Collective Religious Freedom as Associational Action: How Sociological Concepts Can Help Make Sense of the Jurisprudence

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Abstract

Religious freedom is protected by section 2(a) of the *Canadian Charter of Rights and Freedoms.* Historically, the right has been understood in individual terms, though the courts have acknowledged a collective dimension to religion as expressed in a community of believers. Yet, the precise meaning of collective religious freedom has not been fully fleshed out. The current case law only encompasses a limited range of forms of collective religious expression and does not articulate a coherent theory as to why some collective 2(a) claims succeed while others fail. This paper draws on concepts from interpretive sociology to help clarify the existing jurisprudence and reveal a tension that is otherwise invisible over the status of volition/voluntariness in the collective religious freedom framework. Addressing this tension can help rationalize the Court's jurisprudence and give resources to critics looking to change how the law encompasses collective religious experience.

Keywords: Constitutional law, Canadian Charter of Rights and Freedoms, social action, interpretive sociology

Résumé

La liberté de religion est protégée par l'article 2 a) de la *Charte canadienne des droits et libertés.* Historiquement, ce droit a été compris en termes individuels, bien que les tribunaux aient reconnu une dimension collective à la religion telle qu'elle s'exprime dans une communauté de croyants. Cependant, la signification précise de la liberté de religion collective n'a pas été entièrement définie. La jurisprudence actuelle n'englobe en effet qu'une gamme limitée de formes d'expressions religieuses de nature collective et n'articule pas non plus une théorie cohérente expliquant pourquoi certaines revendications collectives au titre de l'article 2 a) vont résulter en un jugement favorable alors que d'autres échouent. Cet article s'appuie sur une série de concepts appartenant à la sociologie interprétative afin de non seulement clarifier la jurisprudence existante, mais également de révéler une tension qui reste autrement invisible sur le statut de la volition / du volontarisme

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dans le cadre de la liberté religieuse collective. Aborder cette tension peut aider à rationaliser la jurisprudence tout en donnant des ressources aux critiques qui cherchent à changer la façon dont la loi englobe l'expérience religieuse collective.

Mots clés: Liberté de religion, droit constitutionnel, Charte canadienne des droits et libertés, action sociale collective, sociologie interprétative

I. Introduction

The collective dimension of religious experience is protected by section 2(a) of the *Canadian Charter of Rights and Freedoms*, which reads that everyone has the fundamental freedom of conscience and religion.[1] Historically, the courts have understood this right in individual terms and as a matter of personal volition and choice, though they have acknowledged there are collective aspects to religion expressed in a community of believers.[2] As described below, while some forms of collective religious freedom have been acknowledged by the courts, scholars have argued the prevailing individualist framing does not fully capture the collective aspects of religious experience.[3] So far, courts have approached collective religious freedom in limited ways using the same conceptual tools that are used in individual religious freedom cases. These tools are arguably ill-fitting for collective expressions and practices, and while some recent decisions of the Supreme Court of Canada (the "Court") may have gone some way to try to address the limited recognition of collective religious freedom, there remains no clear sense of what forms of collective expression are included in the Court's conception of religious freedom and which are not.[4] The Court has yet to articulate a coherent theory as to why some collective 2(a) claims succeed while others fail. As such, the lower courts still lack clarity that could help them more adequately encompass collective religious freedom under section 2(a) of the *Charter*.

The sociological perspective can help clarify this ambiguity and express the Court's approach more coherently. In particular, an interpretivist approach is useful because it places importance on subjective meaning and interpretation, which is compatible with the contextual approach of the courts. Drawing on concepts from

1 Section 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"):
Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

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

2 Kathryn Chan, "Identifying the Institutional Religious Freedom Claimant," *Canadian Bar Review* 95 (2017): 707; Victor Muñiz-Fraticelli and Lawrence David, "Religious Institutionalism in a Canadian Context," *Osgoode Hall Law Journal* 52, no. 3 (2015): 1049–1114.

3 Howard Kislowicz, "Freedom of Religion," *Supreme Court Law Review* 7 (2017): 221–33, at 227; Benjamin Berger, *Law's Religion: Rendering Culture* (Toronto: University of Toronto Press, 2016); Richard Moon, "The Accreditation of TWU's Law Program," *Law Matters (CBA – Alberta)* Summer (2015).

4 Muñiz-Fraticelli and David, "Religious Institutionalism."

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interpretive sociology, it is possible to see there is an incoherence in the Court's jurisprudence that is otherwise invisible. It is related to the relevance of individual volition in its approach to collective religious freedom. The paper begins by highlighting some relevant issues in the jurisprudence regarding collective religious freedom, in particular the question of whether an organization can claim the right. It then provides a brief summary of relevant cases, highlighting the judicial reasoning related to the scope and substance of collective religious freedom. The third part draws on concepts from interpretive sociology to understand the different ways the Court has approached collective religious expression. In particular, the concept of "associational action" can help to pull apart the different forms of collective expression that have been identified by the Court. In the fourth part of the paper, this analysis is used to identify unrecognized complexities related to how the Court invokes the idea of individual voluntariness in collective religious freedom cases. It shows how in the context of what is currently understood as collective religious freedom, the Court seems more inclined to protect those forms that are relatively less voluntary. Yet, there also seems to be a limit where the lack of voluntariness behind a collective expression places it outside the scope of religious freedom protection.

II. Who Can Claim Religious Freedom?

Religious freedom cases involving collective claims often involve organizational entities joined by individual complainants. For example, in *Trinity Western University* 2018 (TWU 2018) the complainants were the private Christian university and an individual graduate of TWU who wished to attend its proposed law school.[5] When institutional/organizational rights claimants find individuals to join them to bring the claim forward, it allows the courts to avoid the issues arising from a purely organizational claim, including whether an organizational entity can be the bearer of such a right, or whether it is a form of expression of individual belief.[6] In such cases, courts proceed on the basis of the individual claim and bypass the need to decide the status of the collective claim and/or organizational claimant. The right is characterized in individual terms, and where religious communities have been given some consideration, the courts have generally characterized them as groups of individuals pursuing common ends.[7] Thus, while several courts have alluded to the idea that collective religious freedom exists and some have speculated organizations could be the bearer of such a right, so far no case has been decided on the basis of a collective claim and it is not clear what the scope of such rights might be. This is one of the reasons why the ambiguities in regard to the scope and meaning of collective religious freedom described below have persisted.

The Court's individualist orientation in the context of religious freedom has been critiqued by scholars for excluding collective aspects of religious experience, with some suggesting these exclusions are more likely to impact Indigenous

[5] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 29. [*Law Society of BC v. TWU*]

[6] Chan, "Religious Freedom Claimant"; see also Muñiz-Fraticelli and David, "Religious Institutionalism."

[7] Moon, "Accreditation of TWU's Law Program," 1.

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religious traditions.[8] For instance, Benjamin Berger argues Charter jurisprudence on religious freedom is fundamentally informed by concepts of individual freedom and autonomy. He writes, "religion has force in the eyes of the law to the extent that it is aligned with autonomy and choice…religion has constitutional relevance because it is an expression of human autonomy and choice."[9] Berger suggests this is a problem because a focus on protecting individual choice leaves out aspects of collective religious expression. For example, insofar as religion is conceived primarily in terms of personal autonomy, the courts tend to see it as a private matter with a limited role in public life.[10]

These observations about the individualist framing of religious experience are correct but the situation is more complex. There is an additional tension in the case law related to the status of individual volition *within* the scope of what is included in collective religious freedom. As demonstrated below, when the Court does give regard to the collective aspects of religious freedom, it seems to step away from fidelity to the notion of individual voluntariness in favour of a more institutional understanding of forms of religious expression. In the section that follows, I demonstrate this with reference to recent cases involving claims for collective religious freedom.

III. Distilling the Case Law

The first relevant case is *Trinity Western University v. British Columbia College of Teachers 2001* (TWU 2001).[11] Trinity Western University is a private Christian university based in Langley, British Columbia.[12] It espouses evangelical values and requires students to sign an agreement at admission known as the Community Covenant.[13] The Covenant is a behavioural contract that prohibits students (staff

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8 Benjamin Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015); Lori G. Beaman, *Defining Harm: Religious freedom and the limits of the law* (UBC Press, 2008); Howard Kislowicz, "Freedom of Religion," 227; Moon, "Accreditation of TWU's Law Program."

9 Benjamin Berger, Law's Religion: Rendering Culture, *Osgoode Hall Law Journal* 45, no. 2 (2007): 277–314.

10 Berger, "Law's Religion," 309–10; others have made related arguments that institutions should be entitled to religious freedom and that religious freedom includes the right to impact third parties. See Dwight Newman, *Religious Freedom and Communities* (Toronto: LexisNexis Canada, 2016) and Muñiz-Fraticelli and David, "Religious Institutionalism."

11 *Trinity Western University v. British Colombia College of Teachers*, 2001 SCC 31 [*TWU v. BCCT*].

12 Founded by the Evangelical Free Churches of Canada and America in 1962 *Trinity Junior College Act*, SBC 1969, c. 44.

13 The Covenant is an encompassing code of conduct that, in addition to mundane items, prohibits sexual intimacy outside of marriage between a man and a woman. Excerpts from the Covenant include:

> The TWU community covenant involves a commitment on the part of all members to embody attitudes and to practice actions identified in the Bible as virtues, and to avoid those portrayed as destructive. Members of the TWU community, therefore, commit themselves to…
>
> • Observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce…
>
> In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions…

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are also required to sign) from engaging in "biblically condemned" activities, including "homosexual behaviour."[14] The case began in 1995 when TWU tried to take full responsibility for delivering a bachelor program in education, which up until that point had involved students completing their final year at Simon Fraser University. The British Columbia College of Teachers (BCCT) denied TWU's application on the grounds that without one year in another university, the Covenant meant graduates of TWU would foster discrimination in public schools. Trinity Western appealed this decision to the Supreme Court, which found the BCCT decision infringed TWU's religious freedom.[15] The Court framed the issue as balancing the religious freedom of "individuals wishing to attend TWU with the equality concerns of students in British Columbia's school system."[16] With this lens, it found that without "concrete evidence" that those trained at TWU would themselves go on to create discrimination in public schools, the denial of TWU's application was not justified.[17] Thus, the BCCT's decision infringed TWU's religious freedom because it was not justified in preventing TWU students from associating to put their religious beliefs into practice in post-secondary education. Note, the Court did not base its decision on the assumption that TWU had religious freedom as an organizational entity. Rather, it referred to the rights of individual members of the TWU community as being engaged.[18]

The next case where the Court had the chance to address collective religious freedom was *Alberta v. Hutterian Brethren of Wilson Colony* (2009),[19] which involved a challenge to an amendment to the Alberta *Traffic Safety Act* (TSA), which stipulates every driver's licence requires a photograph of the holder. Since 1973, there had been an exemption for people who object to photos on religious grounds. In 2003, this exemption was removed as part of a governmental plan to create a complete collection of photos for a facial recognition database. At the time, 450 people held non-photo licences and most were members of the Hutterian Brethren, a closed religious community whose members do not believe in having their photos taken. The Hutterian also believe that living a communal lifestyle

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- Sexual intimacy that violates the sacredness of marriage between a man and a woman…

The community covenant is online at <http://twu.ca/studenthandbook/university-policies/community-covenant-agreement. html>

14 *TWU v. BCCT.*

15 *Ibid.*

16 *Ibid.,* at para 28. Emphasis added.

17 *Ibid.,* at paras 4, 35.

18 The dissenting judgment by Justice L'Heureux-Dubé did address whether TWU could claim religious freedom in its own right. L'Heureux-Dubé J. argued that TWU was an organization and not an individual, so the concept of "belief" did not apply. The BCCT's decision did not engage section 2(a) of the Charter at all. Rather, it engaged 2(b), which protects freedom of expression:

> Signing the contract makes the student or employee complicit in an overt, but not illegal, act of discrimination against homosexuals and bisexuals. It is not patently unreasonable for the BCCT to treat TWU students' public expressions of discrimination as potentially affecting the public-school communities in which they wish to teach.

Here the signing of the Covenant is taken as an act of individual expression. *TWU v. BCCT*, at para 93, 99.

19 *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.

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brings them closer to God.[20] This belief extends to economic activities (principally farming), which are largely self-sufficient and do not involve outsiders. The Hutterian argued the TSA amendment forced them to choose between violating their belief against having photos taken or compromising their practice of communal self-sufficiency.

In deciding the case, the Court adopted an individualist frame similar to *TWU*. However, there was no individual joiner with the organizational complainant. Only the Hutterian Brethren as a collective entity was named. This meant it was not easy to bypass the question of the status of the collective claim for religious freedom and the Court had to make at least some comments on the place of such claims in relation to existing jurisprudence. McLachlin CJ writing for the majority, framed the practice of economic self-sufficiency as an expression of individual belief. Such beliefs can be expressed collectively but this does not "transform the essential claim—that of the individual claimants for photo-free licences—into an assertion of a group right."[21] From this characterization, religious freedom flows from individual belief and collective expressions are to be considered at the justification stage of a Charter analysis, only after the scope of the right has been characterized and an infringement has been found.[22] In the Hutterian case, the majority found that the impact of the law on the community's practice of economic self-sufficiency was trivial as there were alternatives for individuals who did not want to get photo driver's licences, such as hiring outside drivers. In contrast, the minority and concurring judgments put more importance on the collective dimension of religious freedom.[23] Abella J characterized the photo requirement as forcing the Brethren to choose between two religious beliefs, one regarding photos and one regarding collective self-sufficiency.[24] She suggests the majority's conclusion that the harm caused by the government's action was trivial fails to appreciate the significance of the practice of self-sufficiency to the integrity and vitality of the religious community.[25] Similarly, Lebel J wrote religious freedom "incorporates a right to establish and maintain a community of faith,"[26] which includes "religious relationships," "communities of faith," and "a [common] way of life… [passed] onto future generations."[27] Both suggest such collective practices are equally central to individual belief in the context of religious freedom and should be considered when determining the scope of the right and not only at the justification stage. Thus, in *Hutterian,* a majority of the Court saw the collective expression of

[20] The Hutterian Brethren are a communal branch of Anabaptists who trace their roots to the Radical Reformation of the 16th century. See https://sites.ualberta.ca/~german/AlbertaHistory/Hutterites.htm#_edn1.

[21] Janet Epp Buckingham, "Drivers Needed: Tough Choices from *Alberta v. Wilson Colony of Hutterian Brethren*" *Constitutional Forum constitutionnel* 18, no. 3 (2010): 109, at 112.

[22] Janet Buckingham writes, "Given that [*Hutterian*] is a split decision by a less than full panel of the Supreme Court of Canada, it is not likely the final word on the place of the communal aspects of religion," Buckingham, "Drivers Needed," 116.

[23] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at paras 163–66.

[24] *Ibid.,* at paras 163–66.

[25] *Ibid.,* at para 167.

[26] *Ibid.,* at para 181.

[27] *Ibid.,* at para 182.

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religion as secondary to individual belief, with a minority suggesting such expressions are protected as collective forms unto themselves.

Loyola High School v. Quebec (AG) (2015)[28] also involved a collective religious freedom claim. However, the form of expression was quite different from that in Hutterian. This case is more similar to *TWU* in that it involved an individual joiner and an organizational entity. The collective expression also took a more formal form. The Loyola case concerned a law that required schools in Quebec to include an Ethics and Religious Culture (ERC) program in their curriculum that was to be taught in an ethically and religiously neutral manner.[29] The law also included a provision allowing the provincial minister of education to grant private schools an exemption to the required curriculum if they had an equivalent alternative. Loyola, a Catholic high school in Montreal, sought an exemption to teach ethics and religious culture from a Catholic point of view. The minister denied the request because the curriculum did not reflect a neutral perspective and thus it did not satisfy the ERC objectives, which related to fostering tolerance and respect for difference. Loyola challenged the decision and was joined by a father of a child attending the school.

This case is interesting in that all judgments took some time to recognize the role of collective expression in religion. For instance, the majority stated religious freedom under the Charter must "account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions."[30] It continued: "the collective aspects of religious freedom—in this case, the collective manifestation and transmission of Catholic beliefs—are a crucial part of [Loyola's] claim."[31] Despite these statements, however, the Court avoided deciding on whether Loyola *as an organizational entity* had religious freedom, instead basing its reasoning on the religious freedom of the individual members of the Loyola community.[32] The concurring minority went in a different direction, suggesting the collective expression of religion is part of the core of the freedom of religion based on the idea that protecting the religious freedom of individuals requires protecting the religious freedom of organizations.[33] It stated "Loyola as a religious organization is entitled to the constitutional protection of freedom of religion"[34] and went so far as to propose a test for organizational claimants of religious freedom adapted from the test for individual claimants articulated in *Amselem*.[35] Thus, the minority in Loyola

28 *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12 [*Loyola v. Quebec (AG)*].
29 *Loyola v. Quebec (AG),* at para 11
30 *Ibid.,* at paras 60–1.
31 *Ibid.,* at paras 61.
32 *Ibid.,* at paras 32–3.
33 *Ibid.,* at para 94.
34 *Ibid.,* at para 88. Emphasis added.
35 *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551, 2004 SCC 47. In place of the sincerity component, the Loyola minority suggested asking whether an organizational entity is constituted primarily for a religious purpose. The modification replaces the subjective component of belief with a question as to the purpose of an organization, which must be assessed "in light of objective facts such as the organization's other practices, policies and governing documents," *Loyola v. Quebec (AG)*, at para 139. It continues: "Therefore, inquiry into past practices and consistency of position

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would have extended the religious freedom framework to say that organizational entities can be bearers of the right.

The Court had the chance to respond again to the status of collective expressions of religion in 2017, when it decided on the case of *Ktunaxa Nation v. British Columbia.*[36] The Ktunaxa Nation had appealed the province of British Columbia's decision to approve a ski resort in an area known as Qat'muk or Jumbo Valley. Qat'muk is not covered by a treaty and British Columbia characterizes it as Crown land.[37] However, the Ktunaxa claim the area as part of their traditional territory. Among other things, the Ktunaxa argued that the province's decision to approve construction of the resort infringed its freedom of religion.[38] Evidence was presented of the community's belief that a Great Bear Spirit resides in Qat'muk and that building a ski resort in the area would destroy the sacredness of the place. The action was brought by the Ktunaxa Nation Council and its Chair on behalf of the people of the Ktunaxa Nation. The claimant is an organizational entity, but also a political community.[39] The Court accepted that the Ktunaxa beliefs about Qat'muk were sincere and that, as a result of the minister's decision, they would lose meaning, which would harm the vitality of the community. However, the majority held the claim fell outside the scope of section 2(a). It iterated the point that religious freedom is intended to protect the right of individuals to hold and manifest religious beliefs; it characterized the Ktunaxa as seeking protection for the Great Bear Spirit itself from third parties. Following from this, it stated, "[t]he state's duty under s. 2(a) is not to protect the object of beliefs…. [T]he Charter protects the freedom to worship, but does not protect the spiritual focal point of worship."[40] In a concurring decision, Justices Moldaver and Côté came to a similar result via a different route. They stated that if part of the purpose of s. 2(a) is to protect the vitality of religious communities, then state action that renders religious beliefs meaningless necessarily infringes religious freedom, regardless of the content of the beliefs. Despite this, however, they determined the minister's decision to

would be more relevant than in the context of a claimant who is a natural person"; Kathryn Chan explores some of the problems with this test: Chan, "Religious Freedom Claimant," 707.

36 This was also the first case where the Court had the chance to address Indigenous religious beliefs in the context of section 2(a); *Ktunaxa Nation v. British Columbia* (Forests, Lands and Natural Resource Operations), 2017 SCC 54.

37 Howard Kislowicz and Luk Senwung, "Recontextualizing Ktunaxa Nation v. British Columbia: Crown Land, History and Indigenous Religious Freedom," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 88, no. 1 (2019): 205–29 at 205.

38 The Ktunaxa also claimed the Crown failed to meet its duty to consult and accommodate under section 35. Thus, the judicial review required consideration of both s. 35(1) of the *Constitution Act, 1982,* and s. 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The s. 35 issues are to a large extent beyond the scope of this paper except insofar as scholars critiquing the court's approach make a point that would have implications for *Charter* interpretation more broadly. See Robert Hamilton and Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult," *Alberta Law Review* 56, no. 3 (2019): 729.

39 The application of the Charter framework by the Court arguably read down the jurisdictional claim to one of political rights, which can be infringed. See John Borrows's work that argues that the case illustrates the existence of different legal cultures within Canada: John Borrows, *Freedom and Indigenous Constitutionalism* (Vancouver: UBC Press, 2016).

40 "The appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. That claim is beyond the scope of s. 2(a)," *Ktunaxa v. British Columbia* (Forests, Lands and Natural Resource Operations), 2017 SCC at para 71.

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approve the development had proportionately balanced the infringement of the religious rights of the Ktunaxa with the duty to manage the land in the public interest.

Shortly after the Ktunaxa case, the Court had its most recent opportunity to consider a collective religious freedom claim. The case once again involves TWU's Community Covenant, which was embroiled in a legal controversy over the same provision at issue in *TWU* 2001.[41] However, instead of seeking to deliver an education program, TWU now wished to open a law school.[42] After some debate, its application had been approved by five law societies (Alberta, Quebec, Saskatchewan, Prince Edward Island, and Yukon) However, British Columbia, Ontario, and Nova Scotia rejected it because of the discriminatory admissions policy. Trinity Western sought judicial review of these decisions and was joined by an individual who wished to attend the proposed law school. They argued the law societies were infringing their religious freedom. The law societies argued that they were fulfilling their duty to act in the public interest. The outcome of the appeals was mixed ,with TWU prevailing in British Columbia and losing in Ontario.[43] Cross-appeals were heard jointly by the Supreme Court in 2018, which upheld the Ontario Court of Appeal[44] decision and reversed that of the British Columbia Court of Appeal.[45] It found the Law Society of Ontario and Law Society of British Columbia had the authority to consider the discriminatory admissions policy in their decision and that both met their duty to balance the religious freedom of the TWU community with the public's equality rights.[46] The Court did not address collective religious freedom directly but did frame the right at stake as belonging to individuals in the TWU community. In fact, the majority was assiduous in linking religious freedom back to individual belief. For example, it stated section 2(a) is engaged because "evangelical *members* of the TWU community sincerely believe that studying in an environment defined by religious beliefs in which *members* follow particular religious rules of conduct contributes to their spiritual development" (italics added).[47] Not once did the Court imply that religious freedom belonged to TWU as an organizational entity. The concurring minority diverged on this point.

41 *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33.

42 Federation of Law Societies of Canada (FLSC), "Canadian Law School Programs" (2019), https://flsc.ca/law-schools/. The FLSC is the national coordinating body for Canada's law societies. The FLSC's Approval Committee makes the determination of whether to accredit a law school. When the Committee assessed TWU's proposal, it received strong reactions from the legal community. FLSC Canadian Common Law Program Approval Committee, "Report on Trinity Western University's Proposed School of Law Program" (December 2013), http://docs.flsc.ca/ApprovalCommitteeFINAL.pdf.

43 The case involving the NSBS was decided on appeal based on issues of administrative law and did not come before the Supreme Court. On appeal it was found that the NSBS's decision was invalid because it was acting outside its statutory discretion. The question of rights was not a central matter. Instead, what mattered was the wording of the NSBS' founding statute and the passing of a retroactive resolution granting the authority to take equality rights into consideration.

44 *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33.

45 *Law Society of BC v. TWU.*

46 It was announced on August 8, 2019, that the Covenant would not be mandatory for students attending TWU's proposed law school.

47 *Law Society of BC v. TWU,* at para 7.

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It argued religious freedom included the right to "express [religious] beliefs in institutional form."[48] Thus, while there was a unanimous ruling in regard to remedy, the separate reasons show that the issues from Loyola remain unresolved.

IV. Conceptualizing Collective Religious Freedom Using Ideal Types

Current Charter jurisprudence is focused mainly on individual volition and autonomy as the foundation of religious freedom and only partially captures the spectrum of collective expressions of religion. However, there are additional tensions in the jurisprudence that conceptual tools from interpretive sociology can help us see, specifically in regard to the meaning of individual volition within the sphere of collective expression. An interpretive approach is compatible with the contextual approach taken by the courts to legal interpretation, which makes it possible to systematize the different forms of collective expression the courts have recognized so far. However, an interpretive approach also reveals how, within the scope of collective expressions protected by religious freedom, there are different forms of individual volition at stake. In what follows, I analyze the jurisprudence using an interpretivst method involving "ideal types" and a handful of sociological concepts pertinent to understanding collective action.

1. Ideal Types as Analytical Tools

Sociologist Max Weber developed a method for analyzing social action based on the construction of ideal types. These are conceptual tools that are based on abstractions of reality and are designed to highlight specific social meanings. For example, Weber offers the ideal type of an instrumental-rational social action, which he defines as "a pure type of the action as it would be if it proceeded in a rationally purposive way."[49] This ideal type is constructed by taking one possible meaning of a social action for the individual—its instrumental or means/ends aspect—and generating a concept of an action imagined as if it were purely instrumentally rational, lacking any other emotional, traditional, or moral meaning for the individual. This abstract ideal can then be used as a conceptual reference point for understanding whether and how this kind of meaning is involved in real social actions. It is important to note the concept of an ideal type does not suggest a moral or normative ideal in any way. Nor does it imagine such an ideal type exists in reality. It is simply a conceptual tool used by sociologists to interpret real social action in a way that is grounded in its subjective meaning.

2. Social Action

The objective of interpretive analysis is understanding social action, which is any behaviour carried out by an individual who "attaches a subjective meaning to [it]—be it overt or covert, omission or acquiescence" and in some way takes into account

48 *Loyola v. Quebec (AG)*, at para 18.

49 Max Weber, "The Nature of Social Action," in *Max Weber: Selections in Translation,* ed. W. Runciman, trans. E. Matthews (Cambridge: Cambridge University Press, 1978), 7–32 at 9.

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other people (past, present, future) and their expectations, feelings, reactions, etc.[50] Actions such as eating, sleeping, and walking are not social actions unless they have a meaning for the individual that in some way takes others into account. Social action is distinguished from action in general by this aspect of subjective meaning relating to others. For example, having one's photograph taken can be a social action, but its meaning must be understood by looking at the context. For an individual who wants to drive, the action could be quite instrumental: having the photo taken is a means to the end of being able to drive on the roads. Conversely, an individual who has a religious belief that having their photo taken has negative spiritual consequences may refuse to have the photo taken despite the instrumental consequences. In this case the social action would be more value-oriented than instrumental. Both examples are equally social action but the use of ideal types lets us see which is more and less instrumental, etc. and categorize actions according to their subjective meaning. Such examples also show how the use of ideal types allows for a flexible and contextual analysis of social action.

3. Social Relationships

Social action can be both individual and collective. Collective social action is characterized by the presence of a social relationship. A social relationship is the behaviour (social action) of a plurality of individuals insofar as its meaningful content is oriented in terms of the meanings of others, and leads to the probability of a coordinated outcome.[51] For example, a legal order can be understood as a social relationship insofar as it involves a plurality of individuals (lawyers, judges, police, law-abiding citizens, criminals) orienting their behaviour in relation to a "belief in the existence of a legitimate order."[52] Legitimacy here does not refer to normative or moral correctness, or even that everyone in the social relationship believes in the legitimacy of the state, but rather that their actions reflect coordination in relation to what they call "law." One could fully reject the morality of a legal order to the point of having no respect for it at all and thinking it should be overthrown.[53] Nonetheless, one is still meaningfully orienting action to the existence of a legal authority in the sense of understanding there is an organized staff of people (the police, etc.) who will enforce it. Similar to social action, social relationships can take a multitude of forms and have varying degrees of formalization and permanence. They can be fleeting, such as a consumer purchase, or as longstanding as an intergenerational way of life They can also take an organizational form, such as a church or educational institution. The common feature of all social relationships is a plurality of individuals orienting their social action in relation to others with the probability of a coordinated outcome.

[50] Max Weber, *Economy & Society: An Outline of Interpretive Sociology*, ed. G. Roth & C. Wittich (Berkley: University of California Press, 1978), at 4.

[51] Weber, "The Nature of Social Action," 26.

[52] Weber, *Economy & Society,* 31.

[53] One individual may be seeking to evade the law while another is trying to adhere to it, yet they are equally in a social relationship to the extent their action is oriented in terms of the subjective meaning of law as legitimate authority.

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4. Associational Social Relationships

There are many types of social relationships, but those pertinent for this paper are "associational" social relationships. Associational social relationships make a distinction between insiders and outsiders (also known as closed social relationships) and have individuals in place for the purpose of maintaining the social relationship.[54] These two elements define an associational social relationship: a distinction between insiders and outsiders and an internal structure of authority. Churches and administrative agencies, such as provincial law societies, represent associational social relationships. They have restricted membership and an organized staff (priests, elected benchers, etc.) that maintain the rules and procedures of the organization. Of course, not all closed social relationships are associational. Romantic relationships are closed social relationships, but they are not associational as long as there is no mutually recognized authority involved. On the other hand, a legal marriage is an associational social relationship because the law regulates how it can be formed and dissolved. There are recognized persons (e.g., family court judges) appointed for the purpose of maintaining these regulations. Thus, the concept of an associational social relationship is broad enough to include organizational entities, informal collectivities, romantic relations, and fleeting encounters.

5. Ideal Types of Associational Action

As is the case for social action generally, to understand the meaning of associational social relationships requires looking at context and the subjective meanings involved. In this regard, the ideal types of "voluntary" and "institutional" associational action are useful. Voluntary associational action refers to an adherence to norms that have legitimacy due to the personal volition of those who are in the social relationship.[55] As an ideal type, voluntary associational action is "at every moment" dependent on the personal choice of the individuals involved.[56] For example, the Hutterian collective practice of self-sufficiency has strong voluntary aspects because it is enmeshed in everyday activities that depend on the sustained personal volition of the individuals involved. In contrast, institutional associational action refers to social relationships that are imposed with relative success "within a specifiable sphere of application…on all activities satisfying certain criteria."[57] In this sense, the ideal type of institutional associational action is a social relationship that applies to a class of individuals. For example, a university code of conduct has strong institutional aspects in that it is a set of regulations that applies to all individuals with the status of student at the university. It is jurisdictional in that unlike an honour code, for instance, its force does not come from the personal volition of individual students who choose to follow it. Of course, there are also voluntary aspects of a university code of conduct (recall ideal types are empirically unreal), such as how students have the option to leave an institution if they do not

[54] Weber, "The Nature of Social Action," 33.
[55] *Ibid.*, 37.
[56] *Ibid.*, 35.
[57] *Ibid.*, 37.

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like its code of conduct. However, since all universities have something similar, it could be argued that this voluntary aspect is perhaps not so pronounced. Similarly, there could also be institutional dimensions to the practice of economic self-sufficiency as described above, for example, formal or informal pressure from other Church members. The ideal types make it possible to systematically identify and assess these different meanings.

V. Voluntarism and Limits to Collective Religious Freedom

How has the Court interpreted the social relationships that are evident in religious freedom cases? Since they do not define their object of analysis in this way, it is necessary to look for how these interpretations surface implicitly in the jurisprudence. As mentioned above, Trinity Western requires that students sign the Community Covenant as part of admission. The Supreme Court's decision in *TWU* 2001 found that without empirical evidence that individuals trained at Trinity Western would go on to foster discrimination in the classroom, there was no basis to deny accreditation to the education program. Using the interpretive lens developed above, the importance of the impact on third parties to how courts interpret collective religious freedom becomes clear. In *TWU* 2001, the court essentially stated that the act of signing the Covenant does not affect anyone except for the students who make the individual choice to attend Trinity Western. The Court believed that since students make the choice to sign the Covenant, being under its authority is an expression of their personal volition. Recall, the ideal type of voluntary associational action is one that continuously depends on the personal volition of the individuals in the social relationship. In this case, the Court seems to have understood the Covenant as a voluntary associational action. However, a university admissions policy, including a behavioural contract, also has an institutional aspect in that it applies to all those who study at the school. In the context of a teaching program, where there are many university options if an individual does not believe in the Covenant, the institutional aspect is arguably less pronounced.

To what extent did the Court regard Loyola's Catholic high school curriculum as voluntary or institutional associational action? Some light can be shed on this by noting how the majority identified two classes of persons affected by the curriculum: teachers and students. Teachers are required to teach it as part of employment, which is an institutional aspect. At the same time, teachers at Loyola are likely to share the religious beliefs that the high school promulgates. Thus, there is also a voluntary aspect to the curriculum, as it is also an expression of the religious beliefs of teachers. From the perspective of students, however, a school curriculum depends less on personal volition and more on their legally dependent status in relation to their parents, who are the ones who chose to put them in a religious school.[58] In this sense, there is a stronger institutional aspect for students than for teachers.

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58 The strength of the voluntary aspect from the perspective of students depends in part on the extent to which one accepts that parents can legitimately make decisions on behalf of children. Some liberal theorists have questioned the absoluteness of this right, and dicta from the judgement in *AC v. Manitoba* (SCC 2009) may also question it, at least with respect to high school students. This debate is not relevant to the present discussion since a different interpretation of autonomy could

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However, at this point a contradiction begins to emerge in the Court's approach. Despite the emphasis on individual autonomy and choice in the religious freedom jurisprudence generally, the Court has shown signs that in the context of collective expressions of belief it is inclined to give more protection to institutional forms of associational action than to voluntary forms. When the Court had to speak to the content of collective religious freedom in *Hutterian*, for example, it seemed to regard the form of collective religious expression at stake as more voluntary than institutional, describing the practice of economic self-sufficiency as a mere tradition that could be adjusted with minimal difficulty. On an imagined spectrum, the associational action in *TWU* 2001 is seen as less voluntary than *Hutterian* but more voluntary than Loyola. This is interesting because it is different from the way voluntariness is emphasized in the context of individual freedom of religion. As discussed above, critics have noted how the Court's individual focus fails to include collective religious experience. Yet, in cases involving collective expressions of religion, the Court's emphasis on voluntariness is not only less apparent but seemingly reversed. Rather than favouring forms of collective expression that have the strongest voluntary aspects, there is a tendency to favour institutional expressions of religious belief.[59]

The case of the Ktunaxa Nation is quite interesting in this regard as it involves what the Court seems to see as the most institutional form of social relationship in the case law so far. Recall the Ktunaxa Nation claim Qat'muk as part of their traditional territory.[60] While much of the Court's reasoning in the case centred on the Crown's duty to consult Indigenous peoples, with respect to the s. 2 (*a*) claim, it proceeded from the assumption that "the Ktunaxa stand in the same position as non-Aboriginal litigants."[61] Indeed, the British Columbia Court of Appeal characterized the Ktunaxa as claiming the right to "restrain and restrict the behaviour of others who do not share that belief in the name of preserving subjective religious meaning."[62] Kislowicz and Senwung note the Ktunaxa's claim to uses of the land did "[threaten] to occupy some of the state's role as the producer of rules that bind others."[63] In this sense, the Ktunaxa claim has a jurisdictional quality, which is strongly institutional.[64] John Burrows has noted how Indigenous religious freedom

be accommodated by the concepts being developed. See Janet Epp Buckingham, "Religious Education and Identity," in *Religious Freedom and Communities*, ed. Dwight G. Newman (Toronto: LexisNexis, 2016), 197–208.

59 Another case that supports this idea but does not involve the infringement of religious freedom by a government action is *Highwood Congregation of Jehovah's Witnesses v. Wall*, a case involving an application for judicial review of a decision of disfellowship by a Jehovah's Witness Congregation in Calgary. That case involved the question of what kinds of actions fall within the jurisdiction of the *Charter*. The Court found that private religious groups have autonomy over their internal membership rules, even in the absence of a formalized organization entity. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750.

60 Kislowicz and Senwung, "Recontextualizing Ktunaxa Nation," 205.

61 *Ktunaxa Nation*, SCC, para 58.

62 *Ktunaxa Nation v. British Columbia* (Minister of Forests, Lands and Natural Resource Operations), [2015] B.C.J. No. 1682, 2015 BCCA 352, at para. 73.

63 Kislowicz and Senwung, "Recontextualizing Ktunaxa Nation," 220.

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

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"could have a strong impact on the government or a third party's rights or interests" because of how the sacredness of land is understood.[65]

Some have argued that the limits the Court has placed on section 2(a) will have a disproportionate effect on Indigenous spiritual beliefs and should be adapted in this light.[66] For example, Bakht and Collins argue any non-trivial state interference with an Indigenous sacred site should be seen to infringe religious freedom.[67] Further, the approval of commercial or industrial development on an Indigenous sacred site without consent and compensation would be unjustifiable under section 1.[68] Putting the substance of the argument aside, the idea of a Charter infringement that cannot be justified under section 1 raises the issue to the level of governmental constitutional jurisdiction. Charter rights can always be infringed by government action when it is justified to do so within the limits of a free and democratic society. The notwithstanding clause in section 33 reflects the supremacy of Parliament in this regard. Even when government actions conflict with Charter rights, the final word belongs to elected officials. Thus, it is a jurisdictional challenge that is reflected in Bakht and Collins's argument. This resonates with the analysis above of the Ktunaxa claim as a strongly institutional associational action.[69] Within the current religious freedom framework, it is the strongest version of institutional associational action in the case law, which the Court places totally beyond the scope of section 2(a).[70]

This suggests the idea of an internal limit to collective religious freedom, which is evident in the *TWU* 2018 case as well There the meaning of the Community Covenant was interpreted differently than in 2001. In *TWU* 2018, the context was a law school rather than an education program and the Court came to a different conclusion regarding the Covenant's impact on the public interest. An interpretive analysis helps us understand why. In *TWU* 2018, the Court cast the Covenant with a less voluntary character. For example, the way it assessed the impact on the public interest in equality put weight on the impact on third parties, which suggests the Court saw the Covenant as an institutional action. Specifically, the Court described it as a barrier to the public's access to the legal profession.[71] It follows from this view

65 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 255.

66 Kislowicz and Senwung, "Recontextualizing Ktunaxa Nation," 218; Natasha Bakht and Lynda Collins, "'The Earth Is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada," *McGill Law Journal / Revue de droit de McGill* 62, no. 3, (2017): 777–812.

67 Bakht and Collins, 812.

68 Ibid.

69 Richard Moon asks whether the failure to give religious freedom protection to Indigenous practices in this case is more "a recognition of the limits of religious freedom in a democratic political community" than an effect of the Court having "a narrow conception of religion," Richard Moon, "Ktunaxa and the Shape of Religious Freedom" (November 12, 2019), available at SSRN: https://ssrn.com/abstract=3502988; see also R. Moon, *Freedom of Religion and Conscience* (Irwin Law, 2014) and "Freedom of Religion under the Charter of Rights: The Limits of State Neutrality," *UBC Law Review* 45, no. 2 (2012): 497–549.

70 Borrows argues that until the multi-jurisdictional nature of law in Canada is recognized, Indigenous religious freedom cannot be achieved via the *Charter*. He makes this comment in the context of a larger project of constitutional reconciliation and development of a plurinational form of federalism that includes Indigenous legal cultures as a source of law. Canada's Indigenous Constitution, 2010 TUP.

71 Dianne Pothier, "An Argument Against Accreditation of Trinity Western University's Law School," *Constitutional Forum* 22, no. 1 (2014): 1–8 at 4.

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that, if some law schools are governed by a discriminatory admissions policy, it could impact the public's access to the profession in a concrete way.[72] In contrast to *TWU* 2001, therefore, the Court characterized the Covenant as having a stronger institutional aspect by putting more focus on how it affected third parties. In finding an impact on the public outside of a volitional social relationship, it drew a limit to collective religious freedom. Thus, there is a difference in the Court's emphasis on voluntariness within the context of collective freedom of religion The results in *Ktunaxa* and *TWU* 2018 suggest that institutional forms of associational action will be protected more readily than voluntary forms however, only up to a certain point. As Ktunaxa shows, after a point institutional associational action no longer garners more protection but falls outside the scope of religious freedom altogether.

VI. Conclusion

The analysis presented above hopes to add to existing scholarship on collective religious freedom by drawing on sociological concepts and the use of ideal types to better understand how the Court interprets collective expressions of religious belief. It is clear the Court has addressed forms of collective expression differently based on the kind of social relationship they are assumed to represent. This understanding makes it possible to systematize the jurisprudence by looking at how the courts evaluate different forms of collective expression based on the meaning they hold within a social relationship. Conceptual resources from interpretive sociology help express the Court's approach more coherently. In particular, the concept of associational action is useful in that it maintains a link between the individual and collective social action and reveals an ambiguity in how the Court understands voluntariness in collective religious freedom claims. Typically, religious freedom is understood in individual terms as a matter of voluntary belief and practice, but within the sphere of collective religious expression volitional forms of associational action receive less protection than institutional forms. At the same time, there is a point beyond which an associational action becomes too distant from voluntariness to qualify for protection at all. Interpretive sociology does not provide an answer as to how courts should address these tensions regarding collective religious freedom moving forward, but it does help clarify the existing jurisprudence and highlight where the meaning and scope of collective religious freedom remain unclear.

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[72] The proposed law school would have created sixty law school spots that effectively discriminated against LGB people through their admissions policy. This translates to approximately 2.4% of available law school spaces in Canada.

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