Court File No. 32186

IN THE SUPREME COURT OF CANADA
(ON LEAVE FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

Appellant
(Appellant)

- and -

HUTTERIAN BRETHREN OF WILSON COLONY and
HUTTERIAN BRETHREN CHURCH OF WILSON

Respondents
(Respondents)

- and -

ATTORNEY GENERAL OF CANADA and
ATTORNEY GENERAL OF BRITISH COLUMBIA and
ATTORNEY GENERAL OF ONTARIO and
ATTORNEY GENERAL OF QUEBEC

Interveners

FACTUM OF THE INTERVENER
ATTORNEY GENERAL OF ONTARIO
Pursuant to Rule 42 of the Rules of the Supreme Court of Canada

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Factum of the Intervener Attorney General of Ontario

PART I – OVERVIEW

1. The Attorney General of Ontario adopts the facts as set out in the Appellant's factum, and supports the position of the Attorney General of Alberta with respect to the constitutional validity of Alberta's Operator Licensing and Vehicles Control Regulation. Ontario takes no position on whether an exemption from this regulation should be made for the Respondents.

2. Ontario has required a digital photo driver's licence card since 1995[1] in order to provide enforcement agencies with a reliable means of identifying drivers and to reduce the number of unqualified and unauthorized drivers on the road, improve road safety, maintain public security when laying traffic charges, investigating motor vehicle collisions and conducting other enforcement duties. Digital photo driver's licences enable officers to identify those drivers who are suspended or who have falsified, altered or counterfeited licences.

> *Ontario Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 32(13):
>
> The Minister may require as a condition for issuing a driver's licence that the applicant therefore submit to being photographed by equipment provided by the Ministry**.**

3. Although digital photos are essential to the integrity and security of Ontario's driver licensing scheme, Ontario has established a policy that permits Permanent Valid Without Photo ("PVWP") licences where a driver has an objection on religious grounds to having his or her photo taken. To be considered for a permanent exemption from the photo requirement on religious grounds, an individual must complete an Application for Photo Exemption form. For an application to be approved, the applicant must establish that she is a member of a registered religious organization that prohibits its members from being photographed for religious reasons and that the application for an exemption must be supported and substantiated by the individual's religious leader and the provision of

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[1] Mandatory photo requirements were first introduced in 1986. At that time, a photo card with a Polaroid photo was required.

actual scriptural passages to substantiate the religious prohibition.

> *Bothwell v. Ontario*, [2005] O.J. No. 189 (Div. Ct.), paras. 7, 11, 25 and 30, Attorney General of Ontario's Authorities, Tab 3

4. Ontario's PVWP criteria are designed to provide objective and demonstrable guidelines that permit exemptions for individuals who object on religious grounds to having their photo taken, without opening the door to a large number of permanent exemptions that could threaten the integrity of the driver's licensing regulatory scheme.

5. From an administrative perspective, the PVWP criteria enable the province to deal with exemption applications without compromising the important objectives of driver's licence photos. An alternative process could open the door to fraudulent applications and make PVWP licences too accessible to individuals who object to the photo requirement not based on religious belief but rather based on other concerns such as privacy or because they intend to evade regulatory compliance or engage in criminal activity.

> *Bothwell, supra*, at paras. 24 and 30, Attorney General of Ontario's Authorities, Tab 3

6. Since the PVWP policy was introduced in 1986, Ontario has received approximately 80 applications for permanent exemptions from the photo requirement. Ontario has to date not granted an exemption, as applicants either have not met the Ministry's criteria or have not completed the application process.

7. Ontario intervenes in his case because it is concerned that its ability to verify the credence of religious beliefs has been significantly reduced by the decision of this Honourable Court in *Syndicat Northcrest v. Amselem*. While the test for religious exemption set out in *Amselem* was correct in the context of the rule at issue in that case, its application in the context of a provincial licence system that is easily susceptible to insincere or fraudulent applications would undermine the important legislative objectives of the digital photo requirement.

> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, Appellant's Authorities, Tab 8

PART II – ISSUES ON APPEAL

8. Ontario supports the position of the Attorney General of Alberta that if the photo requirement infringes either s. 2(b) or s. 15(1) of the *Charter*, it is, as a general proposition, justifiable under *Charter* s. 1. Ontario takes no position on whether an exception from this regulation should be made for the Respondents. Ontario submits that any exceptions to the photo requirement should be permitted only where the person seeking such an exemption can demonstrate that she holds a sincere religious belief and is a member of a bona fide religious organization that holds this belief as a religious requirement.

9. Ontario further takes the position that, when considering whether a particular requirement meets the requirements of *Charter* s. 1, it is irrelevant whether the impugned limitation is found in legislation or a regulation. Contrary to the position taken by the Respondents (Respondents factum, paras. 49-65) there is no textual, jurisprudential or theoretical reasons to apply the *Oakes* test differently to a statute than to a regulation or other subordinate legislation.

PART III – ARGUMENT

a) Role of the Digital Photo in the Administration and Enforcement of the Driver Licensing Scheme

10. Without a photo on the driver's licence, police cannot rely on the driver's licence as proof of identity because people can easily forge and tamper with the licence. The lack of a photo makes it difficult for the province to effectively employ driver's licence suspensions to combat drinking and driving and *Highway Traffic Act* offences. The digital photo driver's licence is difficult to tamper with and has become the North American standard for driver's licences.

11. The use of a digital photo helps maintain an efficient and effective licensing program that ensures that only licenced drivers operate motor vehicles on the province's highways. From an administrative point of view, the clerk at the Ministry Driver and

Vehicle Licence Issuing Office counter can verify a driver's identity by having a photo available with which to compare the driver. The Ministry database allows approved registry agents (e.g., the Issuing Office counter clerk) to compare the person standing in front of them with the person in the photo on the database, ensuring that a licence is not issued to an individual intending to falsify his or her identity.

12. From an enforcement point of view, the digital photo driver's licence provides enforcement agencies with a reliable means of identifying drivers, which assists enforcement officers in reducing the number of unqualified drivers on the road; improving road safety; and maintaining public security when laying traffic charges, investigating motor vehicle collisions and conducting other enforcement duties.

13. More particularly, when officers lay traffic charges at roadside, the digital photo on a driver's licence:

- provides the first screening by enforcement officers of a driver's identity. This screening is a quick, accurate and reliable means of identification;
- confirms the holder of the licence is the rightful bearer;
- reduces the number of unauthorized and unqualified drivers on the road by allowing officers to identify those drivers who are suspended, or who have falsified, altered or counterfeited licences;
- allows law enforcement officers to reliably confiscate a licence and instantly apply an Administrative Driver's Licence Suspension (ADLS);
- reduces the number of drinking and driving collisions by ensuring that suspended drunk driving offenders do not drive; and
- reduces the time officers take conducting traffic stops. Officers may be at risk during the extra time needed to check a driver's identity. In addition, in many communities, the use of the highways is so intense and congested that reducing the time required to check a driver's identity for officers conducting traffic stops is imperative.

14. The following objectives of the mandatory photo requirement are pressing and substantial:

- promoting public safety and security by ensuring that only qualified and eligible drivers are on the roads;
- assisting in combating crime (including driving and drinking offences), enforcing traffic laws, and ensuring officer safety by aiding in the quick and reliable identification of motorists and holders of driver's licences; and
- protecting the integrity of the driver's licensing regulatory scheme by reducing fraud and misuse of driver's licences and credentials.

b) The Ability of the Province to Provide Exemptions from the Digital Photo Requirement on Religious Grounds

15. In *Amselem*, this Honourable Court held that religious beliefs are personal and are not subject to an objective evaluation. The Court broadly defined freedom of religion to include not only belief or conduct "objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion", but personal "religious" or "spiritual" beliefs "irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials". Accordingly, this Court concluded that, "a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion."

Amselem, supra, paras. 43-49, Appellant's Authorities, Tab 8

16. While the government may inquire into the sincerity of a claimant's religious belief, such inquiries "must be as limited as possible" and are intended "only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings."

Amselem, supra, para. 52, Appellant's Authorities, Tab 8

17. Any inquiry into sincerity of belief is made even more difficult by the fact this Court has rejected evidence of both consistent practices and expert opinion as necessary indicators of religious sincerity.

Amselem, supra, paras. 53 and 54, Appellant's Authorities, Tab 8

18. Ontario takes no issue with this analysis in the context of the *Amselem* case. On the facts of that case it is highly unlikely that anyone would build or dwell in a succah for any reason other than religious belief and, in any event, the potential for harm from such conduct is insignificant. The present appeal, however, presents an entirely different and more difficult context, and this must be considered in the *Charter* s. 1 analysis.

19. In light of the Court's analysis in *Amselem*, provincial governments face a difficult policy conundrum. Is it possible to draft an exemption from the mandatory photo requirement that will exempt the Respondents' members (who are a discrete community with a long established and easily verified sincere religious objection to being photographed) but will not exempt false claims of religious belief, such as claims based on personal, political or philosophical concerns like privacy (which, as a conscientious objection may be easily confused with or disguised as religious), "overnight" conversions, or an intention to evade regulatory compliance or even to engage in criminal activity.

20. Ontario is concerned that the test set out in *Amselem*, however appropriate for the context of that case, may actually make it more difficult for the province to offer a religious exemption for minority communities like the Respondents' because it makes it too easy for other persons with "fictitious" or "capricious" claims to also qualify for an exemption. The province does not have a "window into the souls of men". Unless the province can rely on the kind of objective criteria apparently rejected by this Court in *Amselem*, it cannot offer a religious exemption without threatening the integrity of the driver's licensing regulatory scheme as supported by the digital photo requirement.

21. The government's ability to tolerate exemptions from the photo requirement decreases as the ability to obtain an exemption becomes easier and more common. Ontario's PVWP exemption recognizes only shared and corroborated religious beliefs. This alternative was apparently rejected by Alberta at least in part because it appears, on its face, to be inconsistent with this Court's reasons in *Amselem*. Ontario agrees with Alberta that, if *Amselem* precludes the limited approach used in Ontario's PVWP exemption, then no exemption would be the only alternative that would meet the

province's policy objectives.

> Decision of the Alberta Court of Appeal, Appellants' Record, Vol. I, pp. 30-31

22. To allow exemptions on the basis of individual and subjective religious belief could lead to a great number of exemptions, which could undermine the integrity of the driver's licensing regulatory scheme. It could encourage limitless excuses from applicants seeking to avoid the unwanted legal obligation of being photographed in order to exercise the privilege of driving. Although approximately 80 applications have been made for an exemption under the current PVWP policy, it is reasonable to assume that if the criteria are relaxed to allow for exemptions on the basis of individual belief, this will invite more applications. In such circumstances, it is not simply a question of the raw number of possible exemptions. Equally important to the integrity of the driver's licensing regulatory scheme is the question of who, absent a requirement for corroboration of a shared religious belief, may seek an exemption from the photo requirement. Individuals who are tempted to misuse the privilege of driving or the driver's licence identification card for illegal purposes, for instance, may succeed in obtaining exemptions. Finally, allowing exemptions on the basis of individual belief may encourage religious conversions of convenience by individuals who have secular reasons (such as privacy concerns) for objecting to the driver's licence photo requirement, thus trivializing the important values underlying the freedom found in s. 2(a) of the *Charter*.

> *Bothwell*, *supra*, at para. 24, Attorney General of Ontario's Authorities, Tab 3:
>
> "When he found out about the Ministry's exemption policy, he began to search for a congregation to join that had a religious objection to photographs, without success."

23. There are also other contexts, particularly those involving matters of public health, safety or security, where the government can justify a rule that permits no accommodation or exemption on religious grounds. Religious accommodation does not compel the government to completely abandon reasonable health, safety and security measures if the underlying risk to health, safety and security cannot be adequately addressed through alternative means.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at para. 95, Attorney General of Ontario's Authorities, Tab 13

Amselem, supra, at para. 61, Appellant's Authorities, Tab 8

Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 at para. 45, Appellant's Authorities, Tab 3

B.(R) v. Children's Aid Society, [1995] 1 S.C.R. 315, Attorney General of Ontario's Authorities, Tab 2

R.. v. Badesha, [2008] O.J. No. 854 (O.C.J.) at paras. 52-74, Attorney General of Ontario's Authorities, Tab 10

c) Application of *Charter* s.1 to subordinate legislation

24. The Respondents (at paras. 49-65 of their factum) develop a theory that the *Charter* s. 1 analysis should be applied differently to regulations than it is to legislation, based on the premise that limitations on *Charter* rights should be debated in the legislature and not made "by unelected officials or subordinate bodies behind closed doors and without any public debate" (Respondents' factum, para. 56). The majority of the Alberta Court of Appeal suggests a similar analysis at paragraph 28 of its decision.

25. The Attorney General of Ontario submits that there is no textual, jurisprudential or theoretical basis to apply the *Oakes* test differently to a statute than to a regulation or other subordinate legislation. The Respondents' position in this regard is premised on an archaic notion of the operation of government, and a romanticized perception of legislative debates.

26. The Court and commentators have recognized that, in order for government to respond to the exigencies of the modern state, much of the activities and policies of government must be carried out through delegated legislative authority to the executive branch of government (which is, indeed, elected and directly responsible to the legislature) or through discretion granted to government officials. There is no constitutional requirement that government proceed by way of statute rather than regulation in developing laws or social programs, and there is nothing "undemocratic" in exercising authority delegated by the legislature. As stated by Evans, Janisch, Mullan and Risk:

> Nonetheless, no commentator on contemporary government who

> wishes to be taken seriously can now contend that broad statutory grants of discretion to public officials are in themselves inconsistent with either democratic ideals or an appropriate concern for the rights of individuals. It has become obvious to all that discretion is the very life blood of the administrative state.
>
> Evans, Janisch, Mullan, and Risk, *Administrative Law*, 5th ed., p. 948, Attorney General of Ontario's Authorities, Tab 20
>
> *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at para. 52:
>
> This court has shown a reluctance to disentitle a law to s. 1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers. Much of the activity of government is carried out under the aegis of laws which of necessity leave a broad discretion to government officials.
>
> *R. v. Beare*, [1988] 2 S.C.R. 387 at p. 387 (para. 52) , Attorney General of Ontario's Authorities, Tab 12
>
> *Little Sisters v. British Columbia*, [2000] 2 S.C.R. 1120 at para. 71, Attorney General of Ontario's Authorities, Tab 6:
>
> In effect they argue that Parliament was required to proceed by way of legislation rather than the creation of a delegated power of regulation in s. 164(1)(j), which authorizes the Governor in Council to "make regulations… generally, to carry out the purposes and provisions of this Act," or by ministerial directive. …I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as appellants contend) rather than by way of regulation (as Parliament contemplated in s. 164(1)(j)) or even by ministerial directive or departmental practice
>
> *Little Sisters*, *supra*, at paras. 132-133, Attorney General of Ontario's Authorities, Tab 6**:**
>
> The *Customs Act*, as is the case with most departmental legislation, is rather short on the detail of how the department is actually to be run. This is for good reason. Departmental priorities change and resources rise and fall in response to a moving government agenda. The Minister requires flexibility to determine how the departmental mandate is to be met.
>
> *Rose v. Newfoundland (Social Services)*, [1995] N.J. No. 343 at paras. 13-14 (Nfld. C.A.), Attorney General of Ontario's Authorities, Tab 17

27. Legislation is always the product of multiple, often competing, objectives. Only some of these objectives may be spoken to or debated in the legislature. The others must

be determined by the ordinary principles of statutory interpretation, by reviewing the language of the legislation itself. It is a principle of administrative law that delegated legislative authority must be exercised in a manner consistent with the purposes of the legislation that authorizes it. If the delegated legislation is not consistent with at least one of the purposes of the authorizing statute, the delegated legislation may be *ultra vires* in the administrative law sense, and no constitutional issue arises. If the delegated legislation is *intra vires* the enabling statute it is "prescribed by law" and the Court must assess the constitutional validity of the regulation on the same principles as the legislation itself.

> *M v. H*, [1999] 2 S.C.R.3, at para. 100, per Iacobucci J., Attorney General of Ontario's Authorities, Tab 7:
>
> Often legislation does not simply further one goal but strikes a balance among several goals, some of which may be in tension.
>
> *Delisle v. Attorney General of Canada*, [1999] 2 S.C.R. 989 at paras. 17, 19, Attorney General of Ontario's Authorities, Tab 4
>
> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, Appellant's Authorities, Tab 7
>
> *Apotex Inc. v. Ontario*, [2007] O.J. No. 3121 (C.A.) at paras. 32-33, Attorney General of Ontario's Authorities, Tab 1

28. In assessing the constitutional validity of legislation (or delegated legislation), it is entirely irrelevant whether the validity of the enactment was considered and debated at the time the law was enacted. This is obviously so for legislation enacted prior to 1982, but applies equally to legislation enacted after the adoption of the *Charter*.

29. The legislature is a political forum, not a legal forum. Politicians debate the political merits of bills, and these debates are not intended to be a legal argument or factum. This is why this Court has recognized that although *Hansard* debates are admissible in constitutional cases as evidence of "legislative intent" and an aid in determining the background and purpose of legislation, the "political nature of Parliamentary debates" means that they are of limited reliability and weight because "the statements of a member made in the heat of political debate or in committee hearing may not reflect even that members' position at the time of the final vote on the legislation".

R. v. Heywood, [1994] 3 S.C.R. 761 at pp. 777-778, Attorney General of Ontario's Authorities, Tab 14

R. v. Morgentaler, [1993] 3 S.C.R. 463 at pp. 483-484, Attorney General of Ontario's Authorities, Tab 15

Re: Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297 at pp. 318-319, Attorney General of Ontario's Authorities, Tab 16

R. v. Banks (2007), 84 O.R. (3d) 1 (C.A.) at para. 49, Attorney General of Ontario's Authorities, Tab 11

OTF v. Ontario (1998), 39 O.R. (3d) 140 (Ont. Gen. Div.) at p. 147, Attorney General of Ontario's Authorities, Tab 9

30. The Respondents' position would elevate *Hansard* debates from their present status – admissible but of limited reliability and weight – to the central issue in *Charter* analysis. Courts would no longer be considering the sufficiency of the law, but the sufficiency and quality of the legislative debates surrounding the law. Courts must be concerned with law, not politics. It is not the role of the Court to review legislative debates and consider whether the politicians have adequately considered evidence or articulated justifications for *Charter* limits. The Court cannot treat the legislature as if it were an administrative tribunal or lower court which makes judicial decisions and which must consider specific evidence or give reasons for its decisions, the sufficiency of which are then subject to judicial review.

31. This is why this Court has held that, in considering the validity of legislation under *Charter* s. 1, courts are not limited to considering the evidence that was before the legislature when it enacted the impugned legislation. The issue before the Court is the validity of the legislation, not the legislative process. The Court must consider the validity of the legislation on the basis of the evidence before the Court. It is frequently the case that the legislative debates give no consideration to the specific provision being considered by the Court or to any of the legal issues or evidence being examined by the Court. This does not change the Court's legal conclusion. Otherwise, identical legislation might be valid in one province and invalid in another, or invalid legislation might be re-enacted with identical text but different legislative debates.

Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927 at pp. 983-985, Attorney General of Ontario's Authorities, Tab 5

Delisle, supra, at para.17, Attorney General of Ontario's Authorities, Tab 4

32. For the court to base its legal analysis on the quality or sufficiency of political debates in the legislature would lead to the politicization of the judicial process and undermine the legitimacy of judicial review as a legal process separate from and independent of the political debate.

> *OTF v. Ontario, supra*, at pp. 146 and 148, Attorney General of Ontario's Authorities, Tab 9

PART V – ORDER SOUGHT

33. The Attorney General of Ontario takes no position with respect to the order sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: July 7, 2008

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PART VI – TABLE OF AUTHORITIES

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