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TOP COURT MINIMIZES FREEDOM OF RELIGION IN HUTTERITE CASE

By Jennifer M. Leddy*

A. INTRODUCTION

1. Background

On July 24, 2009 in a split decision of 4-3 the Supreme Court of Canada held that the Alberta Government's regulation that all driver's licences include a photo of the driver was a reasonable limit on freedom of religion that could be justified in a free and democratic society, thereby reversing the decisions of the Alberta Court of Queen's Bench and the Alberta Court of Appeal.[1]

Driver's licences with photos have been required in Alberta since 1974. Until 2003 the Registrar could grant exemptions to those who objected to having their photo taken on religious grounds or a temporary medical condition that affected their appearance. Thereafter, the exemption was removed by a regulation passed under the *Traffic Safety Act*, R.S.A. 2000, c.T-6. Photos of all licensed drivers are placed in the province's facial recognition bank for the purpose of minimizing identity theft and fraud arising from the use of driver's licences.

Members of the Hutterite Colonies which brought the court action ("the Hutterites"*)* objected to having their photos taken on the religious basis that the Second Commandment forbids them from voluntarily having their photograph taken. They were granted an exemption for 29 years and launched court

*Jennifer M. Leddy, B.A., LL.B., is an Associate of Carters Professional Corporation, Ottawa, Ontario, Canada. The author would like thank Ryan Prendergast and Jennifer Schwass, students-at-law, for their assistance in the preparation of this bulletin.
[1] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

proceedings after the exemption was removed. Of the 453 exemptions granted at the time the regulation was revoked, 250 were granted to the Hutterites.

Central to the Hutterites religion is their belief in communal living and self sufficiency. Hence they usually live in rural and farming communities. They use vehicles to obtain medical services, community firefighting and commercial activity to sustain their community.

Prior to the court proceedings, the Government of Alberta offered to accommodate the Hutterites in two ways: 1) licences would have a photo but be carried in a sealed envelope that indicated they were the property of Alberta and a digital photo put in the province's facial recognition bank; or 2) licences would not include a photo but digital photos of the drivers would be placed in the facial recognition bank. The Hutterites rejected both measures because they still required a photo to be taken contrary to their religion. As an alternative, they suggested that they be issued licences without photos that were marked "Not to be used for identification purposes."

More than 700,000 Albertans do not have a driver's licence and are not in the province's facial recognition database.

The majority judgment was written by Chief Justice McLaughlin for Justices Binnie, Deschamps, and Rothstein. There are two passionate dissents by Justice Abella and Justice Lebel, both of which are concurred with by Justice Fish. The Government of Alberta conceded that its regulation infringed freedom of religion under section 2 (a) of the *Charter of Human Rights and Freedoms* ("the *Charter*"). The reasons for the decision, therefore, focused on whether the infringement could be justified under section 1 of the *Charter*.

2. Charter Provisions

> Section 1 – 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.
>
> Section 2 – Everyone has the following fundamental freedoms:
>
> a) freedom of conscience and religion;

3. The Oakes Test

The *Oakes* test gives meaning and structure to the requirements of section 1 of the *Charter* ("the Oakes test"). The test formulated more than twenty years ago relates to sufficiency of purpose and proportionality of means.[2]

The state must first demonstrate a pressing and substantial objective. Then, the state must meet the proportionality requirements which involve three evaluations: 1) Is the means rationally connected to the purpose? 2) Does the limit minimally impair the right? and 3) Is the law proportionate in its effect?

B. THE MAJORITY OPINION

The majority concluded that the universal photo requirement satisfied the Oakes test. The Chief Justice held that the objective of minimizing identity theft associated with driver's licences is a pressing and important goal, the photo requirement is rationally connected to the objective, does not limit freedom of religion more than required to achieve it, and the negative impact on freedom of religion does not outweigh the benefits of the objective.

1. Freedom of Religion

The Chief Justice did not spend much time on this issue since the Government of Alberta had already conceded that its photo requirement infringed the claimants' freedom of religion.

The Chief Justice did, however, neatly reaffirm that freedom of religion is infringed where a) the claimant sincerely believes in a belief or practice that is connected with religion and b) the contested provision interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.[3]

2. Preliminary Comments on Section 1 Analysis

Before embarking on a detailed section 1 analysis, the Chief Justice makes the point that the courts will generally accord governments more deference where *Charter* rights are limited in a regulatory response to a complex social problem than when *Charter* rights are limited by penal measures that

[2] *R.v.Oakes,*[1986] 1 S.C.R. 103.
[3] *Supra* note 1 at para. 32.

directly threaten the freedom of the accused. She also states that the broad scope of the guarantee of freedom of religion presents a particular challenge when it comes to public programs. In her opinion, "Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief" and that acceding to their religious claims could "seriously undermine the universality of many regulatory programs."[4]

3. Is the Purpose for which the Limit is Imposed Pressing and Substantial?

The majority held that the province's goal of ensuring the integrity of the driver's licensing system so as to minimize identity theft associated with that system is pressing and substantial. The purpose of the photo requirement is to have a bank of facial photos to prevent licences being used as breeder documents for purposes of identity theft. It ensures that each licence is connected to one person and no individual has more than one licence.

The Chief Justice criticized Justice Abella for describing the objective too broadly as eliminating all identity theft, thus enabling Justice Abella to compare the claimants with the 700,000 Albertans who are not in the data bank because they don't have licences instead of comparing them with Albertans who do have licences.

4. Is the Limit Rationally Connected to the Purpose?

The rational connection requirement is to prevent arbitrary limits and requires a causal connection between the infringing means and purpose. The Chief Justice found that the Government provided evidence that "a universal system of photo identification for drivers will be more effective in preventing identity theft than a system that grants exemptions to people who object to photos being taken on religious grounds."[5]

5. Does the Limit Minimally Impair the Right?

For the Chief Justice, the test at this stage is whether "there is an alternative, less drastic means of achieving the objective in a real and substantial manner."[6]

[4] *Ibid*. at para. 36.
[5] *Ibid*. at para. 49.
[6] *Ibid*. at para. 55.

She finds that the province's alternative measures would allow the Province to achieve its objectives "while reducing the impact on the members' right to freedom of religion." In her opinion, the claimants' proposal "compromises the Province's goal of minimizing the risk of misuse of identity theft" because if the licence holder's photo is not in the data bank, the risk increases that the holder's identity can be stolen. She concluded that the requirement of the photo minimally impairs the right to freedom of religion because it "falls within a range of reasonable options available to address the goal of preserving the integrity of the driver's licensing system"[7].

The Chief Justice found that the courts below erred in using a "reasonable accommodation" analysis based on human rights law instead of the *Oakes* test under section 1 of the *Charter* in assessing minimal impairment. Finding that minimal impairment and reasonable accommodation are "conceptually distinct", the Chief Justice held that where the validity of a law of general application is at stake, as distinct from government *action* or *administration,* the court's "ultimate perspective" is societal rather than tailoring the law to the needs of individuals. "The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned." The balancing of the benefits and harms only occurs in the third stage of the *Oakes* test[8].

6. Is the Law Proportionate in its Effect?

The question to be answered is whether the limit on the right to freedom of religion is proportionate to the public benefit conferred by the limit.

a) Benefits

The benefit chiefly relied upon by the Government was that the photo requirement enhances the security of the driver's licensing scheme by ensuring that an individual holds only one licence. While the Chief Justice found it "difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions", she still accepted the Government's evidence that the "internal integrity of the system would be compromised."[9]

[7] *Ibid*. at paras. 59 and 62.
[8] *Ibid*. at paras. 68 and 69.
[9] *Ibid*. at para. 81.

The Government conceded that the benefit of assisting police officers in identifying drivers at the roadside would not be enough to justify limiting freedom of religion. The Province also admitted that the benefit from possible harmonization with other licensing systems was as yet unrealized. Nevertheless, the Chief Justice found both of these benefits "support the overall salutary effect of the universal photo requirement."[10]

b) Deleterious Effects

The deleterious effects on the Hutterites' freedom of religion were assessed in light of *Charter* values such as "liberty, human dignity, equality, autonomy, and the enhancement of democracy."[11] The Court followed *Amselem* in finding that the most important values in relation to religion are liberty, autonomy and the right of meaningful choice to follow one's religious beliefs and practices.[12]

In identifying the difficulty in assessing the impact of a measure on religious practice, the Chief Justice said:

"Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others."[13]

For the Chief Justice, it is inevitable that some religious practices will conflict with universal laws, given the many different religions in a pluralistic society and the interplay between religion and so many aspects of daily life. While the perspective of the claimant is important in assessing the seriousness of a limit on freedom of religion, the assertion of a religious belief does not end the matter. It must be considered in light of the duty of authorities to legislate for the general good and the degree to which the limit actually impacts on the adherent.

[10] *Ibid*. at para. 84.
[11] *Ibid*. at para. 88.
[12] *Syndicat Northcrest v. Amselem*, 2004 SCC 47.
[13] *Supra* note 1 at para. 89.

The seriousness of a limit must be judged on a case by case basis. While it is obvious that the state cannot directly compel or interfere with religious belief or practice; it is more difficult to assess the seriousness of a limit on freedom of religion where it is the result of "incidental and unintended effects of the law." The incidental effects may be so great that they "effectively deprive the adherent of a meaningful choice" or the government program may be compulsory with the result that the adherent is left with a choice between "violating his or her religious belief and disobeying the law."[14]

The limit may be less serious and impose costs in terms of "money, tradition or inconvenience" but still leave a meaningful choice in terms of practising religion. "The Charter guarantees freedom of religion but does not indemnify practitioners against all costs incident to the practice of religion."[15]

The impugned regulation imposes a cost – the cost of not being able to drive on the highway – but does not deprive the Hutterites of a meaningful choice as to the practice of their religion because they could hire others to drive them. The Chief Justice thus dismissed the Hutterites' claim that the limit presents them with an invidious choice – between some members violating the Second Commandment and accepting the end of their communal life. The Chief Justice felt that they could arrange alternate transportation by hiring others to drive. While it would cost more and go against their traditional self-sufficiency, it would not be prohibitive and would not deprive them of a meaningful choice to pursue their religion. In addition, the law does not compel the taking of a photo and driving is a privilege, not a right.

C. DISSENTING OPINION OF MADAM JUSTICE ABELLA

Madam Justice Abella found the harm to the *Charter* rights of the Hutterites "dramatic", noting that the inability to drive affected not only a few individuals but also "severely compromises the autonomous character of their religious community." On the other hand, the benefits to the province in her view "are at best marginal."[16]

[14] *Ibid*. at paras. 93-94.
[15] *Ibid*. at para. 95.
[16] *Ibid*. at paras. 114-115.

1. Freedom of Religion

Madam Justice Abella spent more time than the Chief Justice did on the nature of freedom of religion describing it as a "core constitutionally protected democratic value" and referring to cases from the Supreme Court of Canada and the European Court of Human Rights to demonstrate that freedom of religion rests on the values of autonomy and dignity and to support the centrality of rights associated with freedom of individual conscience, that bearing witness in words and deeds is connected to religious convictions and that freedom of religion has both "individual and collective aspects."[17]

2. Preliminary Comments on Section 1 Analysis

Justice Abella stressed that the overarching purpose of the *Oakes* test is to balance the benefits of the objective with the harmful effects of the infringing measure. "The stages of the *Oakes* test are not watertight compartments: the principle of proportionality guides the analysis at each step. This ensures that at every stage, the importance of the objective and the harm to the right are weighed."[18]

3. Important Objective and Rationale Connection

Justice Abella agreed with the Chief Justice that the objective of the infringing measure to protect the integrity of the licensing system and minimize identity fraud was important and rationally connected to the objective.

4. Minimal Impairment

Justice Abella begins to part company with the Chief Justice on the issue of minimal impairment.

For Justice Abella, the question is not whether the limit imposed on the right fulfills the Government objective "more perfectly" than any other, but whether the measure chosen impairs the right "no more than necessary" or as "little as reasonably possible" to achieve the objective. Justice Abella found that the limits imposed on the Hutterites' freedom of religion and proposed alternatives all required the taking of a photo, thereby not only limiting but effectively extinguishing the right.[19]

[17] *Ibid.* at paras. 110 and 127-132.
[18] *Ibid*. at para. 134.
[19] *Ibid*. at paras. 145,147

5. Proportionality

Justice Abella's disagreement with the Chief Justice is most profound in the final stage of the section 1 analysis in weighing the benefits and deleterious effects.

a) Benefits

With respect to the benefits, Justice Abella found that the Government had not discharged its evidentiary burden or shown that the benefits were anything more than speculation. Facial recognition technology is not fool-proof and there was no evidence to suggest that the previous exemption from photos caused any harm to the integrity of the licensing system. She also found it difficult to see how adding 250 Hutterite photos to the data base would significantly reduce identity theft when there are 700,000 unlicensed and unphotographed Albertans. She also noted that there are many other documents that are used for identity purposes that do not have photographs, such as birth certificates and social insurance cards.

b) Deleterious Effects

Justice Abella provided context for the evaluation of the deleterious effects by explaining the deeply religious nature of the Hutterites and the importance of self sufficiency to them with the help of quotations from historians and citing Justice Ritchie in the Supreme Court of Canada case *Hofer v. Hofer*, where he said: "the Hutterite religious faith and doctrine permeates the whole existence of the members of any Hutterite Colony."[20] Quoting the trial judge, he observed: "To a Hutterian the whole life is the Church. ... The tangible evidence of this spiritual community is the secondary or material community around them. They are not farming just to be farming — it is the type of livelihood that allows the greatest assurance of independence from the surrounding world."[21] Justice Ritchie further noted that to the colonies, "the activities of the community were evidence of the living church."[22]

Justice Abella completely rejected the majority's opinion that the effects are minor because the Hutterites can hire third parties. In her view it "fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community. When significant sacrifices

[20] *Hofer v.Hofer*, [1970] S.C.R. 958 at 968.
[21] *Ibid*. at 968.
[22] *Ibid*. at 969.

have to be made to practise one's religion in the face of a state imposed burden, the choice to practise one's religion is no longer uncoerced." It ignores the fact that the community has "historically preserved its religious autonomy through its communal independence."[23]

Justice Abella also expressed discomfort with the majority's differentiating between a government program that is "compulsory" and one that is "conditional" or a "privilege." She stated that it flies in the face of other jurisprudence that provides that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner." Whether the government has acted constitutionally should not depend on whether it does so through legislation, regulation or licence.[24]

Justice Abella concluded that the harmful effects on religious freedom far outweighed the speculative benefits to the public.

D. DISSENTING OPINION OF JUSTICE LEBEL

Justice Lebel agrees with the Justice Abella on the nature of the guarantee of freedom of religion and shares her conclusion that the infringing measure has not been justified under section 1 of the *Charter.*

1. Freedom or Religion

Like Justice Abella, Justice Lebel provides some texture to the nature of freedom of religion. For Justice Lebel, religion is not only about religious beliefs, but also about "religious relationships", about "communities of faith." He states "We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations." He bluntly states that the reasons of the majority understate the importance of this aspect of freedom of religion and characterizes the majority's treatment of the rights of the claimants as "cursory."[25]

[23] *Supra* note 1 at paras. 167 and 170.
[24] *Ibid*. at paras. 171-172, citing *Eldrige v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
[25] *Ibid*. at para. 182.

2. Preliminary Comments on Section 1 Analysis

Justice Lebel offers a reminder that the *Charter* is designed "to uphold and protect constitutional rights" and that "the justification process under section 1 is not designed to sidestep constitutional rights on every occasion."[26]

He notes that courts have rarely questioned the purpose of a law or regulation in the course of a section 1 analysis and rarely has the law foundered on the rational connection ground. For Justice Lebel, the heart of the section 1 analysis is found in the minimal impairment and balancing of effects stages. It is where the means are assessed and the purpose reassessed with respect to the chosen means. Like Justice Abella, he does not favour sharp distinctions between the different stages of the proportionality analysis.

3. Minimal Impairment

Minimal impairment does not mean using the least intrusive measure possible, but rather that the right is infringed "as little as is reasonably possible" within a range of reasonable options. At this stage of the analysis, Justice Lebel asserts that the objective is not an absolute and that alternative measures could be legitimate even if the objective could no longer be completely obtained and might have to be recast. He criticizes the Chief Justice for treating the law's objective as "unassailable" once the courts engage in the proportionality analysis with the result that no means could be considered as a reasonable alternative if they would not allow the objective to be fully realised.[27]

In his view, other approaches to identity theft could be used that would fall within a reasonable range of alternatives and establish an appropriate balance between social and constitutional interests. "This balance cannot be obtained by belittling the impact of the measures on the beliefs and religious practices of the Hutterites and by asking them to rely on taxi drivers and truck rental services to operate their farms and to preserve their way of life."[28]

Absolute safety is not possible and the government's objective need not be achieved at all costs. The photo requirement was not a proportionate limit on the claimants' freedom of religion. "A small

[26] *Ibid*. at para. 187.
[27] *Ibid*. at para. 197.
[28] *Ibid*. at para. 201.

number of people carrying a driver's licence without a photo will not significantly compromise the safety of the residents of Alberta. On the other hand, under the impugned regulation, a small group of people is being made to carry a heavy burden."[29]

4. Driver's licence not a privilege

Justice Lebel held that a driver's licence is not a privilege granted at the discretion of government. A driver is entitled to it provided he or she meets the qualifications. He points out the importance of driving in daily life particularly in rural Alberta.

E. COMMENTARY

In general, the majority decision provides reason for concern, not only for the right to freedom of religion but for other rights guaranteed under the *Charter*. On the other hand, the powerful dissents will provide plenty of grist for the mill in future applications concerning freedom of religion, particularly as they affect the community and relational aspects of religion. It should also be noted that the majority opinion did agree that religion has both individual and collective aspects.

The majority decision found that the impugned regulation was constitutional even though adherents will have to violate their faith by having their pictures taken in order to comply. Not obtaining a driver's licence will also potentially affect their faith community because of the threat to their communal and self sufficient way of life. At no stage of the lengthy majority judgment was there any sense that they had addressed or sufficiently considered the significance of the community life of the Hutterites. As Justice Lebel stated, the Court was not just discussing a "group of farmers" but a community of faith. Unlike the dissenting opinions, the majority opinion jumped into a very technical, analytical and narrow section 1 analysis without appearing to really have a sense of or appreciation of the people who were before the court apart from being a group that maintains a "rural communal lifestyle." A much richer understanding of the Hutterites is found in the dissenting opinions which describe them as a spiritual community, a community that "shares a common faith" whose way of life is "a way of living the faith."

The majority opinion indicated early on its intention to uphold the regulation when the Chief Justice stated:

[29] *Ibid*.

"Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community."[30]

This statement does not bode well for future claims based on freedom of religion. Having provided a very broad definition of freedom of religion in the *Amselem* case,[31] is the Court signalling that it will tend to narrow the scope of the right in the section 1 analysis under the *Charter*? Will it be difficult for claims to be made in the future on the basis of freedom of religion when the universality of a regulatory program is at stake? What will the impact of this statement be on other rights guaranteed under the *Charter*?

The majority opinion seemed mesmerized by the government's objective of protecting the security and integrity of the licensing system to prevent identity theft and fraud and intent on achieving it to the fullest degree possible. Even acceding to this approach, so criticized by the dissent, it is difficult to understand how the alternative means offered by the Hutterites to stamp their photo-less licences with a notice that they were not to be used for identification purposes would not meet the Government's objective. It is difficult to comprehend why this faithful community could not be accommodated even under a strict section 1 analysis.

[30] *Ibid*. at para. 36.
[31] *Supra* Note 12. Also see Terrance S. Carter, "Supreme Court of Canada Adopts Broad View of Religious Freedom" *Church Law Bulletin* No. 5 (August 23, 2004).