law. One might see this as moving the law closer to the aggregate theory of the corporation, but there is an important distinction. The corporation's intentions are not derived from the intentions of the individual stakeholders, but rather from the acts that demonstrate the corporation's own intention. These will most likely be the actions of the board of directors or the officers with the requisite authority derived from the board.

The above-mentioned 2004 amendments to the *Criminal Code* make it easier to attribute criminal liability to the corporation than it was under *Canadian Dredge*'s identification theory. For offences of negligence, for example, an organization can be accused of an offence of negligence where one of its representatives, acting within the scope of their authority, is a party to the offence and the senior officer[134] responsible for that aspect of the organization's activities "departs – or the senior officers, collectively,

132 Welling, *supra* note 63 at 163; see also Lyman Johnson & David Millon, "Corporate Law After Hobby Lobby" (2014) 70: 1 Bus Lawyer 1 at 9, writing about the state corporate law at issue in Hobby Lobby: "As persons that exist only by virtue of law, corporations obviously lack the ability to pursue their purposes and exercise their lawfully delegated powers without the assistance of human beings. The corporate person can do nothing unless human beings act on its behalf…. Corporate law therefore provides a governance framework that specifies who can act lawfully on behalf of the corporation. The board of directors is the primary locus of governance authority. The board acts for the corporation, sometimes in its own capacity and more often through delegation of authority to other humans, namely the corporation's senior officers and those to whom they in turn have delegated authority."

133 Welling, *supra* note 63 at 128.

134 *Criminal Code,* RSC 1985, c C-46, *supra* note 121 at s 2: "senior officer means a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and,

depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence."[135] For other offences that require proof of fault, the corporation can be held liable where one of its senior officers

> (a) acting within the scope of their authority, is a party to the offence;
>
> (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
>
> (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence. [136]

In other words, a greater range of intentions can be attributed to the corporation under these amendments, and a criminal fault can be found through the collective intentions or negligence of a group of natural persons. These legislated changes might be seen as moving the criminal law away from its individualistic tendency demonstrated in the identification theory, under which a corporation was only held liable for a fault where a single individual committed the fault.[137] Perhaps, therefore, the amendments move Canadian criminal law closer to a real entity theory of the corporation. Alternatively, one might see this as an additional embellishment of the legal fiction carried out by the legislature in order to facilitate holding corporations accountable for their actions. For present purposes, the crucial common element is that the corporation, though a legal fiction, can be seen for legal purposes as possessing sufficient intention to carry out a criminal offence.[138]

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in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer."

135 *Ibid* at s 22.1.

136 *Ibid* at s 22.2.

137 Jennifer A Quaid, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" (1997) 43 McGill LJ 67 at 96.

138 For an argument consistent with the real entity theory that corporations with defined decision-making processes can be seen as actually having intentionality, see Quaid, *supra* note 137; see also Sylvia Rich, "Corporate Criminals and Punishment Theory" (2016) 29 Can J Law Jurisprud 97.

If Canadian law can view a corporation as having an intention as a matter of law while usually also taking the view that as a matter of reality a corporation cannot intend anything, why can the same logic not apply to religious beliefs? If the corporation can intend, why can it not believe sincerely that it must do or refrain from doing certain activities for religious reasons? The identification theory developed in the criminal law and intentional tort contexts provides a basis on which one might attribute such beliefs to a corporation. If the directing mind of the corporation chooses a course of action for the corporation based on religious principles, it is difficult to explain why the law should accept that the knowledge and intentions of the directing mind are, in law, those of the corporation, but that the religious motives for the act are not. While some might label this "reverse veil-piercing,"[139] it seems more accurate to say that the law is just doing what it needs to do in order to attribute rights and obligations to the corporation. As Brett McDonnell argues in the American context, "[c]orporate personhood is not really an argument that corporations cannot have a religious purpose. Rather, it is an argument against inferring such a purpose from the individual beliefs of its shareholders."[140] As with other areas of the law where intentionality is required, attributing an intention to the corporation on the basis of the actions of its directing mind (usually the board of directors) is not piercing a veil, it is instead attributing consequences to actions undertaken by individuals in their corporate capacity.[141]

While it is true that one will never encounter a corporation in the neighbouring seat at a religious service, one will also never negotiate a contract with, be battered by, or witness a corporation committing a crime. As Lyman Johnson and David Millon write,

> [t]he idea of the corporation as a distinct rights-bearing entity – with rights that exist independently of those humans who are associated with it – might seem puzzling when the rights involve political speech or religious exercise, but it should not be. It is not any stranger than imagining a corporate person owning legal title to a building, filing a lawsuit in its name, or making a charitable donation."[142]

139 Rajanayagam & Evans, *supra* note 101 at 341-346.
140 McDonnell, *supra* note 72 at 795.
141 Johnson & Millon, *supra* note 132 at 17.
142 *Ibid* at 19.

That the corporation simply cannot hold a religious belief is no answer to religious freedom claims brought by corporations; [143] on the legal fiction theory, the corporation cannot do or intend anything. Though Canadian law adopts this theory it has found ways to attribute mental states to the corporation in order to hold corporations liable for criminal, tortious, and bad faith conduct. If there is to be a distinction between religious mental states and other mental states, it cannot be found in the corporation's actual capacities. I suggest, then, that one appropriate approach is for the religious freedom right to follow the pattern of contract, tort, and criminal law, and allow for the possibility that the religious beliefs of the corporation's directing mind can be considered, as a matter of law, the religious beliefs of the corporation. Significantly, it will not suffice for shareholders of a corporation to assert their own individual beliefs as the beliefs of the corporation. Rather, the corporation's religious beliefs will be ascertained through evidence of the corporation's own beliefs, as expressed through the actions of its directing minds.[144]

1. Corporate Purposes

As discussed in Section II, one argument against allowing corporations to make religious freedom claims relates less to what corporations are and more to what they and their directors are entitled to do. If corporations are only entitled to pursue wealth maximization for their shareholders, they cannot be motivated by anything that would hinder the ability to profit, including religious beliefs. Some US scholars read the *Hobby Lobby* decision as answering this question of corporate law. As Johnson and Millon write, "[w]ithout the Court's threshold holding that, as a matter of state corporate law, business corporations can exercise religion because they need not solely pursue profits, the [religious freedom] claim in *Hobby Lobby* would have failed."[145] Indeed, McDonnell celebrates *Hobby Lobby* as a liberal victory, at least in terms of corporate law. Because the "majority opinion stresses that corporations can, and do pursue a large variety of ends beyond simply maximizing the profit that flows to shareholders," the holding resonates with the views of corporate social responsibility advo-

[143] But see the contrary view of Gervais, *supra* note 32 at 286-287: "une personne ne peut se prétendre victime d'une attente à sa liberté de religion si elle ne possède aucune croyance… ou si elle ne prend part à aucune forme de rite ou de cérémonie religieuse."

[144] See Section V below for further elaboration.

[145] Johnson & Millon, *supra* note 132 at 2.

cates, who believe that corporations should be used to pursue goals other than wealth maximization.[146]

The SCC has addressed this issue even more explicitly than its American counterpart in *Hobby Lobby*. Corporate directors owe a fiduciary duty to act in the best interests of the corporation. The Court has been clear that "the phrase the 'best interests of the corporation' should be read not simply as the 'best interests of the shareholders'."[147] In discharging this duty, directors may consider "*inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment."[148] It follows from these holdings that "Canadian law seems to reject the imperative of shareholder value maximization,"[149] even if it does not make the consideration of all stakeholders perspectives mandatory. As such, there seems to be little room for an argument in Canada that a corporation cannot make a religious freedom claim on the wealth maximization argument.

At the same time, however, directors of a corporation must act in the best interests of the corporation and thus may need to explain how taking a religiously motivated course of action meets this test.[150] If they are sacrificing profit for the sake of religious principle or practice, they may have to answer to shareholders who claim that such a decision was not in the corporation's best interests. They may also need to answer to a broader range of stakeholders who claim that the decision was "oppressive or unfairly prejudicial"[151] to them. Directors may be on surer footing in this regard if the corporation's articles of incorporation make specific reference to a religious purpose. This would support their claim that acting in accordance with religious principles was in the best interests of the particular corporation, even if it would not be in the best interests of just any corporation.

146 McDonnell, *supra* note 72 at 779-780.

147 *Peoples Department Stores Inc. (Trustee of) v. Wise*, *supra* note 74 at para 42.

148 *Ibid*; the holding was subsequently reaffirmed in *BCE Inc. v. 1976 Debentureholders*, *supra* note 74.

149 Michael Marin, "Disembedding Corporate Governance: The Crisis of Shareholder Primary in the UK and Canada" (2013) 39 Queen's LJ 223 at 243.

150 It is perhaps a fear of such challenges that has motivated some jurisdictions to create the vehicle of community contribution companies, which allow for the identification of a community purpose toward which a for-profit company can contribute its resources. See Gail E Henderson, "Could Community Contribution Companies Improve Access to Justice? " (2016) 94: 2 Can Bar Rev 209 at 217-226.

151 See *CBCA*, *supra* note 98, s 241. All Canadian corporate statutes include some form of this "oppression remedy" except for Prince Edward Island's.

Where the corporation is closely held and the shareholders, directors, and officers are all the same people, this is less of a practical concern. However, should there be a disagreement even among a small group about which course of action best balances the corporation's business and religious priorities, directors will need to be cautious around their ability to justify their decisions with regards to the corporation's interests. If the religious interests of the corporation are not set out in its founding documents, the argument will be harder to make unless there is a business case for the corporation observing religious principles.[152]

B. Other Constitutional Rights

Leaving the private and criminal law spheres, Canadian courts have also opined on whether corporations can claim constitutional rights other than religious freedom. Sometimes, the constitutional text provides direction. Equality rights under s 15 of the Charter are guaranteed to "individuals," a term taken to exclude corporations.[153] Similarly, voting rights, some mobility rights,[154] and minority official language education rights are available only to "citizens," which corporations cannot be.

On the other hand, many Charter rights are granted to "everyone," a term that does not on its face exclude corporations. In such cases, sometimes the question whether a corporation can assert such a right is either never asked or the answer is implicit in the decision. For instance, in *Hunter v Southam*, the Court seems to assume that a corporation can assert a claim on the basis of the right to be secure against unreasonable search and seizure, guaranteed to "everyone" by s 8 of the Charter.[155]

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152 See Section V below for further discussion.

153 *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326. Gervais argues that the term "individual" should not be so narrowly interpreted and underscores that the French text of s 15(1) does not use a parallel term. He suggests that there are some circumstances in which s 15(1) should apply to corporations as they too can be victims of discrimination. Though a corporation itself will not have one of the characteristics enumerated in s 15(1), it may be associated with natural persons who share that trait and discriminated against on that basis, according to Gervais: see Gervais, *supra* note 32 at 332-351.

154 For an account of the Supreme Court's early decisions on mobility rights and argument that those which apply to permanent residents should apply to corporations, see Gervais, *supra* note 32 at 306-312.

155 *Hunter v Southam Inc*, [1984] 2 SCR 145; Rozéfort, *supra* note 12 at 203.

In contrast, sometimes the Court inquires more explicitly into whether a corporation, as a fictional entity, can exercise a particular right. The right against self-incrimination is available under s 11(*c*) of the Charter only to "a witness who testifies."[156] In *R v Amway*, the SCC held that the right did not apply to corporations because "it would strain the interpretation of s. 11(*c*) if an artificial entity were held to be a witness."[157] Moreover, the Court held that the underlying purpose of s 11(*c*) is "to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth."[158] The implication is that, not only can a corporation not testify, it can also not experience dignity or privacy, so extending the right against self-incrimination to corporations does not further the purpose of that provision. This latter is somewhat at odds with the holding in *Hunter v Southam*, where, despite holding that the purpose of the right against unreasonable search and seizure is "to protect *individuals* from unjustified state intrusions upon their privacy,"[159] the Court allowed a corporation to invoke the right. Indeed, in a later decision, the majority of the SCC held that "warrants for the search of any premises constitute a significant intrusion on the privacy of individuals and corporations alike."[160] Perhaps, then, the difference in the cases is that a corporation can own or lease a building, but it cannot itself take the witness stand. In Welling's terminology,[161] the analogy to individuals is possible in the search and seizure context, but not in the witness testimony context. Alternatively, one might understand *Hunter v Southam* as allowing corporations to assert rights against unreasonable search and seizure because of societal interests in ensuring that law enforcement agents are held to constitutional norms regardless of whether the property owner or lessor is a natural or legal person. In contrast, the SCC found no parallel societal interest in the context of potential corporate self-incrimination.

156 *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(*c*).

157 *R v Amway Corp*, [1989] 1 SCR 21 at 39; Robert Yalden et al, *Business Organizations: Principles, Policies and Practice* (Toronto: Emond Montgomery Publications Limited, 2008) at 244.

158 *R. v. Amway Corp.*, *supra* note 157.

159 *Hunter v. Southam Inc.*, *supra* note 155 at 160.

160 *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421 at 444.

161 See Section IV. A. above.

Both of these approaches – the legal fiction approach and the societal interest approach – are seen in the SCC's holding in *Irwin Toy*. In that case, the SCC held that a corporation cannot invoke the rights of life, liberty, and security of the person protected by s 7 of the Charter because "it is nonsensical to speak of a corporation being put in jail" and "[t]o say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition."[162] In this respect, the reasoning tracks *Amway*: although the rights in question are guaranteed to "everyone," the Court held in both cases that corporations are simply unable to hold the right. In contrast, when the Court addressed the Charter right of freedom of expression in *Irwin Toy*, it did so by examining the societal interests the right serves. Instead of asking whether a corporation can bear the right of free expression, the Court asked whether commercial expression is excluded from the Charter's guarantee.[163] On this question, the Court quite easily came to the conclusion that, because commercial expression is non-violent and conveys meaning, it should be protected by s 2(*b*) of the Charter. It based this finding in part on the view that since "the *Canadian Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(*b*) of the *Charter*."[164] Interestingly, the Court came to this conclusion while also holding that "[f]reedom of expression was entrenched in our Constitution… so as to ensure that everyone can manifest their *thoughts, opinions, beliefs, indeed all expressions of the heart and mind*."[165] It never asked whether a corporation can have a thought, opinion, belief, or an expression of the heart and mind.[166] In the more recent decision of *JTI-Macdonald*, the Court explained that *Irwin Toy* was based on "an examination of the values protected by the free expression guarantee: individual self-fulfilment, truth seeking and democratic participation," and a finding "that commercial speech may be useful in giving consumers

162 *Irwin Toy Ltd v Quebec (Attorney General)*, *supra* note 9 at 1002-1003. The court goes on to reject the argument that s 7 protects economic liberty interests. See also *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154.

163 Gervais, *supra* note 32 at 290.

164 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 (C) at para 59.

165 *Irwin Toy Ltd v Quebec (Attorney General)*, *supra* note 9 at 968 (emphasis added).

166 In part for this reason, Gervais is critical of giving expressive freedom rights to corporations, though he allows that corporations are entitled to freedom of the press: Gervais, *supra* note 32 at 291, 299–300 He also allows for freedom of expression to apply to "ideological organizations" and for corporations to have freedom to communicate on business matters with their shareholders, employees, and clients.

information about products and providing a basis for consumer purchasing decisions."[167] The consistent position of the SCC has been that corporate expression is protected regardless of whether a corporation can feel self-fulfilment, be interested in the truth, or participate in the democratic process. Rather, commercial expression by corporations is protected because it serves broader societal interests and the potential receivers of the expression.

In *R v CIP Inc*, the Court summarized its approach in *Irwin Toy* as setting out the following analytical framework: "whether or not a corporate entity can invoke a Charter right will depend upon whether it can establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision."[168] On this basis the Court held that corporations are protected by s 11(*b*) of the Charter, which guarantees the right to be tried within a reasonable time. The Court held that the "right to a fair trial is fundamental to our adversarial system" and there is "no principled reason for not extending that protection to all accused."[169] Moreover, s 11(*b*) engages the societal interests of ensuring that offenders are tried speedily and that those on trial are treated fairly and justly. In the Court's view, these interests applied equally to corporations and individuals. "To hold otherwise would be to suggest that the community is somehow less interested in seeing the former brought to trial. It would also suggest that the status of an accused can determine whether that accused is to be accorded 'fair' and 'just' treatment." [170]

In sum, the SCC's reasoning on ss 7 and 11(*c*) can be explained by an underlying legal fiction theory of the corporation. It is because the corporation does not exist in reality that it cannot be imprisoned and cannot testify. In the commercial expression, search and seizure, and s 11(*b*) cases, however, the Court sidesteps the entire question and is not delayed by considerations regarding the nature of the corporation and whether it can

167 *Canada (Attorney General) v. JTI-Macdonald Corp.*, *supra* note 9 at para 34.

168 *R v CIP Inc*, [1992] 1 SCR 843 at 852. Notably, perhaps, in reaching its conclusion in CIP, the Court noted in passing at 855 that "corporate criminal liability is essentially vicarious liability based upon the acts and omissions of individuals", citing the *Canadian Dredge* case discussed above in Section III. This is puzzling given how the Court in *Canadian Dredge* was at great pains to distinguish the identification theory from vicarious liability.

169 *Ibid* at 856.

170 *Ibid* at 858.

truly express itself or suffer injustices related to invasions of privacy or trial delays. Instead, the Court relies on the purpose and nature of the right to allow for corporate claimants.

C. Back to Religious Freedom

As seen above in Section I, the SCC's treatment of corporations' freedom of religion has, at first glance, been consistent with its approach to ss 7 and 11(*d*) of the Charter. Just as a business corporation cannot be imprisoned and cannot testify, the Court has reasoned that it cannot hold religious beliefs.[171] There are, however, two important exceptions that may yield the practical result of often treating religious freedom more like expressive freedom or the right to be tried within a reasonable time. The first exception was set out in *Big M*. In that case, as noted above, a corporation accused of violating the *Lord's Day Act* was granted standing to argue that it violated s. 2(*a*) of the Charter. The SCC held:

> Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid… Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant… A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(*a*) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue.[172]

This exception is consistent with the Court's approach to expressive freedom as it is based principally on the societal interest in having laws conform to the constitution. It renders irrelevant the nature of the corporation. It is also similar to the corporate expression cases because it addresses legislation with a purpose (rather than an effect) that violates a constitutional right. Indeed, the *Big M* exception only clearly applies where the remedy sought is a striking down of the unconstitutional statute because its purpose is unconstitutional. The *Lord's Day Act* at issue in *Big M* was

171 *R v Edwards Books and Art Ltd*, *supra* note 1 at 784.

172 *R v Big M Drug Mart*, *supra* note 10 at paras 39-41. The rule was expanded to apply to civil proceedings where a corporation is brought to court involuntarily on the basis of a law it argues is unconstitutional: *Canadian Egg Marketing Agency v Richardson*, [1997] 3 SCR 157 at paras 36-44.

unconstitutional because of its underlying Christian religious purpose. In the language of the current religious freedom case law, it violated the state's obligation of religious neutrality.[173] The Court was careful to note, however, that "if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant."[174] When legislation of this kind was at issue the following year in *Edwards Books*,[175] the majority of the court held that the legislation abridged the religious freedom of Saturday-observing retailers, but was justified under s 1 of the Charter. Accordingly, the Court granted no remedy, and was able to avoid answering the question raised in *Big M*.[176] The Court inclined to the legal fiction theory of the corporation in remarking that "a business corporation cannot possess religious beliefs,"[177] but also left open the possibility that the fiction could be expanded to account for the religious beliefs of relevant individuals.

If the *Big M* exception provides one way around the corporate religious freedom question, the SCC's more recent decision in *Loyola* provides another. In that case, a Catholic school established as a corporation applied for judicial review of a ministerial decision with respect to a mandatory curriculum on Ethics and Religious Culture. In response to the argument of Québec's Attorney General that, as a corporation, the school could not make a religious freedom claim, the majority of the Court held that any subject of an administrative decision "is entitled to apply for judicial review and to argue that the Minister failed to respect the values underlying the grant of her discretion as part of its challenge of the merits of the decision."[178] Accordingly, the majority thought it unnecessary "to decide whether Loyola itself, as a corporation, enjoys the benefit of s. 2(*a*) rights, since the Minister is bound in any event to exercise her discretion in a way that respects the… *Charter*-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education."[179]

173 *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16.
174 *R v Big M Drug Mart*, *supra* note 10 at para 42.
175 *R v Edwards Books and Art Ltd*, *supra* note 1.
176 *Ibid* at para 153.
177 *Ibid.*
178 *Loyola*, *supra* note 20 at para 34.
179 *Ibid.*

There are a few different ways to read this passage with respect to the question of corporate religious freedom. Most unsympathetically, perhaps, one might say that despite the passage's claim that it need not decide whether corporations are entitled to religious freedom, it effectively assumes as much by allowing Loyola to assert the claim. In other words, if Loyola is not entitled to religious freedom under the Charter, then the Minister need not consider the school's religious freedom interests in making her decision because it does not have any. Allowing Loyola to make the claim implies that the school, a corporation, has cognizable religious freedom interests under the Charter. Alternatively, one might say that granting a corporation a remedy here is attributable to the differences in approach to the judicial review of legislation and the judicial review of administrative action. One might argue that the Charter values that must guide administrative decision-making give a greater scope for corporations to receive remedies as compared to the Charter rights that limit legislative authority.[180]

Yet another characterization of the *Loyola* ruling is as an apparent acceptance of the aggregate theory of the corporation due to its willingness to view the corporation as representing its members. Arguably, a similar willingness to protect the religious freedom of individuals through their representative institution was at work in the Supreme Court's earlier decision in *Trinity Western University v The British Columbia College of Teachers*. The University, a corporation, was the subject of an administrative decision to deny accreditation by the College of Teachers, but the court saw the dispute as engaging "the religious freedoms of *individuals* wishing to attend TWU."[181] It is perhaps the not-for-profit and religious aspects of these institutions that allow for this apparent slippage into the aggregate theory.

In any event, the two exceptions set out in *Big M* and *Loyola* provide a significant way around the holding that a business corporation cannot possess religious freedom. If a corporation is charged with an offence under any unconstitutional statute, it can rely on *Big M* if the law is wholly

[180] See generally Audrey Macklin, "*Charter* Right or *Charter*-Lite? " (2014) 67 SCLR 2d 561; Christopher D Bredt & Eva Krajewska, "*Doré*: All that Glitters is Not Gold" (2014) 67 SCLR 2d 339; Lorne Sossin & Mark Friedman, "*Charter* Values and Administrative Justice" 67 SCLR 2d 391.

[181] *Trinity Western University v. British Columbia College of Teachers*, *supra* note 83 at para 28.

unconstitutional; if it is the subject of an administrative decision (such as a decision to grant or deny a licence), it can likely rely on *Loyola*. The situations that do not fall within these exceptions are those where a statute has a valid secular purpose but produces effects that unreasonably limit religious freedom. For example, if the court had held in *Edwards Books* that Ontario's secularly motivated Sunday closing legislation was not justified under s 1 of the Charter, this would have been a case not falling within either exception. At such a point, the Court would have been forced to address the possibility that a business operating as a sole proprietorship would have been entitled to a remedy, while the same business operating as a corporation might not have.

The exceptions set out in *Big M* and *Loyola* are consistent with the purposive approach to Charter interpretation that motivated the Court to disregard debates about the nature of the corporation in the cases on free expression, unreasonable search and seizure, and the right to be tried within a reasonable time. Like these rights, we might understand the guarantee of religious freedom to have societal dimensions. As the SCC has held, free expression benefits society by allowing for the proliferation of ideas through which individuals can seek truth and self-fulfilment; ensuring timely trials benefits all, even those not engaged with the justice system, because all members of society have a legitimate interest in the justice system's fairness. Similarly, we all have an interest in ensuring that our society is religiously free and that it "accommodate[s] a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."[182] This is part of the purpose of protecting religious freedom. Even if a law or administrative decision does not affect us personally, we have an interest in fostering a society where individuals and communities are not unreasonably constrained by the interaction of state policies and their religious traditions. More instrumentally, we all have an interest in being exposed to multiple religious viewpoints that provide us with a variety of ways of being in the world and morally evaluating our public and private decisions.[183] The religious freedom guarantee functions, in part, to leave individuals and communities with a meaningful choice to continue to adhere to their religious traditions, the continued existence of which provides

[182] *R v Big M Drug Mart*, *supra* note 10 at para 94.

[183] See Bhiku Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Houndmills: Macmillan Press Ltd, 2000) at 167.

non-community members with partners in dialogue and tools for critical self-reflection.

As to the objection that religious freedom is distinguishable from expressive freedom because of the "inherently and quintessentially individual"[184] nature of religious belief, the SCC has now (rightly, I think) recognized the many collective aspects of religious belief and practice.[185] Sometimes, it may be that the collective aspects of such practices are best represented through an institution with a distinct identity and legal personality.[186] While one might expect religious organizations to be particularly well suited to this role, a large and liberal view of religious freedom should be open to the possibility that some might put their religious principles into action through a corporation, perhaps in concert with others. Accordingly, it would be appropriate for the law's approach to whether corporations can assert religious freedom rights to follow the example set in the expressive freedom jurisprudence, and do directly what the *Big M* and *Loyola* exceptions do indirectly and incompletely. This, of course, would not guarantee success to every corporate religious freedom claimant. The risk that a corporation would illegitimately take advantage of this opportunity is balanced by the corporation's need to prove a rights infringement, and government actors' ability to justify any proven infringement. On the other hand, if corporations can never institute a religious freedom claim, religious freedom violations may go uncorrected. In short, the risk of false negatives is worse than the risk of false positives, which the law can correct through established doctrine.

V. Mechanics: Proving a Corporate Religious Freedom Claim

Should the above arguments prove persuasive and courts allow business corporations to assert religious freedom rights, there remains the difficulty of adapting the sincere belief test from the individual to the corporate context. A minority of the Court in *Loyola* proposed an analytical framework under which religious organizations established as cor-

184 Rajanayagam & Evans, *supra* note 101 at 355-356.

185 *Loyola*, *supra* note 20 at paras 59-61, 92–94.

186 See Howard Kislowicz, "On Collective Constitutional Rights: Lessons for Religious Rights from Language Rights" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis Canada Inc, 2016).

porations could assert religious freedom rights. The main justification for this proposed framework was a recognition that the "freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith."[187] Because of this, reasoned the minority, "a religious organization may in a very real sense have religious beliefs and rights."[188] The minority also relied on the Court's jurisprudence with respect to "freedom from unreasonable search and seizure and trial within a reasonable time, all of which have been held to apply to corporations."[189] This reasoning yielded an adapted form of the general test for infringement of the religious freedom right that would require the organization to prove that "(1) it is constituted primarily for religious purposes, and (2) its operation accords with these religious purposes."[190]

The minority holding in *Loyola* is, of course, not binding case law. Further, its framework applies only to religious organizations, not business corporations. It is remarkable, however, in its theory of the corporation, at least as it applies to religious organizations. The reasoning contains some echoes of the aggregate theory of the corporation because it sees the religious organization as a repository of its individual members' faith. However, the requirements it imposes on organizations to show that they were founded specifically for religious purposes are unlike those imposed on individuals. The Court takes what Kathryn Chan labels a "mission-operation" approach to determining corporate beliefs instead of the "moral-association" approach which would allow the beliefs of members to be the more relevant indicators.[191] In its focus on the mission of the corporation rather than the beliefs of its members, this is more consistent with either the real entity or legal fiction theories. The approach differs from that applied to individuals, who are not required to demonstrate that their beliefs are longstanding or that their observance has been consistent, though these may be factors in the assessment of their credibility. While the minority's framework has the benefit of being a straightforward way to limit the number of potential claimants, the minority does not fully explain

187 *Loyola*, *supra* note 20 at para 94.

188 *Ibid* at para 99.

189 *Ibid* at para 95.

190 *Loyola*, *supra* note 20.

191 Kathryn Chan, "Identifying the Institutional Religious Freedom Claimant" (2017) 95 Can Bar Rev (forthcoming).

why religious organizations should be held to this stricter test. Moreover, it does not explain why the organization must be constituted *primarily* for religious purposes. This seems at odds with the large and liberal approach to Charter rights, which should be open to the possibility that activities can have both religious and secular dimensions. A business might primarily be established to generate profit by selling goods or services, but it might also forego the profit motivation to close on the Sabbath or to refrain from certain kinds of transactions (e.g. charging interest) for religious reasons.

One alternative to this framework is to use several indicators for sincerity of corporate religious belief. In the American context, Brett McDonnell argues that corporations' religious freedom claims should consider both organizational and ownership indicators. The organizational inquiry, which is more important for McDonnell, "looks to various ways in which the corporation, as an organization, has formally or informally committed to following a religious purpose."[192] The most persuasive evidence would start with "a provision in the corporate charter, which must be approved by both the board and the shareholders," and move down through "a provision in the bylaws, which may be approved by either the board or the shareholders on their own," and finally to shareholders' agreements that bind the corporation.[193] Also relevant would be policy statements adopted by a board, choices of goods or courses of action that deliberately reflect religious values, marketing decisions, and formal disclosures.[194] In addition, some have argued that "employees' beliefs and practices are part of the corporation's religious identity" because from "an organizational perspective, employees are an important part of the firm- perhaps its most important set of participants."[195] On the theory advanced here, however, an employee's views are relevant to determining the sincere religious beliefs of the corporation only where the employee is acting as the corporation's directing mind. To the extent that a board or shareholder decision negatively impacts the religious interests of employees, we can expect this to be weighed in the analysis under s 1 of the Charter or through other human rights mechanisms. If the employee requires accommodation of their religious beliefs due to the employers' practices, they can pursue remedies under the governing human rights legislation. If the employee's reli-

192 McDonnell, *supra* note 72 at 781.
193 *Ibid.* at 796-797.
194 *Ibid.*
195 Matthew T Bodie, "Faith and the Firm" (2015) 60 Saint Louis U LJ 609 at 618.

gious freedom interests are engaged by the corporation's position on a generally applicable law (as was arguably the case in *Hobby Lobby*), then the courts can take those concerns into account in judging whether the infringement of the corporation's religious liberty is justified. As a matter of law in Canada, while a board of directors is allowed to take into account employee interests in making its decisions, the board's duty is to the corporation and the employees are not the corporation.

The less important ownership inquiry "looks to the number and concentration of shareholders, and the degree to which they share strongly held religious beliefs."[196] This is relevant, according to McDonnell, because of shareholders' position "as the body that elects the board and their role in amendments to the charter and bylaws."[197] Here, the sincerity of individual shareholders, the degree to which ownership is concentrated in shareholders sharing religious views, and the degree to which shareholder composition is likely to change are all relevant.[198]

McDonnell's framework is quite helpful in the Canadian context. It takes the legal fiction seriously, prioritizing the acts *of the corporation* (usually expressed by the board) in the search for standing to assert a religious freedom claim. It also has the benefit of looking to ownership as non-determinative context. Given the concession/legal fiction theory of the corporation that underlies much Canadian law, simply looking at shareholder beliefs would inappropriately disregard the corporation's legal personality and rely too heavily on an aggregate theory of the corporation.[199] On the other hand, in corporations where share ownership and control is concentrated in the same people, we can expect the court to rely more heavily on those people's own views. Even in such contexts, however, the decisions that matter most will be those made in the individuals' capacity as directors of the corporation.

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196 McDonnell, *supra* note 72 at 781.
197 *Ibid* at 797-798.
198 *Ibid*.
199 See Section III above. For a criticism of *Hobby Lobby* in this regard, see Sepper, *supra* note 80 at 307–308.

Returning to the fictional facts that began this article, we might say that the current state of the law produces a strange result for corporate religious freedom claimants. In the face of a licensing system that requires stores to open seven days a week, our would-be record store owner could certainly make a religious freedom claim if he ran his business as a sole proprietorship. If he chose to incorporate, the corporation could likely rely on the *Loyola* exception if it applied for a licence and was denied one by an administrative decision maker. There may, however, be a difference in treatment that depends on which level of government enacted the rule. Municipal councils are generally treated as administrative decision makers, and so arguably are subject to the *Loyola* exception; if the law were passed by a provincial legislature, the *Loyola* exception would likely not apply because it only applies to administrative decisions and not to the legislation of a provincial or federal legislature. The corporation could likely only rely on the *Big M* exception to obtain a remedy if there was evidence of a religious or anti-religious purpose for such legislation, but this question is still without a definite answer in the jurisprudence.

The *Loyola* and *Big M* exceptions, therefore, provide an incomplete avenue for corporations to make religious freedom claims. To the extent they allow such claims, it is in the name of the societal interest in ensuring that laws and other state action comply with the constitutional protection of religious freedom. I have argued that this societal interest could be understood to fully authorize corporate religious freedom claims in the way that the SCC has consistently allowed corporations to make expressive freedom claims as well as claims based on rights to trial within a reasonable time and rights against unreasonable search and seizure. While some say the idea of a corporation holding a religious belief is nonsensical, nothing about a corporation "makes sense" by this standard. Instead, Canadian law has routinely embellished the legal fiction of the corporation to vest it with a complete juridical personality that holds the rights and obligations arising from its interactions with others. While it might be said that a corporation cannot meaningfully be imprisoned or serve as a witness, the law has developed a mechanism for attributing mental states to corporations, and this mechanism could serve to give religious freedom the large and liberal interpretation required by the case law. This broader protection of religious freedom is of particular concern for members of religious minorities. Such individuals and communities are more likely than others to experience difficulties with generally applicable laws because, as minorities, their

religious interests and needs can be overlooked by legislators in a democracy. Legislators may be perfectly well-intentioned but still pass laws that have a disproportionate and unanticipated impact on the freedom of minority religious groups. Without extending religious freedom rights to corporations, members of religious minorities may be put in the position of choosing between their faith and their financial interests in ways that members of dominant religious groups are not. Extending religious freedom rights to corporations, where the sincere beliefs of the corporation can be proven by reference to its governing documents, the actions of its board of directors, and other contextual factors, will provide a more robust delivery on the Charter's promise of religious freedom.