OUR INNER GUIDE

Protecting Freedom of Conscience

SEPTEMBER 2021

CARDUS *Perspectives*

Cardus is a non-partisan, faith-based think tank and registered charity dedicated to promoting a flourishing society through independent research, robust public dialogue, and thought-provoking commentary.

Cardus Religious Freedom exists to acknowledge the good of religion within our common life as citizens. We accomplish this through undertaking emerging scholarship, facilitating public discussion, and engaging our country's democratic institutions on the fundamental character of religious freedom to our citizenship.

How to cite: "Our Inner Guide: Protecting Freedom of Conscience." Cardus, 2021. www.cardus.ca/research/reports/our-inner-guide-protecting-freedom-of-conscience/.

Head Office: 185 Young Street, Hamilton, ON L8N 1V9 | info@cardus.ca

EXECUTIVE SUMMARY

Freedom of conscience appears in the Canadian Charter of Rights and Freedoms, the Universal Declaration of Human Rights, and many other bills of rights. Yet, despite its universality, this human right is, by and large, universally neglected by courts, legislatures, and policy-makers.

Today, more so than before, reliance on freedom of conscience implicates the interests and rights of other citizens. Owing to modern phenomena such as globalization, many of us live in deeply diverse, multicultural, and plural societies. These current characteristics of many Western societies inevitably increase the prospect of sharp disagreements between citizens on what is good, right, and true—as well as the need to resolve these disagreements. This paper takes up the challenge of grappling with the clash of interests and rights in these cases.

This paper unpacks what freedom of conscience protects, why it is worth protecting, and when it may—and may not—be limited. For the sake of individual flourishing, peaceful coexistence, and liberal democracy itself, we say that freedom of conscience merits robust protection.

We aim to raise awareness of the importance of freedom of conscience in a liberal democracy and alert Canadians to the pressing need for this human right to be afforded due respect. Using current case studies from Canada that engage freedom of conscience, we offer concrete recommendations as to how this human right can be robustly protected at home and abroad.

History teaches that conscience can instigate fundamental social change, for the better. Conscience not only safeguards core convictions—it also promotes moral growth, for individuals and societies alike. Conscience, though inherently individual, is vital to the common good. To realize societies that are just and equitable, it is safe to say that freedom of conscience is indispensable. It is our intention that this paper will contribute to an essential public discussion on freedom of conscience and how we can better shape our laws, and ourselves, in accordance with this neglected freedom.

TABLE OF CONTENTS

INTRODUCTION

More than seventy years after the advent of the Universal Declaration of Human Rights in 1948, a watershed moment for the protection of human rights under the law, some rights remain universally neglected. This paper focuses on one of them: freedom of conscience.

In a previous Cardus paper, "The Imperative of Conscience Rights," we proposed that freedom of conscience—understood as the freedom to live in alignment with our moral and ethical convictions—merits robust protection in a liberal democracy.[1] Such protection is merited by the vital importance of conscience to the flourishing and ethical integrity of individuals and the societies in which they live. With this paper we wish to move beyond that initial first step, toward renewing and cultivating respect for freedom of conscience in Canadian law and among Canadians.

Broadly stated, freedom of conscience sparks controversy in two contexts. The first is when a person refuses, because of conscience, to perform an action that happens to be lawful: the soldier who declines to work at a concentration camp, the pacifist who will not bear arms, or the physician who refuses to euthanize a patient. The second is when a person refuses to do something that would endorse a belief or cause that she conscientiously disagrees with: the journalist who opposes a directive to publish state propaganda, the public official who refuses to take an oath containing statements that he considers dangerous or untrue, or the politician who votes against legislation that she deems gravely harmful to the common good.

How, in a liberal democracy, should we handle these scenarios? When must conscience give way to other considerations in the public square? When should conscience take precedence? This paper tackles these questions. Even when considering these questions, can we accept the fundamental premise that all of us would wish, if we were to find ourselves in any of the scenarios described above, to be free to follow conscience? We at Cardus would argue in favour of such an assertion: that this hope is common to all of us. How can we accept this as objectively true? Because of the immense value that we, as human beings, innately ascribe to living integrally. It is only reasonable, then, that we should support fellow citizens who find themselves in these scenarios—even if we disagree with their convictions of conscience. All of us naturally hope that our fellow citizens would afford us the same treatment if ever the tables are turned.

Article 1 of the Universal Declaration of Human Rights captures this idea well by not only affirming that all human beings "are born free and equal in dignity and rights" but also, fittingly for the topic at hand, that they are also "endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[2] This outlook should

1 Cardus, "The Imperative of Conscience Rights," December 4, 2018, https://www.cardus.ca/research/law/reports/the-imperative-of-conscience-rights/.

2 Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art. 1.

be embraced by all citizens for the sake of individual flourishing, peaceful coexistence, and liberal democracy itself. This paper makes the case for that destination, and explores how we can get there. We aim to raise awareness of the value and significance of freedom of conscience in a liberal democracy, alert Canadians to the pressing need for this human right to be afforded due respect and protection, and propose ways in which that respect and protection can be cultivated and achieved.

This paper proceeds as follows. Part 1 offers a primer on what freedom of conscience protects, why it is worth protecting, and when it can be limited. Part 2 presents three current case studies that engage freedom of conscience. With these case studies in mind, part 3 offers concrete recommendations as to how freedom of conscience should be robustly protected in Canada.

I. A PRIMER ON FREEDOM OF CONSCIENCE

Freedom of conscience appears in s. 2(a) of the *Canadian Charter of Rights and Freedoms*, Canada's constitutional bill of rights.[3] To date, there has been only one court decision in Canada that has relied exclusively on the guarantee of freedom of conscience in the *Charter*.[4] It is fair to say that freedom of conscience is a dormant *Charter* provision. This dormancy is surprising given what the Supreme Court of Canada stated in 1985, in its first decision on s. 2(a). In *Big M Drug Mart*, the Court affirmed the relationship between "respect for individual conscience and the valuation of human dignity" and that an "emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition."[5] One would have expected, reading this early *Charter* case, that freedom of conscience would play a major role in the life of the *Charter*. Yet in the nearly forty years since the *Charter* arrived, this has been far from the reality.

Conscience instantly brings to mind morality, ethics, right and wrong, and an inner voice that urges each person to do good and avoid evil. In popular culture, that voice often belongs to an angel sitting on a person's shoulder while, on the other shoulder, a devil tempts a person to commit evil. While invocations of conscience are often intertwined with invocations of religion, there is a rich tradition, dating back to antiquity, of studying conscience independently from religion. We instinctually say that everyone

3 *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

4 *Maurice v Canada (Attorney General)*, 2002 FCT 69, [2002] FCJ No 72.

5 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 346, 18 DLR (4th) 321.

has a conscience, but not that everyone has a religion. This instinct is expressed in article 1 of the Universal Declaration cited above, which proclaims that all human beings are "endowed with reason and conscience."[6]

Over the centuries, countless individuals have made the choice to follow their conscience despite the adverse consequences of doing so. Many of these individuals, though persecuted in their time, have been seen in a better light later on. Muhammad Ali was stripped of his world heavyweight championship and banned from boxing for three years for his conscientious refusal to fight in the Vietnam War. Ali was arrested, tried, and convicted of evading military service. Desmond Doss, a pacifist who suffered ridicule for refusing to bear arms during World War II, won the US Medal of Honor for his heroism as a combat medic. The Oscar-winning film *Hacksaw Ridge* recounts his story. Thomas More, the sixteenth-century Chancellor of England, lost his head for refusing to recognize the decision of king Henry VIII to split from the Catholic Church. Today pilgrims honour More by visiting the place where his head now lies. That place is an Anglican church in Canterbury—a poignant twist of fate, as the Church of England is what More conscientiously refused to recognize.

Admiration for figures of conscience, regardless of whether one shares their convictions, reveals a shared respect for courage. It speaks to the universality of conscience: each person has one. While most of us will not be forced to choose between life and conscience, we all hope to be free to choose the latter should the scenario ever confront us. The freedom to follow conscience is also valued in the circumstances of everyday life. Most people dread the prospect of being told to violate their core convictions or else suffer some adverse consequence, such as losing a job.

Today, more so than before, reliance on freedom of conscience implicates the interests and rights of other citizens. Conscientious objection to military service does not adversely affect other citizens in an immediate sense, while conscientious refusals to provide lawful health-care services such as abortion or assisted death do. Conscientious refusals to take an oath of citizenship or to pay taxes do not deny something to other citizens, while conscientious refusals to provide a public benefit such as civil marriage do. Contemporary cases of conscience are, in this sense, more delicate than those of the past.

Owing to modern phenomena such as globalization, many of us live in deeply diverse, multicultural, and plural societies. These current characteristics of many Western societies inevitably increases the prospect of sharp disagreements between citizens on what is good, right, and true—as well as the need to resolve these disagreements. This paper takes up the challenge of grappling with the clash of interests and rights in these cases. This clash often involves fundamental concerns such as dignity and harm. At times, those concerns are at stake both for the person who invokes conscience and for the person who is adversely affected by the invocation. An example is the case of the patient who wants an abortion and the doctor who refuses on conscientious grounds to provide one. These are difficult cases. This reality, however, does not diminish the need for guidance on how to reach just outcomes.

This paper focuses on freedom of conscience within the Canadian legal landscape, but the legal protection of this human right in many

6 Universal Declaration of Human Rights, art. 1.

places means that the conclusions here are relevant elsewhere. Freedom of conscience is one of the "fundamental freedoms" in the *Canadian Charter of Rights and Freedoms*. Section 2(a) of the *Charter* guarantees, in one clause, "freedom of conscience and religion." The placement of conscience and religion in the same provision is the norm in major bills of rights: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights follow this form.[7] Freedom of religion has been studied and litigated to a far greater extent than freedom of conscience. The reasons why are likely multifaceted, but it seems fair to suggest that the longstanding nexus between religion and conscience in popular culture, literature, philosophy, and other intellectual disciplines has afforded conscience a strong religious connotation. The result, in modern human-rights discourse, is that the distinct human right known as freedom of conscience has, at best, been a "silent partner" to religious freedom.[8]

This paper contends that freedom of conscience deserves robust protection because of what it protects and why this is protected. This human right should not be limited without compelling justification, because of its substance and rationale. Freedom of conscience protects the freedom of individuals to live in alignment with their core commitments, whether those commitments stem from religious or non-religious sources. Due to the inescapable relationship between conscience and conduct, freedom of conscience is primarily concerned with action. By contrast, the freedom to hold beliefs, moral or otherwise, is guaranteed by other human rights such as freedom of thought, opinion, or belief.

Moral or ethical commitments—matters of conscience—refer to moral principles, or ethical frameworks, and convictions. A detailed account of what constitutes a moral or ethical issue exceeds the scope of this paper, but ethics or morality is instinctually engaged by issues such as life, death, harm, and fundamental personal decisions. It is fair to say that by and large we intuitively know when ethical behaviour or morality is on the table in our daily affairs.

Freedom of conscience is about living in alignment with our core judgments, regardless of where those judgments come from. Why we protect this freedom boils down to the idea that conscience touches on core commitments that sustain our identity and integrity. Conscience, in short, preserves who I am and what I stand for in a fundamental sense. Freedom of conscience enables us to lead lives that are coherent narratives—and the stakes can be high when that freedom is jeopardized. Professionals who find themselves in a crisis of conscience have an unattractive choice to make: abandon a cherished career, or violate these core commitments. When a person betrays these commitments, she inevitably compromises her integrity and identity. This can be a dreadful and inwardly divisive experience.

7 Universal Declaration of Human Rights, art. 18; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 arts 12(3), 13(3) 14, 18(3), 19(3)(b), 21, 22(2) (entered into force March 23, 1976); *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 UNTS 221 art 5 (entered into force 3 September 1953).

8 R. Haigh and P. Bowal, "Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis," *Dalhousie Law Journal* 35, no. 1 (2012): 91.

Moral injury and distress are tangible harms. While moral distress manifests itself in a variety of ways depending on the individual and the nature of the constraint on conscience, the "psychological characteristics of moral distress have been described consistently as involving frustration, anger, guilt, anxiety, withdrawal, and self-blame."[9] The consequences of violating conscience reflect the gravity of such violation. One author writes that "among the worst fates that a person might have to endure is *that he be unable to avoid acting against his conscience*—that he be unable to do what he thinks is right."[10] And another says that "even one instance of acting against one's conscience—an act of self-betrayal—can be devastating and unbearable."[11]

There is a spectrum of ways that the state might interfere with freedom of conscience. On one end is state action that bans activity which happens to complicate a person's pursuit of a core conviction. A person who considers it wrong to eat meat and thus declines to consume this type of food is following her conscience. But laws of general application that happen to incidentally affect the ease with which she can honour this belief, such as a tax on fruits and vegetables to support struggling farmers, do not compel her to violate her conscience. In general, this sort of state interference with conscience does not cause concern in respect of freedom or dignity.

It would be different, however, if the state were to compel—through legislation, for example—all citizens to eat meat or pay a fine. This is the other end of the spectrum of how the state can interfere with conscience, and this end certainly engages the two broad contexts in which conscience makes headlines, described at the start of this paper. Here, the state forces the citizen to perform lawful activity that will require her to either violate her conscience—an act that always causes the citizen to endorse a belief with which she fundamentally disagrees—or suffer a penalty. State action that compels a citizen to do something that violates her conscience or face some sort of adverse consequence is a severe breach of freedom of conscience. The bureaucrat ordered to kill or be killed is a classic example. The person jailed simply for expressing a belief that is unpopular or unwelcome in the eyes of a government is a modern example. Today, Amnesty International identifies such persons as "prisoners of conscience."[12]

In liberal democracies such as Canada, these scenarios—in which freedom of conscience is profoundly and coercively violated—are rarely seen. Today, coercion by the state to violate conscience is more subtle. Do X, or forfeit access to a government program that is funded by taxpayers. Endorse a certain belief through action, or possibly lose your job. The stakes are lower than life or death, but they are still high.

9 E.G. Epstein and A.B. Hamric, "Moral Distress, Moral Residue, and the Crescendo Effect," *Journal of Clinical Ethics* 20, no. 4 (2009): 331.

10 C. Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003), 55.

11 M.R. Wicclair, *Conscientious Objection in Health Care: An Ethical Analysis* (Cambridge: Cambridge University Press, 2011), 11.

12 Amnesty International (Canada), "Prisoner of Conscience," October 5, 2018, https://www.amnesty.ca/category/issue/prisoner-of-conscience.

Choosing to follow conscience in these cases can lead to fines, exclusion from a profession, or unequal access to taxpayer-funded government programs. Conversely, choosing to violate conscience will almost inevitably lead to some degree of self-harm.

When is it justifiable to curtail freedom of conscience? Three principles—harm, human dignity, and undue hardship—are useful touchstones. Only so much can be said here on how these principles function in specific cases, but some guidance can be given. First, disapproval of a person's views or style of life does not injure that person's dignity. If the opposite were true, the scope of permissible discourse and expression in a plural society would be limited to a degree that is antithetical to liberal democracy. The notion that pointed critique of a person's worldview constitutes harm or violence has gained traction in recent years. This notion not only departs from the principled reverence that is afforded to freedom of thought and expression in a truly free and democratic society. More troublingly, this notion is often—if not always—tactically deployed to suppress and exclude views that are unpopular or offensive today rather than substantively engaging with these views in the marketplace of ideas. This shortcut may be convenient and expedient for those who profess views that enjoy the favour of the majority today, but that favour will not necessarily be enjoyed tomorrow. It does not take extensive reflection to appreciate that the weaponization of emotion and offence runs the risk of inviting totalitarian tendencies into a liberal democracy.

Second, freedom of conscience can be limited when a citizen invokes the freedom to negate the essence of her profession—for example, a restaurant owner who refuses to serve a same-sex couple because of their sexual orientation. Third, freedom of conscience can be limited when the claimant refuses, for reasons of conscience, to provide a service if the refusal does not contribute to the claimant's ability to live in alignment with a core conviction. The restaurant owner does not meaningfully manifest his judgment that marriage is the spousal union of one man and one woman by refusing to serve a same-sex couple a meal. Fourth, the principle of undue hardship implies the existence of "due" hardship. Adversity—within limits—is one of the costs of living in a plural, free, and democratic society in which the law protects human rights and worldviews collide. This adversity enables the exercise of those rights by all citizens. Today I may experience adversity for the benefit of a fellow citizen. Tomorrow, the roles may be reversed.

With these broad brushstrokes on the shape and substance of freedom of conscience in hand, we turn now to case studies that will serve to animate the discussion on how freedom of conscience ought to be more robustly protected in Canada moving forward.

II. CURRENT MATTERS OF CONSCIENCE

This paper takes up three case studies—one from health care, one about renting space for an event, and one regarding the publication of an article on a hot-button issue—for the purposes of considering the future of freedom of conscience in Canada. These case studies stem from different contexts and raise different substantive issues, but they are linked by their common implication of freedom of conscience. The range that these case studies presents suggests that matters of conscience can arise in various—indeed countless—situations in our lives. This reality reinforces the urgency with which we must attend to the just resolution of conscience claims.

ASSISTED SUICIDE: IRENE THOMAS HOSPICE

Freedom of conscience, when it makes the headlines, often does so because of conscientious refusals by health-care workers to participate in certain procedures or prescribe certain drugs. The prevalence of conscience in health care is understandable, given that the substance of this field—life, death, and the human body—inevitably and regularly raises moral and ethical issues. With the steady expansion of procedures in Canada such as assisted death, health care is poised to remain a hot spot for the topics of conscientious objection and freedom of conscience.

The Delta Hospice Society, a private organization founded in 1991 to provide end-of-life care, for many years operated a hospice in Delta, British Columbia. The facility, the Irene Thomas Hospice Centre, had ten beds. The BC Ministry of Health and the applicable health authority, Fraser Health, permitted the Irene Thomas Hospice to operate by granting the Society a lease for the land that the facility is located on and by providing funds to cover part of the operating costs.[13]

After assisted suicide arrived across Canada in 2016, pressure mounted on the Society to permit this at the hospice. Nancy Macey, who founded the Society in 1991, had long opposed assisted suicide. She worked to provide palliative care as the hospice's director until she was fired from this role in September

13 The story of the Irene Thomas Hospice has been covered extensively by A. Ruck of the *B.C. Catholic*. See, for example, "Delta Hospice Society Facing Transition, Uncertain Future," March 24, 2021, https://bccatholic.ca/news/catholic-van/delta-hospice-society-facing-transition-uncertain-future; Ruck, "Questions Abound as Hospice Workers Face Deadline to Move Out," February 23, 2021, https://bccatholic.ca/news/catholic-van/questions-abound-as-hospice-workers-face-deadline-to-move-out; Ruck, "Delta Hospice Society Pledges to Fight on as It Faces Layoffs, Eviction," January 19, 2021, https://bccatholic.ca/news/catholic-van/delta-hospice-society-pledges-to-fight-on-as-it-faces-layoffs-eviction; and Ruck, "Hospice Willing to Lose $750K Rather than Allow Euthanasia Onsite," January 17, 2020, https://bccatholic.ca/news/catholic-van/hospice-willing-to-lose-750k-rather-than-allow-euthanasia-onsite. Other articles by Ruck can be found at https://bccatholic.ca/authors/agnieszka-ruck.

2019 by a board that favoured assisted suicide, despite the hospice's founding principles and constitution. After her ouster, a new board was elected in November 2019—in this case, the board opposed the provision of assisted suicide in keeping with a conscientious conviction that assisted suicide does not form part of hospice and palliative care.

Since then, continuing pressure on the Society to betray this conviction led to an attempt to transform the membership of the governing body such that it would be controlled again by individuals who favoured the provision of assisted suicide at the Irene Thomas Hospice. This effort failed, but it did not stop Fraser Health and the provincial government from giving the Society an ultimatum: allow for the provision of assisted suicide, or lose the property that the hospice is situated on. The Society offered to forgo the $750,000 in public funds that it receives and operate solely on the basis of private donations. The relevant public authorities dismissed this offer.

In June 2020, the Society attempted to take the step of becoming a faith-based health-care institution so as to benefit from the present exemption that such institutions enjoy to conscientiously refuse to provide assisted death. Before a vote could be held, the Supreme Court of British Columbia ruled in favour of an application made by detractors of this option to halt the vote on taking this step. The Court, in reaching its ruling, cited a lack of procedural fairness. In March 2021, the Fraser Health Authority assumed control of the Irene Thomas Hospice Centre. As of this writing, the Society is considering other avenues of legal redress.

PROVISION OF GOODS AND SERVICES: STAR OF THE SEA

In Canada, there have been few court rulings on the question of when individuals or organizations may conscientiously refuse to provide goods and services that would amount to endorsing or celebrating LGBTQ rights. In 2005, the BC Human Rights Tribunal decided that a Catholic group could refuse to rent its event hall for the reception of a lesbian couple's wedding if the refusal were courteously communicated.[14] This precedent is poised to be tested by an ongoing lawsuit between an LGBTQ advocacy group and a Catholic community in White Rock, British Columbia.[15]

The White Rock Pride Society, an LGBTQ advocacy group, requested to use the event hall at Star of the Sea Parish for a 2019 fundraiser during pride week. The Society's second annual "Love Is Love" fundraiser, in keeping with its first fundraiser in 2018, sought to "create an event that ties in with the White Rock Pride flag raising ceremony; to promote inclusiveness, diversity and LGBTQ rights." The event in 2018 raised funds for

14 *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544, https://canlii.ca/t/h3930.

15 CBC News, "Pride Society Files Human Rights Complaint After Catholic Parish Refuses to Rent Venue," June 4, 2019, https://www.cbc.ca/news/canada/british-columbia/pride-society-discrimination-1.5161427.

the non-profit organization PFLAG (Parents, Families and Friends of Lesbians and Gays). The event included a "catered meal, live music, auction, emcee, dancing and drag queen performances."[16]

Star of the Sea refused White Rock Pride Society's request to use its event hall for the fundraiser because, in the view of the parish, the proposed use of the space would contradict certain moral teachings of the Catholic Church. The Catholic Church believes that marriage is the union of one man and one woman and that sexual intimacy may occur only within that union. The general stance of Catholicism—and of Pride—on these issues is well known. White Rock Pride filed a complaint against Star of the Sea under the BC *Human Rights Code,* alleging discrimination in the provision of goods and services available to the public. The Society argued that Star of the Sea could not enforce its moral beliefs when renting the hall to the public, and disputed the view that Pride events contradict Catholicism. The BC Human Rights Tribunal, after being asked to dismiss the complaint for having no reasonable prospect of success, ruled that the case from 2005 does not definitively govern the present case. The Tribunal ruled that the case of White Rock Pride merits a full hearing. The hearing of this complaint is scheduled for January 2022.

The Tribunal has also allowed the BC Humanist Association to participate in the proceedings as an intervenor. The association describes itself as an "independent, non-partisan, registered charity that provides a community for the non-religious and campaigns for progressive secular values." The association "supports a secular state where government institutions are strictly separated from religious organizations" and works "to promote progressive values, secularism and works to end religious privilege and discrimination based on religion and belief."[17]

PREFERRED PRONOUNS: *CANADIAN LAWYER* MAGAZINE

In recent years we have witnessed as a potential cause for concern the addition of "gender identity" and "gender expression" to the list of prohibited grounds of discrimination in human-rights codes across Canada. Human-rights codes, broadly stated, prohibit certain kinds of discrimination in contexts such as employment, housing, and services available to the public. In our previous paper, we noted that the validity of any concerns about the

16 *Klassen obo White Rock Pride Society v. Star of the Sea Parish*, 2020 BCHRT 120, https://canlii.ca/t/j7x1f.

17 *Klassen obo White Rock Pride Society v. Star of the Sea Parish (No. 2)*, 2021 BCHRT 18, https://canlii.ca/t/jd1h5.

addition of gender identity and expression to these statutes would depend on how courts and human-rights tribunals interpret these concepts of gender identity and expression, "particularly with respect to the nature of (and relationship between) sex and gender."[18] In other words, much would depend on whether these bodies took a side in the larger debate on matters concerning transgender rights and required citizens to take the same side or suffer some sort of sanction. We also noted that an area to watch would be policies concerning the mandatory use of preferred pronouns. The Ontario Human Rights Commission, in its commentary on Ontario's human rights code, continues to suggest that gender provisions could require an employer to accommodate a transgender employee by using the pronouns that the employee prefers.[19]

In the short amount of time that has elapsed since we flagged our concerns on this topic, policies on preferred pronouns have become increasingly common, even appearing in unexpected contexts. In December 2020, the Supreme Court of British Columbia issued a practice direction to clarify "how parties and/or counsel can advise the Court, other parties, and counsel of their pronouns and form of address."[20] The Court directed that at the beginning of any proceeding, when "parties or counsel are introducing themselves, their client, a witness, or another person, they should provide the judge or justice with each person's name, title . . . and the correct pronouns to be used in the proceeding." The Court also directed that if a "party or counsel do not provide this information in their introduction, they will be prompted by a court clerk to provide this information." The use of the phrase "correct pronouns" rather than "preferred pronouns" in the practice direction is notable. There seems to be a qualitative difference between saying that the pronouns selected by each person are *correct* and saying that these pronouns represent this person's perspective or preference. The state is arguably taking a side in the underlying philosophical and scientific debate on the meaning of sex and gender and is requiring citizens to endorse the same side in order to access the courts.

Shahdin Farsai, a lawyer in British Columbia, authored an opinion article in February 2021 that expressed concerns over the practice direction. The article appeared in *Canadian Lawyer,* a magazine that covers the Canadian legal profession and that "welcomes commentary and op-ed pieces from members of the profession, students, legal academics, judges, and others in the legal community." In her article Farsai argued that directions of this sort "are potentially compelled speech in court, a breach of privacy rights, and damage the perception of judicial impartiality." She noted that "preferred gender pronouns are unavoidably controversial and they are not universally accepted." She went on to write that they are "part of a larger socio-cultural and legal debate over subjective gender identity

18 Cardus, "Imperative of Conscience Rights."

19 Ontario Human Rights Commission, "Questions and Answers About Gender Identity and Pronouns," http://www.ohrc.on.ca/en/questions-and-answers-about-gender-identity-and-pronouns.

20 Supreme Court of British Columbia, "Forms of Address for Parties and Counsel in Proceedings," https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD-59_Forms_of_Address_for_Parties_and_Counsel_in_Proceedings.pdf.

versus objective sex—that is, as a biological reality that conforms to scientific evidence."[21]

Almost immediately after the article was published, fierce criticism of it emerged on social media. Several lawyers and legal academics, some of whom favour transgender rights, decried the article as offensive, transphobic, and harmful. Over two hundred members of the legal community signed a letter that was sent to the editor of *Canadian Lawyer* asking for the article to be removed from the magazine's website.[22] Two days after the article was published, the magazine removed the article from its website. The editor-in-chief of the magazine noted that the article "did not reflect the views of Canadian Lawyer Magazine, Key Media and its related entities."[23] After the removal of the article, certain of the individuals who had called for this step suggested that *Canadian Lawyer* would have to demonstrate how similar articles would be prevented from being published in the future. On social media, many individuals criticized the magazine's decision to remove the article, describing the step as illegitimate censorship.[24]

With the salient facts of these case studies in hand, we turn now to discussing how freedom of conscience should be better—indeed robustly—protected in a free and democratic society.

III. ROBUST PROTECTION FOR FREEDOM OF CONSCIENCE

For freedom of conscience to enjoy greater protection and respect in our society, a paradigm shift must occur in various contexts. Merely enacting legislation or ratifying policies that protect conscience will not suffice; there must also be a change in our personal attitudes on this issue. Before the law gets involved, we as citizens must learn, or relearn, the importance of conscience rights to the flourishing of the individual and society alike. Such a shift would mean that, in the case of Star of the Sea described above, for example, the complaint of White Rock Pride would not have been filed in the first place. The adage "live and let live" must be rediscovered and reaffirmed. It is easy to exhibit a "spirit of brotherhood" when we agree with each other. We must do the same even—

21 An archived version can be found at S. Farsai, "British Columbia's Practice Directions on Preferred Gender Pronouns in Court Are Problematic," *Canadian Lawyer*, February 5, 2021, https://web.archive.org/web/20210206061100/https://www.canadianlawyermag.com/news/opinion/british-columbias-practice-directions-on-preferred-gender-pronouns-in-court-are-problematic/337574.

22 The letter can be found at Letter to the Editor of *Canadian Lawyer*. February 6, 2021, https://docs.google.com/document/d/1XLYsM-aRgN9pytk03VKxY3XCpkqCK51Qr5oeYBTDous/edit.

23 *Canadian Lawyer*, "Statement Regarding a Recent Opinion Posted on Our Website," February 7, 2021, https://www.canadianlawyermag.com/news/opinion/statement-regarding-a-recent-opinion-posted-on-our-website/337574.

24 For more on the case of Shahdin Farsai and the surrounding context, see K. Litzcke, "Gender Activists Co-opted British Columbia's Courts. Meet the Woman Who Stood Up to Them," *Quillette*, May 19, 2021, https://quillette.com/2021/05/19/gender-activists-co-opted-british-columbias-courts-meet-the-woman-who-stood-up-to-them/.

and perhaps especially—when we disagree. Tolerance of beliefs that we reject or actively oppose is a key feature of a free and democratic society, not a sign that such a society is malfunctioning. Tolerance is a fixture of liberal democracy, not a discretionary benefit that the powerful grant to the powerless. Practicing tolerance is often a tall order, but avoiding the alternative—punishing those who dissent from the prevailing opinions of the day—is always a worthy pursuit.

The Supreme Court of Canada gestured to this relationship between conscience and flourishing in *Big M Drug Mart,* wherein the Court noted that an "emphasis on individual conscience and individual judgment" lies at "the heart of our democratic political tradition."[25] Our ability to "make free and informed decisions," the Court went on to say, is the "absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government."[26] These sentences evoke the practice of free votes in Parliament on legislation that deals with sensitive issues, but the Court in *Big M Drug Mart* did not limit its discussion to the halls of power. The Court underlined the "centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system."[27] Notably, the Court appeared to suggest that freedom of conscience not only is guaranteed by s. 2(a) of the *Charter* but also somehow imbues all of the other fundamental freedoms in section 2: freedom of religion, thought, opinion, belief, expression, association, peaceful assembly, and the press.

How do we cultivate a social ecosystem in which conscience is, without recourse to litigation or legal processes, largely respected and afforded ample room to live, breathe, and move? In fairness, it is probably the case that this ecosystem already exists in Canada, at least to a certain extent. Each of us acts on conscience on a daily basis, often without being acutely aware that we are doing so. Many of our conscientious decisions are respected by others, often without their being acutely aware that they are respecting conscience. The challenge for freedom of conscience arises when our conscientious convictions happen to deviate from the majority's opinion on a given issue. Where the issue is seen by the majority to implicate rights, the challenge becomes trickier.

Beyond legislative or policy choices, we must first and foremost rediscover the notion that the principle of tolerance—that idea of live and let live—is fundamental to the "free and democratic society" that Canada aspires to be.[28] Tolerance is by nature an uncomfortable principle, for it asks us to permit the manifestation of viewpoints that we consider to be offensive, wrong, and even abhorrent. Of course, the freedom to manifest these viewpoints cannot be absolute; the state's ability to place reasonable limits on rights and freedoms is essential to liberal democracy. But for freedom of conscience to meaningfully exist and function, we must be prepared to allow beliefs and convictions that diverge from ours to have a place in the public square. We would expect the same courtesy whenever the tables are turned, especially when the convictions are

25 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 346, 18 DLR (4th) 321.

26 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 346, 18 DLR (4th) 321.

27 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 346, 18 DLR (4th) 321.

28 Canadian Charter of Rights and Freedoms, s 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

rooted in conscience and therefore engage our integral humanity. Besides common courtesy, the reality is that this way of living together sits at the heart of liberal democracy. It is one of the conditions of being a member of such a society. At times we enjoy the benefit of this condition, and at other times we bear its burden.

If this grassroots rediscovery of tolerance does not occur, and tolerance thereby fades further and further out of view, our society will inevitably gravitate closer and closer to the so-called tyranny of the majority, or at least to the tyranny of the intolerant minority within the majority. Such a state of affairs not only is antithetical to the essence of liberal democracy but also runs the risk of creating a vicious cycle, in which today's tyrannized minority will be tempted to become tomorrow's tyrannizing majority. Human nature, we can all agree, is flawed. We would do well to avoid inviting these human frailties to take centre stage and become unbridled. The case of Shahdin Farsai, whose article in *Canadian Lawyer* magazine was ultimately removed due to an outcry emanating from antipathy toward her point of view on mandatory pronoun policies in courtrooms, would not be a case available to study if the tolerant and liberal democratic atmosphere that we call for in this paper were already firmly in place. We hope that, in the future, such will be the case.

Apart from the matter of conscience treated by her article, Farsai's case reveals that freedom of conscience plays a vital role in a society that aspires to be just, equitable, and good. Freedom of conscience intersects with freedom of expression insofar as these two fundamental freedoms permit open debate in the public square on matters of fundamental importance. Matters of conscience engage matters of right and wrong, true and false, good and evil. For a society to move toward the right, true, and good, there must be ample room for citizens to express their opinions and beliefs on matters of conscience. Where freedom of conscientious expression on matters is unjustly suppressed, the potential lessons to be learned and wisdom to be gained from the content of the expression are lost. Private media outlets are certainly entitled to choose which opinions they will publish and not publish, but in a liberal democracy they should strive for even-handedness and it should only be in the rarest of cases that published opinions are subsequently deleted. Farsai's article is a far cry from one of these rare cases.

As for how a rediscovery of tolerance and other cornerstones of liberal democracy can occur, we must engage each fellow citizen of goodwill, in good faith, to remind them (and ourselves) of these first principles of the sort of society that we desire. This essay serves as just one medium by which to undertake this engagement. The provision of space by media outlets for opinions that cut against the prevailing or popular opinion on a given matter is another way to reaffirm our basic commitment to discourse and debate, rather than coercive and dictatorial approaches, on matters of shared concern.

What is most important is that discourse on tolerance and other bedrock principles of liberal democracy take place across and throughout society, from the halls of power to university classrooms to workplace corridors and beyond. These bedrock principles are being increasingly forgotten or ignored, to the detriment of many unpopular viewpoints today. Should these principles fade too far out of view, we fear that the unpopular viewpoints of tomorrow and beyond will also be prone to suppression and that the persons who hold them will be subjected to ostracization.

If the rediscovery of the essential ingredients of a free and democratic society occurs through civil discourse and debate, many if not all of the remaining recommendations in this paper—all of which implicate state action—will not be necessary. We recognize that such a comprehensive shift in attitudes and dispositions among the citizenry is not likely to occur without state-sponsored safeguards, but it is also true that any movement in this direction, no matter how small, will only better the prospects for freedom of conscience in Canada.

CREATE CONSCIENTIOUS OBJECTION POLICIES WITHIN HEALTH-CARE PROFESSIONS

Besides the need to increase and enhance our public discourse on freedom of conscience as a means to change our attitudes and everyday behaviour in respect of this fundamental freedom, there is certainly a role for legislation and public policy to play. Beginning with health care, the field in which controversy over freedom of conscience most often arises today, we call on regulators of the various health-care professions—physicians, nurses, pharmacists, and others—to craft and adopt robust conscientious-objection policies.

By robust, we mean policies that encompass the freedom to refuse to provide referrals for procedures or prescription drugs in addition to the freedom to refuse the actual provision of these procedures or administration of these drugs. In general, across Canada the current state of affairs on this front is that health-care workers may conscientiously refuse to perform certain procedures or prescribe certain drugs. The main point of contention, however, is referrals. Referrals are problematic for some health-care workers because, in their view, they amount to material cooperation—significant complicity—with immoral or unethical activity. The proximity of a referral—finding a person willing to perform the procedure—to the procedure itself lends credence to this view about complicity. Alternatives to mandatory referrals for procedures that commonly attract conscientious objection can reconcile patient access to the full range of lawful services with the moral and ethical freedom of health-care workers to avoid becoming complicit in delivering them.

CARE COORDINATOR SERVICES AND ONLINE REGISTRIES

Given that the procedures or drugs that often attract conscientious objection are easily identifiable, one alternative to referrals is a public office to manage controversial procedures. For assisted suicide, Alberta created a "care coordination service" to facilitate access to this procedure.[29] Another option, which appears to be not yet implemented in Canada, is to create an online database that can indicate which physicians are willing to perform particular procedures that attract conscientious objection. The website of the public regulator of physicians

29 Alberta Health Services, "Medical Assistance in Dying Care Coordination Service," https://www.albertahealthservices.ca/assets/info/maid/if-maid-coordination-teams.pdf.

in Ontario already has a searchable database of physicians, with customizable search criteria such as the physician's gender and language.[30] It would not be onerous to add search criteria for the relatively few services that are known to attract conscientious objection. Each of these policy options inflicts less harm on the freedom of conscience of health-care workers than do obligatory referrals. They are, by all accounts, inexpensive and effective. There is no evidence that these measures would impair access to procedures or that they would be inferior in this regard when compared to referrals.

Care coordination services and online registries can function well in cities and suburbs but not in rural locations where no doctor will perform assisted deaths or refer for this procedure. Some might argue that, in these circumstances, the doctor must at least refer for the procedure—if not perform it. Or perhaps the state should pay to bring a doctor to that community to perform these procedures when they are requested. We would argue, however, that if no doctor lives in the community, such a step would go beyond what is normally provided for other procedures. Residents of remote communities often absorb costs associated with travelling elsewhere for procedures that are not available in their community. Neither health care in general nor specific procedures that are delivered through the health-care system are freestanding *Charter* rights. While some may find it odd that a standard of delivery for procedures such as abortion and assisted suicide would differ from the standard for chemotherapy or open-heart surgery, such an approach does seem to be available to the state.

Some will argue that the state should not be expected to pay for a doctor to visit a rural community when another doctor already works there but conscientiously refuses to perform a procedure. The state, however, does not force health-care professionals to live in certain places. They are not deployed like members of the armed forces, and they are not employed by the state. What, then, justifies requiring the only doctor in a rural community to violate her conscience if she will not perform certain procedures (assuming that the procedures fall within her clinical competence) when referrals would be futile on account of geography and a lack of appropriate alternatives? In the absence of a *Charter* right to health care in general or to specific health-care services, the justification for limiting the freedom of conscience of that doctor appears to be absent. The norm in Canada—and in most other liberal democracies—is to allow physicians to conscientiously refuse to perform procedures, regardless of where the physician resides. According to the mandatory "effective referral" policy in Ontario that has generated litigation, the only doctor in a small town may conscientiously refuse to perform a procedure (as long as he refers).[31] Where that doctor refuses to refer, an online registry or care coordination service would be equally effective in terms of identifying willing doctors—regardless of whether the patient lives in a large city or a small town.

Inequitable access, we must recall, is both a flaw and a feature of Canada's public health-care system. Quality of access varies across provinces, between urban and rural settings,

30 College of Physicians and Surgeons of Ontario, "Doctor Search," https://doctors.cpso.on.ca/?search=general.

31 College of Physicians and Surgeons of Ontario, "Professional Obligations and Human Rights," https://www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Professional-Obligations-and-Human-Rights.

The state realistically cannot provide instant or problem-free access to health care. If that reality is tolerated on account of funding constraints and geography, why refuse to tolerate it for the sake of a basic human right?

and depending on the procedure. The state realistically cannot provide instant or problem-free access to health care. If that reality is tolerated on account of funding constraints and geography, why refuse to tolerate it for the sake of a basic human right? If services such as abortion or assisted suicide are brought to the patient, what is the compelling justification for facilitating access to these services to a greater extent than for chemotherapy, heart surgery, or dialysis? Many Canadians must travel to obtain these latter services. It is one thing to not tolerate conscientious objection if it hinders access to health-care services—though, even in that scenario, there remains a good case for accommodation. The refusal to tolerate the exercise of freedom of conscience in health care is particularly difficult to justify given, as the Divisional Court of Ontario accepted, that there is "no study or direct evidence that demonstrates that access to health care is, or was, a problem that was caused by physicians objecting on religious or conscientious grounds to the provision of referrals for their patients."[32]

The leading court decision on referrals is the subsequent ruling of the Ontario Court of Appeal in the same legal proceeding cited above. The Court concluded that, with respect to physicians, mandatory referrals do not unjustifiably infringe the *Charter* rights of conscientious objectors. Notably, this case barely considered freedom of conscience and instead relied on religious freedom. In a ruling of 188 paragraphs, only six are specifically dedicated to freedom of conscience. There remains a dire need for courts in Canada, along with lawyers and litigants, to squarely raise and consider freedom of conscience in cases that inescapably engage this human right.[33]

While health-care professionals in Canada are generally free to not participate directly in lawful medical services that they deem immoral or unethical, it is not outlandish to harbour concern about the current trajectory of this issue in Canada. Today the point of contention is referrals, but the future may well consist of challenges to the core of conscientious objection in health care: that professionals and institutions working within certain sectors of health care must provide certain procedures or else they will not be authorized to provide anything at all. The experience of the Irene Thomas Hospice suggests as much. It does not take more than a cursory review of the comments posted below any news article on conscientious objection in health care to realize that the notion that health-care professionals

32 *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at para 147, https://canlii.ca/t/hq4hn.

33 *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393, https://canlii.ca/t/j08wq.

should provide all lawful health-care services or exit their profession has gained and continues to gain steam.

If there is an area of the public square in which freedom of conscience should be robustly granted and reluctantly curtailed, health care is it. The basic motivation for conscientious objection is that the health-care service at issue does not help but harms: it injures health and is not care. Physicians who conscientiously refuse to intentionally terminate a patient's life do so because health care, in their moral or ethical judgment, excludes killing. Health care, in their view, seeks to alleviate suffering while preserving life. Accordingly, removing reflection from health care may adversely affect patient care. If health care is laden with moral and ethical issues, it is dangerous to restrict the moral or ethical agency of health-care workers. The idea of health-care professionals assuming the posture of uncritical bureaucrats rather than morally and ethically sensitive health-care providers is unsettling, given the nature of their work. Conscientious objection in health care implicates procedures and drugs such as abortion, contraception, assisted suicide, assisted reproduction, and sex reassignment. The number of procedures and drugs that attract conscientious objection is extremely small when one considers the vast range of services that fall under the category of lawful health care in most countries.[34]

ENACT LEGISLATION TO PROTECT CONSCIENTIOUS OBJECTION

If or where regulators of health-care professions are unwilling to adopt robust conscientious-objection policies, we call on legislatures to enact legislation that enshrines conscientious objection for these professionals into law. In November 2017, the province of Manitoba enacted legislation of this sort in respect of assisted suicide. The legislation, the *Medical Assistance in Dying (Protection for Health Professionals and Others) Act,* explicitly protects individuals who refuse to participate in the provision of assisted suicide on the basis of conscientious convictions.[35] Legislation of this sort should be adopted in other provinces—certainly where professional regulators refuse to safeguard the freedom of conscience of their membership, and perhaps in any event. It seems fair to say that the policies of these regulators of health-care professionals are more prone to amendment and even repeal than are laws enacted by a legislature.

GIVE PROPER MEANING AND DUE PROTECTION TO FREEDOM OF CONSCIENCE IN THE COURTS

Failing the adoption of conscientious-objection policies or legislation, we call on the judiciary to afford proper meaning and due protection to freedom of conscience where this freedom is either specifically raised in litigation or inescapably at issue. In the litigation in Ontario that challenged the constitutionality of mandatory effective referrals for physicians in that province, the Ontario Court of Appeal

34 S.J. Nordstrand, M.A. Nordstrand, P. Nortvedt, and M. Magelssen, "Medical Students' Attitudes Towards Conscientious Objection: A Survey," *Journal of Medical Ethics* 40, no. 9 (2014): 609, https://jme.bmj.com/content/40/9/609.

35 *The Medical Assistance in Dying (Protection for Health Professionals and Others) Act*, SM 2017, c 38, https://web2.gov.mb.ca/bills/41-2/b034e.php.

essentially took a pass on considering the implications of this policy on freedom of conscience. While the litigants focused their claim on religious freedom, surely freedom of conscience merited more than a few paragraphs in a case that specifically dealt with *conscientious* objection. If a similar claim comes before the courts in the future, we urge the judiciary to meaningfully consider what has to date been a forgotten fundamental freedom in Canada.

SAFEGUARD CONSCIENTIOUS OBJECTION FOR INSTITUTIONS

To be clear, we take the position that the policy and legislative recommendations concerning health-care *professionals* described above should equally be adopted, enacted, and respected in relation to health-care *institutions* that, owing to their identity and mission, conscientiously refuse to be involved with particular procedures or drugs. These recommendations, in other words, ought to protect an institution in the position of the Irene Thomas Hospice. The hostility that has been directed toward this institution on account of its conscientious refusal to provide assisted suicide within its facility reveals the dire need for counteractive state action immediately. In the case of the Irene Thomas Hospice in particular, we call on Fraser Health and the province of British Columbia to reverse its decision and permit the hospice to return to the provision of what it considers to be excellent, dignified, and ethical end-of-life care.

Accommodating conscientious objection in health care supports pluralism and sustains diversity. If the state bars conscientious objection to abortion, for example, not only will persons who conscientiously oppose abortion find themselves excluded from the medical profession, but patients who oppose abortion will lack access to like-minded physicians and other health-care workers to whom they may want to entrust their care. Detractors of conscientious objection in health care at times argue that this practice creates disparities in health-care delivery and disadvantages vulnerable communities, but this critique is premised on a particular vision of what counts as health care, and it lacks the necessary nuance. These detractors are in fact saying that conscientious objection to services *permitted by law to be delivered through the health-care system* impedes access to these services. This position overlooks the constitutional guarantee of freedom of conscience as a fundamental freedom, the importance of ethical reflection within health care, and the role of the state in accommodating this freedom through devising alternative ways to deliver these services. Moreover, this critique neglects to consider the benefit of making room for health-care providers who do not automatically equate "lawful" with "ethical." A health-care profession that holds a diversity of moral and ethical beliefs is sensible for a morally and ethically diverse society.

Many health-care workers view their work as more than just a job or career. The practice of medicine has existed since antiquity. The Hippocratic Oath, the classic statement of ethics for physicians, dates to the fourth or fifth century BC. For many, joining this profession was a response to a calling. To them, it is a vocation. We have been starkly reminded of this truth in the era of the COVID-19 pandemic. Health-care workers have gone above and beyond, day in and day out. Besides working tirelessly to heal persons afflicted by the

COVID-19 pandemic, they have comforted patients in their suffering and at the moment of death in lieu of family and loved ones who are not allowed to be present.

The COVID-19 pandemic has reminded us, in dramatic fashion, that the true purpose of health care is to preserve life and ease suffering. From the outset of the pandemic, our almost involuntary instinct has been to spare no expense or precaution to save lives. It seems particularly disturbing to imagine legalizing euthanasia in this moment, let alone expanding access to euthanasia if it is already legal. Even so, this is precisely what happened in Canada.[36]

Procedures and drugs that attract conscientious objection often require difficult and painful decisions for all involved. In the case of abortion, a woman's body, psychological integrity, life, and the future are at stake. However, physicians who conscientiously refuse to perform abortions do so because the body, life, and the future of the fetus are also at stake—not to mention their own moral, ethical, and psychological integrity. The focus of health care is undoubtedly the well-being of the patient, but health-care workers are not—and given what is at stake in health care, should never be—robotic functionaries. They are human beings, with human rights, and must not be instrumentalized.

Shifting from health care to the marketplace, we urge provincial legislatures to amend their human-rights codes so that these laws explicitly permit institutions that, owing to their identity and mission, conscientiously refuse to provide goods or services so as to not betray their moral or ethical compass. In other words, these laws should clearly entitle a group or institution, whether religious or non-religious, to refuse to lend its facilities or support to an event or cause that contradicts the worldview of the group or institution. It is troubling that the case of Star of the Sea and White Rock Pride became litigious. Anti-discrimination laws are not tools for coercing others to adopt our own worldview—be it liberal, conservative, progressive, or another. They do not empower majorities to ostracize minorities. These laws, in the context of providing services to the public, target invidious and unjust discrimination. If we wish to convince others of our views on a given issue, we should use the proper means in a liberal democracy: dialogue, debate, and discourse.

Anti-discrimination laws are not tools for coercing others to adopt our own worldview —be it liberal, conservative, progressive, or another.

If we are prepared to require Star of the Sea to rent its event hall to White Rock Pride, we must be prepared to do the same if the tables are turned. We must, in other words, be even-handed in this regard. What if White Rock Pride owned an event hall and, like Star of the Sea, rented it out for various functions in service to the community? What if Star of the Sea did not

36 J. Bryden, "Canadian Senate Passes Bill C-7, Expanding Assisted Dying to Include Mental Illness," *Global News*, March 17, 2021, https://globalnews.ca/news/7703262/canada-senate-passes-bill-c-7/.

own a hall and asked to use White Rock Pride's facility for a gala to promote Catholic beliefs on marriage and family? In our view, White Rock Pride should be entitled to refuse the rental. It would be unjust, even cruel, to require White Rock Pride to grant Star of the Sea a platform on its own turf to advance these beliefs. If that is true, it is unjust to require Star of the Sea to rent its hall to White Rock Pride. In a free and democratic society, it is coherent for—and even expected that—a person may reject Star of the Sea's beliefs on marriage and family and yet support the parish's refusal to rent its hall to a group holding opposing beliefs and wanting to use the hall to advance them. This case ought to be resolved in favour of the Catholic parish. To use the language of the BC *Human Rights Code*, we submit that the parish possessed a "bona fide and reasonable justification" for refusing the request of White Rock Pride.[37]

ENSURE HUMAN-RIGHTS CODES COMPLY WITH THE *CHARTER*

Beyond institutions and groups with a mission statement, exemptions from the requirements of human-rights codes for individuals in the contexts of employment, accommodation, and commerce should also be afforded greater consideration. Human-rights codes, being statutes enacted by legislatures, must comply with the *Charter*. Canadian courts have rarely considered the claim that human-rights codes unjustifiably limit *Charter* rights. Most of the codes predate the *Charter*. These codes do not expressly balance the exercise of *Charter* rights by individuals in their profession against the goal of combatting discrimination. This is so even in the human-rights codes of Saskatchewan and Quebec, each of which features a bill of rights (that guarantees human rights such as freedom of conscience and religion) as well as anti-discrimination provisions.

The case of Scott Brockie and Ray Brillinger is one of the rare instances in which a Canadian court has considered whether anti-discrimination provisions in a human-rights code comply with the *Charter*.[38] Brockie was the president of Imaging Excellence, a commercial printer in Toronto. Brillinger was the president of the Canadian Lesbian and Gay Archives. The Archives asked Imaging to print official letterhead, envelopes, and business cards, but Brockie refused due to his religious belief that homosexual activity is sinful. Brockie testified that Imaging serves LGBTQ customers, but he refused to provide services that in his view promote homosexual activity. The Archives sued under Ontario's *Human Rights Code,* arguing that Brockie discriminated against it on the basis of sexual orientation. The Ontario Human Rights Commission agreed and ordered Imaging to provide the services and to pay $5,000 in damages.

Brockie appealed, arguing that the *Human Rights Code* unjustifiably limited his freedom of religion in the *Charter*. The Divisional Court of Ontario upheld the lower decision, with one proviso. The Court concluded that the "objectives under the anti-discrimination provisions of the *Code* must be balanced against Mr. Brockie's right to freedom of religion and conscience."[39] The Court varied the decision so that Brockie would not be required to "print material of a nature which could reasonably be considered to be in direct conflict with

37 *Human Rights Code*, RSBC 1996, c 210, s 8(1), https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96210_01.

38 *Brockie v Brillinger (No. 2)*, 2002 CanLII 63866, 22 DLR (4th) 174 (Ont Sup Ct J Div Ct), https://canlii.ca/t/g9p1z.

39 *Brockie v Brillinger (No. 2)*, 2002.

the core elements of his religious beliefs or creed."[40] The Court offered an example: material that "conveyed a message proselytizing and promoting the gay and lesbian lifestyle or ridiculed his religious beliefs."[41]

The broader issue in *Brockie* is whether individuals may refuse in commercial contexts to endorse a cause or an event that betrays their core convictions. What if the organization that requested printing services was an anti-abortion advocacy group with a religious affiliation? What if, instead of opposing abortion, the group opposed same-sex marriage? If the printer held the conviction that abortion or same-sex marriage should be lawful, what should happen if that group requested printing services for a public rally? Unless the exemption that was judicially carved out in *Brockie* takes hold, the printer would, by refusing to provide printing services, commit unlawful discrimination on the basis of religion. It is disquieting that this business owner would have to choose between lending her support—and her professional talents—to a cause that she fundamentally disagrees with, and facing punishment under human-rights codes and even resigning. Conscience-based exemptions in human-rights codes merit deeper consideration.

AVOID COMPELLED IDEOLOGICAL SPEECH

In the case of preferred pronouns, we call on state authorities to refrain from enacting legislation or adopting policies that require individuals to affirm or use the pronouns with which another individual wishes to be addressed. Where the state has enacted such legislation or adopted such policies, they should be repealed. In the case of human-rights codes, guidance should be provided that a refusal to use preferred pronouns does not constitute discrimination on the basis of gender identity or gender expression. It is one thing to refuse to employ an individual, or provide them goods and services, on account of their gender identity or gender expression. It is another thing entirely to require citizens to use language that is arguably tantamount to taking a side in the persisting and unresolved debate on gender and sex. Deeming preferred pronouns to be "correct" and subsequently enforcing their use represents the state "taking sides in a legal, political, and philosophical dispute" over matters pertaining to gender and sex. It is troubling that in British Columbia, taking a side in such a dispute has become a precondition for accessing the courts—a "fundamental right" of citizens who live in a society ruled by law.[42]

We agree that to compel the use of preferred pronouns is "to insist that people can own and control how others regard them, and to force them to reflect a particular view of reality."[43] It can hardly be said that debates surrounding transgender issues are settled and uncontested.

40 *Brockie v Brillinger (No. 2)*, 2002.

41 *Brockie v Brillinger (No. 2)*, 2002.

42 *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214 at 219.

43 B. Pardy, "B.C. Courts Asking for 'Correct Pronouns' Is State-Mandated Identity Politics," *National Post*, February 9, 2021, https://nationalpost.com/opinion/bruce-pardy-b-c-courts-asking-for-correct-pronouns-is-state-mandated-identity-politics.

In fact, the opposite is true: these issues remain thorny and controversial. The state should not intervene in ways that compel individuals to effectively adopt a public position in this debate, especially where that position happens to contradict the actual viewpoint of a given individual.

Before concluding this paper, we believe that it is worth noting that policies on preferred pronouns and other concepts pertaining to transgender issues have rapidly become commonplace in the private sector. It is now common for workers, students, and volunteers to be asked in various contexts to announce their preferred pronouns and to refer to others by their preferred pronouns. It is notable that the public debate on these issues prior to the ratification of these policies at work-places, universities, and elsewhere has been less than robust.

Court rulings rather than civic dialogue, along with the labelling of certain views as progressive and the labelling of contrary views as regressive, have done the heavy lifting to build the political consensus that is said now to exist on these issues. The decision of some, if not many, individuals to remain silent and toe the line—perhaps out of fear of negative social or professional consequences flowing from exposure as a proponent of "regressive" views—is likely also a factor in this apparent consensus. Just as the state ought not to settle controversial issues through requiring citizens to publicly take a side, the private sector should also exercise restraint. We call on private entities to abandon mandatory pronoun policies and for provinces to consider amending human-rights and employment legislation to prevent disciplinary action against individuals who decline to comply with these policies.

CONCLUSION

In this paper we have proposed that freedom of conscience should be afforded robust protection in a free and democratic society, and we have offered proposals for how this standard of protection can be realized in contexts ranging from health care, to the marketplace, to how we address one another.

Before limits to freedom of conscience are imposed in the name of progress, we should acknowledge that societies have made mistakes in the past and might do so today. Humility is a virtue for wielders of public authority because human beings are fallible. We may sincerely perceive a certain cause or idea to be good and true—and it may well be. For persons such as Martin Luther King Jr., Nelson Mandela, and Mahatma Gandhi, the causes and ideas that they opposed were, at the time, widely thought to be legitimate and even righteous. Thanks to

their exercise of conscience, today we recognize those causes and ideas as instances of evil and injustice. On many occasions, the individual exercise of conscience has transformed societies for the better. As the Reverend King once said, there "comes a time when one must take a position that is neither safe, nor politic, nor popular, but he must take it because conscience tells him it is right."[44]

At times, private conscience must yield to public authority. But even where that is the proper course of action for the sake of the common good, the state should take care not to devalue the exercise of conscience. The humility that enables the recognition of a society's failings is unlikely to emerge if recourse to conscience is denigrated. History teaches that conscience can instigate fundamental social change, for the better. Freedom of conscience not only safeguards core convictions but also promotes moral growth, for individuals and societies alike. Conscience, though inherently individual, is vital to the common good. In order to realize societies that are just and equitable, it is safe to say that freedom of conscience is nothing short of indispensable. May this paper inspire us to shape our laws, and ourselves, accordingly.

44 M.L. King, Jr., "A Proper Sense of Priorities," speech given in Washington, DC, on February 6, 1968, http://www.aavw.org/special_features/speeches_speech_king04.html.

REFERENCES

Alberta Health Services. "Medical Assistance in Dying Care Coordination Service." https://www.albertahealthservices.ca/assets/info/maid/if-maid-coordination-teams.pdf.

Amnesty International (Canada). "Prisoner of Conscience." October 5, 2018. https://www.amnesty.ca/category/issue/prisoner-of-conscience.

B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 SCR 214.

Brockie v Brillinger (No. 2), 2002 CanLII 63866, 22 DLR (4th) 174 (Ont Sup Ct J Div Ct). https://canlii.ca/t/g9p1z.

Bryden, J. "Canadian Senate Passes Bill C-7, Expanding Assisted Dying to Include Mental Illness." *Global News*, March 17, 2021. https://globalnews.ca/news/7703262/canada-senate-passes-bill-c-7/.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Canadian Lawyer. "Statement Regarding a Recent Opinion Posted on Our Website." February 7, 2021. https://www.canadianlawyermag.com/news/opinion/statement-regarding-a-recent-opinion-posted-on-our-website/337574.

Cardus. "The Imperative of Conscience Rights." December 4, 2018. https://www.cardus.ca/research/law/reports/the-imperative-of-conscience-rights/.

CBC News. "Pride Society Files Human Rights Complaint After Catholic Parish Refuses to Rent Venue." June 4, 2019. https://www.cbc.ca/news/canada/british-columbia/pride-society-discrimination-1.5161427.

Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario, 2018 ONSC 579 at para 147. https://canlii.ca/t/hq4hn.

Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario, 2019 ONCA 393. https://canlii.ca/t/j08wq.

College of Physicians and Surgeons of Ontario. "Doctor Search." https://doctors.cpso.on.ca/?search=general.

———. "Professional Obligations and Human Rights." https://www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Professional-Obligations-and-Human-Rights.

Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 UNTS 221 art. 5 (entered into force September 3, 1953).

Epstein, E.G., and A.B. Hamric. "Moral Distress, Moral Residue, and the Crescendo Effect." *Journal of Clinical Ethics* 20, no. 4 (2009): 330–42.

Farsai, S. "British Columbia's Practice Directions on Preferred Gender Pronouns in Court Are Problematic." *Canadian Lawyer*, February 5, 2021. https://web.archive.org/web/20210206061100/https://www.canadianlawyermag.com/news/opinion/british-columbias-practice-directions-on-preferred-gender-pronouns-in-court-are-problematic/337574.

Haigh, R., and P. Bowal. "Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis." *Dalhousie Law Journal* 35, no. 1 (2012): 89–125.

Human Rights Code, RSBC 1996, c 210, s 8(1). https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96210_01.

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 arts 12(3), 13(3) 14, 18(3), 19(3)(b), 21, 22(2) (entered into force March 23, 1976).

King, M.L., Jr. "A Proper Sense of Priorities." Speech given in Washington, DC, on February 6, 1968. http://www.aavw.org/special_features/speeches_speech_king04.html.

Klassen obo White Rock Pride Society v. Star of the Sea Parish (No. 2), 2021 BCHRT 18. https://canlii.ca/t/jd1h5.

Klassen obo White Rock Pride Society v. Star of the Sea Parish, 2020 BCHRT 120. https://canlii.ca/t/j7x1f.

Kukathas, C. *The Liberal Archipelago: A Theory of Diversity and Freedom*. Oxford: Oxford University Press, 2003.

Letter to the Editor of *Canadian Lawyer*. February 6, 2021. https://docs.google.com/document/d/1XLYsM-aRgN9pytk03VKxY3XCpkqCK51Qr5oeYBTDous/edit.

Litzcke, K. "Gender Activists Co-opted British Columbia's Courts. Meet the Woman Who Stood Up to Them." *Quillette*, May 19, 2021. https://quillette.com/2021/05/19/gender-activists-co-opted-british-columbias-courts-meet-the-woman-who-stood-up-to-them/.

Maurice v Canada (Attorney General), 2002 FCT 69, [2002] FCJ No 72.

The Medical Assistance in Dying (Protection for Health Professionals and Others) Act, SM 2017, c 38. https://web2.gov.mb.ca/bills/41-2/b034e.php.

Nordstrand, S.J., M.A. Nordstrand, P. Nortvedt, and M. Magelssen. "Medical Students' Attitudes Towards Conscientious Objection: A Survey." *Journal of Medical Ethics* 40, no. 9 (2014): 609–12. https://jme.bmj.com/content/40/9/609.

Ontario Human Rights Commission. "Questions and Answers About Gender Identity and Pronouns." http://www.ohrc.on.ca/en/questions-and-answers-about-gender-identity-and-pronouns.

Pardy, B. "B.C. Courts Asking for 'Correct Pronouns' Is State-Mandated Identity Politics." *National Post*, February 9, 2021. https://nationalpost.com/opinion/bruce-pardy-b-c-courts-asking-for-correct-pronouns-is-state-mandated-identity-politics.

R v Big M Drug Mart Ltd, [1985] 1 SCR 295 at 346, 18 DLR (4th) 321.

Ruck, A. "Delta Hospice Society Facing Transition, Uncertain Future." *B.C. Catholic*, March 24, 2021. https://bccatholic.ca/news/catholic-van/delta-hospice-society-facing-transition-uncertain-future.

———. "Delta Hospice Society Pledges to Fight on as It Faces Layoffs, Eviction." *B.C. Catholic*, January 19, 2021. https://bccatholic.ca/news/catholic-van/delta-hospice-society-pledges-to-fight-on-as-it-faces-layoffs-eviction.

———. "Hospice Willing to Lose $750K Rather than Allow Euthanasia Onsite." *B.C. Catholic*, January 17, 2020. https://bccatholic.ca/news/catholic-van/hospice-willing-to-lose-750k-rather-than-allow-euthanasia-onsite.

———. "Questions Abound as Hospice Workers Face Deadline to Move Out." *B.C. Catholic*, February 23, 2021. https://bccatholic.ca/news/catholic-van/questions-abound-as-hospice-workers-face-deadline-to-move-out.

Smith and Chymyshyn v. Knights of Columbus and others, 2005 BCHRT 544. https://canlii.ca/t/h3930.

Supreme Court of British Columbia. "Forms of Address for Parties and Counsel in Proceedings." https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD-59_Forms_of_Address_for_Parties_and_Counsel_in_Proceedings.pdf.

Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

Wicclair, M.R. *Conscientious Objection in Health Care: An Ethical Analysis*. Cambridge: Cambridge University Press, 2011