

## ALBERTA COURT OF APPEAL UPHOLDS PROVINCE'S OBLIGATION TO ACCOMMODATE RELIGIOUS BELIEFS

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### A. INTRODUCTION

In a 2 to 1 decision released May 17, 2007, the Alberta Court of Appeal has upheld a decision of the Queen's Bench, which held that a mandatory photo requirement for drivers' licences constituted an infringement of the respondent's right to freedom of religion and equality that could not be justified in a free and democratic society.<sup>1</sup> A *Church Law Bulletin* discussing the lower court decision was published in July 2006.<sup>2</sup> In *Hutterian Brethren of Wilson Colony v. Alberta*, Madam Justice Carole Conrad of the Alberta Court of Appeal, writing for the majority, held that inquiry under section 1 of the *Canadian Charter of Rights and Freedoms* (the "Charter") in this case should be limited to whether the impugned regulation serves an objective related to the permissible goal of highway safety. However, in what has been termed by some commentators as a "more compelling argument," Justice Frans Slatter writing the dissent suggested that discerning the objectives of the legislation solely from the wording of the statute, as was done by the majority, was improper, writing that "such a narrow and technical approach to constitutional questions would be unfortunate. The Courts must have regard to the social and factual context in which the statute operates in order to properly adjudicate its validity."

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<sup>1</sup> *Hutterian Brethren of Wilson Colony v. Alberta*, 2007 ABCA 160.

<sup>2</sup> See Mervyn F. White and Anne-Marie Langan, "Operator's Licenses and Religious Freedom: A Case Comment" in *Church Law Bulletin* No. 18 (19 July 2006), available at [www.churchlaw.ca](http://www.churchlaw.ca).

With increasing pressures placed on governments to respond to issues of fraud, identity theft and terrorism, the government is reviewing the decision to consider whether they will appeal to the Supreme Court of Canada. This *Church Law Bulletin* reviews the court's decision and discusses its implications for churches and other religious charities in Canada.

## B. BACKGROUND TO THE DECISION

When the province of Alberta introduced the requirement for photographs to be included in driver's licences in 1974, an exemption was provided to those who objected on religious grounds and such individuals were able to seek a non-photo licence. The respondents believe it is a sin to be willingly photographed, and for some, it is believed that it is a sin for that photograph to be seen by another person. When the impugned *Operator Licensing and Vehicle Control Regulation* (the "Regulation") was passed in 2003, there were approximately 450 individuals in the province taking advantage of the exemption, and approximately 56 percent of those were held by members of the Hutterian Brethren colonies. The Regulation eliminated the Registrar's discretion to grant an exemption.

While the province acknowledged the Hutterian Brethren hold a genuine religious belief that they cannot have their photo taken, and that the photo requirement under the Regulation constitutes a *prima facie* violation of their *Charter* rights, the province submitted that the photo requirement was designed to meet the pressing and substantial objectives of minimizing fraud, identity theft and terrorism, while also contributing to interprovincial and international licensing harmonization. The province contended that the photo requirement was rationally connected to these objectives, that these objectives could not be achieved without affecting the Hutterian Brethren's rights, and that maximum accommodation had been offered.

Given this position, the only issue before the court was whether or not requiring the Hutterian Brethren to be photographed as a condition of licensing can be justified in a free and democratic society.

## C. LEGAL FRAMEWORK

Where it is proven that there is a *prima facie* breach of a *Charter* right, the onus is on the government to justify that breach according to section 1 of the *Charter*, which states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The basic framework for evaluating whether the government has met the onus under section 1 of the *Charter* is set out in the well-established *Oakes* test, which requires that:

- the infringing measure has an objective of sufficient importance to warrant overriding a *Charter* right; and
- the means chosen are proportional to the objective, which requires the court to ensure that (a) the means chosen are rationally connected to the objective, (b) the means impair the right as little as possible, and (c) there is proportionality between the effects of the infringing measure and the objective.

#### D. THE MAJORITY DECISION

The majority decision, written by Madam Justice Conrad, held that the lower court did not err in concluding that the Regulation, which created the mandatory photo requirement for driver's licences, constitutes an unjustified infringement of the Hutterian Brethren's *Charter* rights. Justice Conrad observed that "failure to correctly identify the government's objective at the initial stage of the section 1 analysis may compromise the entire inquiry that follows." While Justice Conrad accepted that increasing security, preventing identity theft and minimizing terrorism are pressing and substantial goals sufficient to warrant, in principle, a breach of an individual's *Charter* rights, she intimated the government would have to pass laws aimed squarely at these purposes in order to meet the section 1 test. However, in the present case, the legislation under which the Regulation was passed had the overarching purpose of highway regulation and safety. As such, the court concluded that "the inquiry should therefore be limited to whether the impugned regulation serves an objective related to the permissible goal of highway safety."

In this regard, the court concluded that the objective should be defined as (a) preventing one individual from acquiring two licenses, and (b) ensuring each individual acquires a licence in his or her actual name. Although the court found the rational connection between the photo requirement and the objective was questionable, the Regulation failed nonetheless at the minimal impairment stage of analysis, which requires the government to abridge the individual's rights as "little as is reasonably possible." Instead, the court concluded that the province had not proposed any accommodation which would alleviate the need for the Hutterian Brethren to be photographed as a condition of licensing. As such, the court reasoned that the impugned Regulation

offered only a very slight protection against the risk that a licence will be issued to an individual in a name other than his or her own, while completely infringing the respondents' rights.

## E. THE DISSENTING DECISION

Justice Slatter identified three different categories of legislative enactments that may impair an individual's freedom of religion, noting that the justification analysis will vary depending on the category. The three categories included: (a) enactments whose very purpose is religious, i.e. the *Lord's Day Act*; (b) enactments whose provisions have some general secular purpose, but that have unintended and disproportionate effect on a religious practice, i.e. the general prohibition on weapons in schools which had a specific impact on Sikhs; and (c) laws of general application enacted for legitimate secular purposes, which requires an individual to do something contrary to his or her religious beliefs in order to obtain access to a secular privilege. In this regard, Justice Slatter wrote:

It is more difficult to justify a statute whose purpose is overtly religious. Where a statute has a disproportionate effect on a particular religious group, the emphasis in the analysis will be on accommodation and undue burden on the government. Where the applicant seeks access to a statutory privilege, but seeks an exemption from the general requirements for that privilege, there must be a balancing between freedom of religion and the legitimate secular goals of the government. A free and democratic society can more easily tolerate statutes in the last category. Indeed, in the United States no religious exemption is recognized from the provisions of statutes of general application enacted for legitimate secular purposes.

Justice Slatter quickly disposed of one of the Hutterian Brethren's arguments in relation to their concern about the effect that their photographs may have on the souls of the registry clerks who may have to look at the photographs. He stated, "while the respondents are entitled to assert their own religious rights, they have no standing to advance the religious well being of third parties, particularly where the third parties may not share their beliefs."

In addressing the section 1 analysis, Justice Slatter was of the opinion that the court must consider the social and factual context in which the statute operates in order to properly adjudicate its validity. In this regard, he pointed to the Supreme Court of Canada's decision in *Thomson Newspapers Co. v. Canada (A.G.)*, [1988] 1 S.C.R. 877, in which the Court held that "context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision." As such, Justice Slatter suggested that even if

one focuses on the primary use of the driver's licence as a means of identifying qualified drivers, it is clear that the prevention of misuse of driver's licences is within the core objectives of the statute.

Acknowledging that the *Charter* requires the state to accommodate freedom of religion to the point of undue hardship, Justice Slatter noted that the government need not show a hardship that completely negates the objectives of the statute. In this regard, he accepted the government's position that the integrity of the licencing system depends on their being a photograph on or associated with every licence. Justice Slatter suggested that "so long as the system tolerates exceptions to the requirement of a photograph, it will suffer from a vulnerability that can be exploited by those who seek to misuse the identities of others, and those who are a threat to public safety."

In addressing the Hutterian Brethren's concern with respect to the impact of the impugned Regulation on the second commandment, Justice Slatter noted that "it is only the 'voluntary' taking of photographs that the respondents believe is prohibited." Justice Slatter suggested that while it is not open for the government to tell people what they should or should not believe, it was appropriate to analyze the infringed religious belief on its own terms, which includes the "voluntariness" of the prohibited conduct. In other words, while the test for religious belief is subjective, the measurement of minimal impairment is at least partly objective. Justice Slatter wrote:

In the balancing process, the severity of any residual infringement of the religious freedom notwithstanding the accommodations offered can be measured by the internal standards of the religion. Any other approach would allow the religious group to dictate its own level of accommodation. . . . Submitting to the requirement of a photograph, in order to obtain a driver's licence that is necessary to maintain the very existence of the colony, is not, by any objective standard, the voluntary submission to a photograph.

Noting that the province offered two possible accommodations: one, to seal the photograph in a special package that the licensee would not be required to open; and two, to store a digital image in the facial recognition database but not print the image on the licence, Justice Slatter suggested that the Hutterian Brethren's proposed accommodation that they be issued photoless driver's licences marked "not to be used for identification" was no accommodation at all. In fact, Justice Slatter suggested that the driver's licence would always be used for the very purpose supposedly excluded: the identification of the driver as a qualified driver. As such, Justice Slatter characterized the proposed accommodation by the Hutterian Brethren as an assertion that nothing which infringes the second commandment can ever be justified, which he noted was

contrary to the case law which recognizes that the constitution does not always require the least intrusive solution imaginable. Accordingly, Justice Slatter concluded that the Regulation was constitutional, subject to the province extending the two forms of accommodation proposed.

## F. COMMENTARY

Regardless of whether the majority or dissenting decision eventually wins the day should this decision be appealed to the Supreme Court of Canada, churches and other religious organizations should find encouragement in the court's acknowledgment that an infringement of an individual's freedom of religion cannot be justified in a free and democratic society where reasonable accommodation is available. Further, despite the different conclusions, both the majority and minority decisions implicitly and unreservedly adopted the Supreme Court of Canada's decision in *Multani v. Commission Scolaire Marguerite-Bourgeoys*,<sup>3</sup> where 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 accommodated to the point of undue hardship.

Until there is a final determination in this case, either by an appeal to the Supreme Court of Canada or the province's acceptance of the Court of Appeal's decision, the question will continue to be to what degree the government must accommodate groups who are negatively affected by its legislation. In this regard, both the majority and dissenting decisions acknowledged that the Supreme Court of Canada has limited the broad interpretation of freedom of religion by holding that the right is not absolute or unassailable, writing that:

... conduct 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.<sup>4</sup>

## G. CONCLUSION

Although the Hutterian Brethren have thus far been successful in advancing the cause of freedom of religion, the decision may have little impact on the related security and fraudulent identification issues that have arisen in the post-9/11 context. In fact, Justice Conrad acknowledged that the analysis applied in this case may be

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<sup>3</sup> 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," in *Church Law Bulletin No. 17* (16 March 2006), available at [www.churchlaw.ca](http://www.churchlaw.ca).

<sup>4</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551. See Terrance S. Carter, "Supreme Court of Canada Adopts Broad View of Religious Freedom" in *Church Law Bulletin No. 5* (23 August 2004), available at [www.churchlaw.ca](http://www.churchlaw.ca).

different if the court was considering photo requirements for passports. Indeed, the Hutterian Brethren are already anticipating further legal battles in light of the U.S. requirement for all Canadian citizens to have passports by the end of 2008 in order to cross the Canada-U.S. border, and other minority religious groups have faced their own battles recently, e.g. the chief electoral officer in Quebec reversing his decision to allow Muslim women to vote without lifting their veils to identify themselves during the provincial election earlier this year. Some found this decision particularly distressing, as the decision was purportedly made not in the name of national security but in order to placate those who would disrupt the electoral process.

Still the Hutterian Brethren decision is important for its emphasis on the need for governments to accommodate religious beliefs and for the courts to perform a balancing act when there is an apparent infringement of religious rights. Nonetheless, the decision also identifies the need for churches and other religious charities to remain vigilant in enunciating religious doctrines and seeking accommodation from the government when its legislation and policies adversely impact one's religious beliefs.



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