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OPERATOR'S LICENSES AND RELIGIOUS FREEDOM: A CASE COMMENT

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A. INTRODUCTION

In a recent decision of the Alberta Court of the Queen's Bench, *Hutterian Brethren of Wilson Colony v. Alberta* [1] it was affirmed once again that the government has a duty to accommodate the religious beliefs and practices of its citizens to the point of undue hardship. In this decision, section 3 of Alberta Regulation 137/2003, a regulation passed under the *Operator Licensing and Vehicle Control Regulation* (the "Regulation"),[2] which requires all individuals to be photographed in order to obtain a operator's license, was declared unconstitutional. The Regulation was challenged by a Hutterian community that interprets the Bible's Second Commandment as prohibiting the willing capture of their image in photographs. The community successfully argued that the Regulation violated their guarantee of freedom of religion and equality under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[3] This *Church Law Bulletin* will review the court's decision and discuss its implications for churches and religious charities in Canada.

B. THE DECISION

The Alberta government did not dispute that the new requirement that individuals be photographed in order to obtain an operator's license violated the Hutterites' guarantees of freedom of religion and equality under the *Charter* (subsections 2(a) and 15(1) respectively), and accepted the sincerity of the Hutterites' beliefs in this regard. However, the government argued that the regulation could be saved under section 1 of the *Charter* as

[1] 2006 ABQB 338 ("*Hutterian Brethren*")
[2] Alta. Reg. 320/2002, as am. by *Operator Licensing and Vehicle Control Amendment Regulation*, Alta. Reg. 137/2003.
[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("*Charter*").

the infringement of the Hutterites' religious freedom was "demonstrably justified in a free and democratic society."[4] In order for a court to accept that the infringement of *Charter* rights is demonstrably justified, the government has the onus of showing that the legislation in question has a pressing and substantial objective, and the means the government has chosen to achieve the objective has been designed to minimally impair the *Charter* right in question and is proportional to their objective.

1. Importance of the Objective

The government characterized the objective of the Regulation as being to prevent identity theft and fraud and to assist in the harmonization of international and provincial standards for photo identification. Ultimately, the Regulation was meant to ensure that individuals would not have multiple licenses under different names, thereby making it more difficult for disqualified drivers to fool the traffic safety enforcement officers. The court accepted this as a "sufficiently pressing and substantial objective."[5] However, because these licenses are only issued to those who are qualified to drive and not to all Albertans, the government's objective of increasing public security "in general" was more limited than it contended.

2. Proportionality

The court found that the government's requirement of photographing all drivers was adopted in good faith and was rationally connected to its objective of preventing identity theft and fraud. However, the Regulation did not meet the second stage of the proportionality test, which requires that the limit minimally impair the right or freedom that has been infringed.

The court cited the decision in *Multani v. Commission Scolaire Marguerite-Bourgeoys* ("*Multani*"), in which the Supreme Court of Canada upheld a Sikh student's constitutional right to carry a kirpan (dagger) to school.[6] In that case, the Court held that, where a rule that is neutral on its face creates a distinctive burden for a group protected by subsection 15(1) of the *Charter*, the group must be

[4] *Ibid.*, s. 1.
[5] *Hutterian Brethern, supra* note 1, at para. 14.
[6] 2006 SCC 6, [2006] S.C.J. No. 6. For a review of the *Multani* decision and a discussion of its implications, see Terrance S. Carter and Anne-Marie Langan, "Supreme Court Gives Strong Endorsement to Freedom of Religion," *Church Law Bulletin* No. 17 (16 March 2006) available at www.churchlaw.ca.

accommodated to the point of undue hardship by the party who is responsible for providing the accommodation.

As a result, the constitutionality of the Regulation in *Hutterian Brethren* depended on whether reasonable accommodation could be provided for the Hutterites that would not create undue hardship for the Alberta government. The courts accepted the reasonableness of the Hutterite's proposal that the Alberta government issue special, non-photograph operator's licenses marked "not to be used for identification purposes." As a result, the regulation went beyond minimally impairing the Hutterites freedom of religion and could not be saved by section 1 of the *Charter*.

C. COMMENTARY

Churches and religious organizations may find encouragement in the court's conclusion that an infringement of subsection 2(a) of the *Charter* cannot be justifiable for the purposes of section 1 where reasonable accommodation is available. The reasoning in this case, which was also adopted in the *Multani* decision, affirms that the state has a duty to accommodate the religious belief and practices of individuals to the point of undue hardship.

The notions of "accommodation" and "undue hardship" are principles of human rights law which have mainly been discussed in the context of employment law. In that context, the Supreme Court of Canada has interpreted the duty to accommodate to mean that an employer must "take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer."[7] According to the Ontario Human Rights Commission, some of the factors to consider in determining what constitutes undue hardship are cost, outside sources of funding, and health and safety risks. There is no set standard for undue hardship by virtue of the fact that:

> Undue hardship is a relative concept. Accommodation may cause undue hardship to one employer but not to another. It is also possible that a method of accommodation which does not cause undue hardship to an employer now, may cause undue hardship in the future.[8]

However "undue hardship" is defined, the *Hutterian Brethren* decision suggests that a reasonable accommodation shall not require "individuals with *bona fide* religious objections to violate their religious

[7] *Ontario Human Rights Commission v. Simpson Sears Ltd*, [1985] 2 S.C.R. 536 at para 23.
[8] Ontario Human Rights Commission, "Policy on Creed and the Accommodation of Religious Observance" (October, 1996), available at < http://www.ohrc.on.ca/english/publications/creed-religion-policy.shtml>

beliefs."[9] Indeed, the court rejected the government's proposed accommodations because they still required the Hutterites to be photographed, which was "precisely their problem."[10] This suggests that the government will be placed under a significant burden to accommodate any groups negatively affected by its legislation if it infringes on their religious beliefs. It will be interesting to see how this area of the law develops as marriage commissioners opposed to same-sex marriage on religious grounds continue to bring human rights complaints against their provincial governments for forcing them to perform the ceremonies or resign their marriage commission.

It is also interesting to note that in this case that the government conceded without need for argument that the regulation in question violated the Hutterites' *Charter* rights. The court also accepted the sincerity and validity of the Hutterites' religious beliefs without question. This is an encouraging change from cases where courts have conducted investigations into the religious tenets and doctrines of various denominations and have tried to determine for themselves the sincerity and validity of the religious beliefs of the complainant.[11]

This investigatory trend of the courts seems to have been curtailed, however, as a result of the Supreme Court of Canada's decision in *Syndicat Northcrest v. Amselem*.[12] In that case, Orthodox Jewish residents of a co-operatively owned apartment argued that their freedom of religion gave them the right to build succahs, or temporary shelters, on their balconies for the Jewish holiday of Succot, a practice that was prohibited by the terms of co-ownership. Two rabbis testified at trial that such practice was not required by Jewish religious doctrine. The trial judge, and a majority of the Quebec Court of Appeal, concluded that the claimants' freedom of religion had not been violated because they had failed to establish that the practice at issue was required by official religious teachings. This decision was overturned by a majority of the Supreme Court of Canada. Justice Iacobucci, writing for the majority, concluded that all an individual needs in order to establish that a particular practice or belief is protected by the *Charter* is that it is something that "he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or

[9] *Hutterian Brethern, supra* note 1 at para. 29.
[10] *Ibid*. at para. 24 These included suggestions of placing the operator's license in an envelope so that the carrier never saw the photograph, or issuing a license with no photograph but keeping one on file.
[11] See e.g., *Hall v. Powers* (2002), 59 O.R. (3d) 423 (Sup. C.J.) at paras. 23 and 30-31. Despite the testimony of a Bishop asserting the Catholic Church's stance same-sex relationships, the court found that a Catholic school board's ban on same-sex dancing was "not the only Catholic position" nor the "majority position," and concluded that the "substantial diversity of opinion within the Catholic community" undermined the correctness of the Bishop's doctrinal interpretation.
[12] [2004] 2 S.C.R. 551 ("*Amselem*"); see also Terrance S. Carter, "Supreme Court of Canada Adopts Broad View of Religious Freedom" in *Church Law Bulletin* No. 5 (23 August 2004).

her spiritual faith, irrespective of whether [it] is required by official religious dogma or is in conformity with the position of religious officials."[13] Justice Iaccobucci went on to observe that:

> … the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.[14]

As a result, the fact that some Hutterites may not object to having their photographs taken should not affect the court's acceptance of the sincerity of the beliefs held by other Hutterite individuals who do object to having their photograph taken.

It should be noted that in *Amselem*, the Supreme Court of Canada did limit its broad interpretation of freedom of religion by holding that the right is not an absolute nor an unassailable one, and that:

> [C]onduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.[15]

This need to balance competing *Charter* rights was also emphasized in the *Hutterian Brethren* case. Had the Alberta government chosen to issue a universal identification card requiring a photograph for all Albertans, its objective in achieving public safety would have been far more pressing and substantial and the parties arguing that their "freedom of religion" had been infringed would have had to address the competing *Charter* right of others to "security of the person." This would require a "careful analysis and definition of the competing rights and the values they reflect, and how these rights and values relate to one another."[16]

[13] *Ibid.* at para. 46.
[14] *Ibid.* at para. 50.
[15] *Ibid.* at para. 62
[16] *Hutterian Brethern*, *supra* note 1 at para. 41.

D. CONCLUSION

The Alberta government is appealing this decision before the Alberta Court of Appeal, although a hearing date has not been set at the time of this writing. Counsel for the Hutterites has suggested that this litigation may make its way to the Supreme Court of Canada.[17] In the meantime, despite the courts' apparent willingness to broaden their protection of freedom of religion, religious charities and churches should continue to clearly enunciate their religious doctrines in a Statement of Faith to avoid facing any discrepancy as to the sincerity of their beliefs.

[17] "License decision to be appealed" *The Toronto Star* (13 May 2006), online: The Toronto Star <http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&call_pageid=971358637177&c=Article&cid=1147470611948>.

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