S.C.C. File No. 32186

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR 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 COLONY

Respondents (Respondents)

- and -

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PART I – OVERVIEW

1. This appeal tests Canada's commitment to religious toleration. The issue presented is whether Alberta's decision to end almost 30 years of religious accommodation for the Wilson Colony Hutterites unjustifiably infringes s. 2(*a*) of the *Charter*.

2. The CCLA submits that Alberta has failed to discharge its burden of demonstrating that the impugned regulation under the *Traffic Safety Act* imposing a categorical photo rule for those with sincere religious objections is a reasonable limit on s. 2(*a*) of the *Charter*. Alberta concedes that the regulation cannot be justified on the basis of traffic-related objectives alone, and therefore seeks to invoke non-traffic objectives alien to the *Traffic Safety Act*, such as preventing fraud, identity theft, and terrorism. Such *ultra vires* objectives cannot be considered under s. 1. In any event, Alberta has not established that it would suffer undue hardship by accommodating 252 Hutterites out of the more than 2.5 million licencees in the Province.

3. The CCLA's approach does not improperly fetter governments in addressing new social problems, but rather underscores that they must choose constitutionally appropriate means. In short, Alberta cannot create an identity card regime by stealth sheltered under the traffic-related purposes of the *Traffic Safety Act*.

PART II – BACKGROUND FACTS

4. ***1974-2003 – Alberta's discretionary policy to accommodate religious objections.*** In 1974, Alberta introduced photographs on driver's licences by regulation under the *Traffic Safety Act*, by providing that the registrar "may" require a photograph for incorporation in the licence.[1] For the next 30 years, until May 2003, the registrar required photos as a general rule, but could issue a non-photo or "Code G" licence if a person had a sincere religious objection or a temporary medical condition which affected their appearance.[2]

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[1] Alta. Reg. 152/73, *Regulations to Amend Regulations Under the Highway Traffic Act*, filed June 13, 1973 (O.C. 881/73).

[2] *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, s. 14(1)(*b*). See also Alberta Government Services, Registry Agent Motor Vehicles Policy Manual Sub Section on Condition Codes, issued

5. In practice, however, Alberta's policy, as formulated by the Solicitor General, provided that the religious exemption applied "only [...] to members of a Hutterite colony".[3]

6. ***May 2003 – Alberta introduces the categorical rule.*** In May 2003, Alberta's Minister of Transportation amended the regulation to impose a categorical rule requiring a photo in *every* case and to remove the registrar's discretion to issue non-photo licences. By substituting "must" for "may" before "require a photograph", the Minister ended almost 30 years of religious accommodation in Alberta.[4]

7. Nothing in the record indicates that the Minister considered in advance the impact of the categorical rule on religious minorities or any possible accommodations.

8. ***Alberta's state-of-the-art photo database.*** Digital photos taken pursuant to the new categorical rule are entered into Alberta's advanced facial recognition database, but even it is not foolproof. Alberta acknowledges that "facial recognition software is not so advanced that it can make a definitive determination of whether two photographs are of the same person".[5] The software merely narrows down potentially similar faces to a manageable number. A human investigator still has to 'eyeball' the pictures to determine if they are, in fact, the same person.[6]

9. ***The miniscule impact of retaining the religious exemption.*** As of May 20, 2003, when the categorical rule was imposed, there were a total of 453 Code G licences out of more than 2.5

November 14, 1989 and revised December 18, 2002, p. 4 of 8: *Appellant's Record*, vol. II, p. 110: "A registry agent shall place Condition Code G on a licence when an applicant is a member of a recognized religious organization that is exempted by the Registrar from obtaining a photo. A written statement from the client indicating the religious affiliation must be submitted for microfilming. A registry agent shall place a Condition Code G licence when an applicant has a temporary medical condition, which affects the appearance of the applicant, *e.g.*, shingles, facial burns, reactions to cancer treatment."

3 Alberta Solicitor General, Motor Vehicles Division Policy Manual regarding Licence Codification – Condition Codes, issued April 1, 1989 and revised October 28, 1992: *Appellant's Record*, vol. II, p. 119 ("Condition Code G shall be placed on a licence by an MVD staff member or Issuing Agent when: a. An applicant is a member of a religious organization that is exempted by the Registrar from obtaining a Part 1 Photo Card. *This policy only applies to members of a Hutterite Colony*" (emphasis added)).

4 *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 137/2003, s. 3.

5 Affidavit of Joseph Mark Pendleton, sworn July 28, 2005, para. 16: *Appellant's Record*, vol. II, p. 96.

6 *Id.*; see also Transcript of Cross-Examination of Rosemarie Bullock, February 2, 2006, ll. 10-16: *Appellant's* Record, vol. IV, p. 442.

million licencees in the Province of Alberta.[7] Of these, 252 or 56% had been issued to Hutterites,[8] amounting to 0.01016% of the issued licences (presumably the remainder had temporary medical conditions).[9] Thus, restoring the religious exemption would still preserve photographs on 99.98984% of Alberta's driver licences.

10. ***No evidence of floodgates opening.*** Nothing in the record suggests that non-photo licences have ever been issued to any religious groups other than Hutterites. Indeed, there is no evidence of anyone else even *applying* for such a licence from 1974 to 2003, other than one Caucasian man who was refused an exemption based on "Native Spirituality".[10] Alberta's evidence is that veiled Muslim women do not object to being photographed or showing their faces to police officers. Alberta allows them to attend at a registry agency after hours to be photographed outside the presence of men who are not family members.[11]

11. ***The Wilson Colony's vehicle needs.*** The Wilson Colony uses motor vehicles to obtain medical services each week for (amongst others) the 48 children and 8 diabetics on the Colony, for community firefighting by volunteer firefighters, and in commercial activity to sustain their community.[12]

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[7] Affidavit of Joseph Mark Pendleton, sworn July 28, 2005, para. 9: *Appellant's Record*, vol. II, p. 94; Reasons of Conrad J.A., para. 5: *Appellant's Record* vol. I, p. 21.

[8] Affidavit of S. Samuel Wurz, affirmed November 10, 2005, paras. 24, 33: *Appellant's Record*, vol. II, pp. 218, 220; Reasons of Conrad J.A., para. 5: *Appellant's Record* vol. I, p. 21; Affidavit of Joseph Mark Pendleton, sworn July 28, 2005, para. 19: *Appellant's Record*, vol. II, p. 97.

[9] *Cf.* Reasons of Conrad J.A., para. 51: *Appellant's Record* vol. I, p. 31 (estimating non-photo licences at "approximately 0.02 per cent of the total number of licences in this province").

[10] Affidavit of Joseph Mark Pendleton, sworn July 28, 2005, para. 42: *Appellant's Record*, vol. II, pp. 103-104.

[11] *Id.*

[12] Affidavit of S. Samuel Wurz, affirmed November 10, 2005, paras. 15-18: *Appellant's Record*, vol. II, pp. 216-218.

PART III – SUBMISSIONS

A. ALBERTA'S CATEGORICAL RULE INFRINGES THE RESPONDENTS' FREEDOM OF RELIGION

12. While Alberta conceded that categorical photo rule infringes s. 2(*a*) of the *Charter*, the Attorneys General of Ontario[13] and Quebec[14] invite the Court to revisit its approach to freedom of religion in *Amselem*, which assesses a claimant's subjective sincerity of religious belief.[15] The invitation should be declined. *Amselem* is based on fundamental principles of personal autonomy and the courts' justified reluctance to become arbiters of religious dogma.

(a) The Broad Scope and Jealous Protection of Freedom of Religion

13. The freedom of religion is "broad" and "jealously guarded".[16] This Court in *Amselem* affirmed that religion is about "freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith".[17] Freedom of religion revolves around "the notion of personal choice and individual autonomy and freedom".[18] This focus on individual autonomy led the Court to adopt a test based on subjective sincerity of religious belief, and to affirm its consequence, that "the State is in no position to be, not should it become, the arbiter of religious dogma".[19] The Court recently affirmed these principles in *Multani*[20] and *Bruker*.[21]

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13 Factum of Attorney General of Ontario, paras. 7, 19-21.

14 Factum of Attorney General of Quebec, paras. 2, 52-59.

15 *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, Iacobucci J.

16 *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para. 53.

17 *Amselem*, above, note 15, para. 39.

18 *Id.*, para. 40.

19 *Id.*, para. 50.

20 *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, para. 35, Charron J.

21 *Bruker v. Marcovitz*, 2007 SCC 54, paras. 37, 67, Abella J.

14. Lower courts have applied *Amselem* without difficulty. For example, in *Bothwell v. Ontario (Minister of Transportation)*[22] the Ontario Divisional Court upheld Ontario's decision to refuse an individual a religious exemption from its photo requirement for a driver's licence (Ontario grants religious exemptions under certain conditions). The applicant, a former Anglican, had long possessed (and not objected to) an Ontario driver's licence with a Polaroid photo, but asserted religious objections to it being replaced with a digital photo. Applying *Amselem*, the Court doubted the applicant's sincerity of belief given his past acceptance of the Polaroid, his family digital camera and website with digital family photos, and his public statements raising privacy rather than religious objections.[23]

(b) An Infringement of Section 2(*a*) of the *Charter* Was Established

15. A breach of s. 2(*a*) was established.[24] The respondents sincerely believe that allowing themselves to be photographed infringes the Old Testament's Second Commandment against idolatry.[25] In addition, the impact of Alberta's categorical rule on the respondents is not trivial or insubstantial. A member of the Wilson Colony explained:

> [Alberta] is in effect attempting to force the Hutterian Brethren to make a choice between two of our religious beliefs, adhere to the Second Commandment or adhere to our communal way of life. Without being able to drive, we cannot maintain our communal way of life as society is currently structured. However, in order to be able to drive, [Alberta] says we must contravene The Second Commandment. *The position of [Alberta] is tearing apart the fabric of our existence* (emphasis added).[26]

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[22] *Bothwell v. Ontario (Minister of Transportation)* (2005), 193 O.A.C. 383 (Div. Ct.).

[23] *Id.*, paras. 1, 4, 24, 32, 40-42, 59-64.

[24] *Multani*, above, note 20, para. 34, requiring that (1) a person sincerely believes in a practice or belief that has a nexus with religion, and (2) the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with the person's ability to act in accordance with that practice or belief.

[25] "You shall not make for yourself an idol, or any likeness of what is in heaven above or on earth beneath or in the water under the earth": *Exodus* 20:3-17, reproduced in *Appellant's Record*, vol. II, p. 206.

[26] Affidavit of S. Samuel Wurz, affirmed November 10, 2005, para. 25: *Appellant's Record*, vol. II, p. 218.

B. ALBERTA'S CATEGORICAL RULE IS NOT JUSTIFIED UNDER SECTION 1

16. Alberta has not discharged its onus under s. 1 of the *Charter* of showing that it pursued a legislative objective that is sufficiently important to warrant limiting a constitutional right or that the means chosen were proportional to the ends sought.[27]

(a) Only *Intra Vires* Objectives May Be Considered Under Section 1

17. An impugned regulation may be justified under s. 1 of the *Charter* based only on objectives that are *intra vires* the enabling legislation.[28] Here, the only objectives that are *intra vires* the *Traffic Safety Act* are those which relate to traffic safety, such as regulating highways and promoting reasonable safety on them.[29] While the majority of the Alberta Court of Appeal characterized the *Traffic Safety Act* having regard to its traffic safety purposes,[30] the dissent also looked to non-traffic related purposes, such as preventing fraud, identity theft, terrorism, and the Minister's desire to create a facial recognition database.[31] The dissent suggested that it was proper to consider these new and developing factual circumstances in identifying the original purpose of the *Traffic Safety Act*.[32]

18. Alberta relies on the dissent's approach, stating that "[o]ur justification of our photo requirement does not focus on the ways in which a driver's licence photo assists peace officers in enforcing traffic laws".[33] Rather, Alberta states that *"two recent developments justify our new insistence on a licence photograph. There are, first, threats to the public that did not exist in*

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27 *Multani*, above, note 20, para. 43.

28 *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, paras. 20, 25.

29 See *Thomson v. Alberta (Transportation and Safety Board)* (2003), 232 D.L.R. (4th) 237, para. 47 (Alta. C.A.), lv. to S.C.C. refused [2003] S.C.C.A. No. 510. The level of safety is the attainable goal of reasonable safety, rather than the unattainable goal of absolute safety: see *Multani*, above, note 20, paras. 45-48.

30 Reasons of Conrad J.A., para. 30: *Appellant's Record*, vol. I, p. 26.

31 Reasons of Slatter J.A. (dissenting), paras. 90, 96-97: *Appellant's Record*, vol. I, pp. 42, 44.

32 Reasons of Slatter J.A. (dissenting), paras. 65-66, 68: *Appellant's Record*, vol. I, pp. 35-36.

33 Factum of the Crown in Right of Alberta, para. 51.

1974 [when the Traffic Safety Act was enacted], which, second, we may now reduce with facial recognition technology and digital photos of licensees."[34]

19. There are at least two objections to the approach taken by the dissent and Alberta. First, it relies on a "shifting purpose" arising from "changing social conditions" to justify legislation under s. 1 of the *Charter*.[35] However, in conducting a s. 1 analysis, the Court "must look at the intention of [the legislature] when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the provision. Although the application and interpretation of objectives may vary over time, new and altogether different purposes should not be invented".[36]

20. Second, the dissent's and Alberta's approach characterizes the legislation at an excessively high level of generality for purposes of s. 1. The dissent attributed to the Act the purpose of "preventing the misuse of driver's licenses" in the most general possible sense, thereby making the purpose broad enough to contemplate misuse both *within* and *outside* the traffic context. However, as McLachlin J. noted in *Zundel*: "[j]ustification under s. 1 requires more than the general goal of protection from harm [...]; it requires a *specific* purpose so pressing and substantial as to be capable of overriding the *Charter*'s guarantees" (emphasis added).[37]

21. These objections do not necessarily require that state objectives invoked to limit *Charter* rights be 'debated' in the legislature. Rather, they require that the claimed objectives be the objectives of the law itself, rather than constituting new objectives or *ex post* rationalizations squeezed into pre-existing laws. The requirement that limits on *Charter* rights be "prescribed by law" ensures a transparent and accessible democratic process. Facial recognition databases and identity cards are highly controversial, and merit appropriate public review and scrutiny.

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[34] Factum of the Crown in Right of Alberta, para. 9 (Alberta's emphasis).

[35] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, p. 334, Dickson C.J.; Peter W. Hogg, *Constitutional Law of Canada* (2007+), heading 38.9(e), pp. 38-26 to 38-27.

[36] *R. v. Zundel*, [1992] 2 S.C.R. 731, p. 761, McLachlin J. (as she then was).

[37] *Id.*, p. 762.

22. These objections would also be consistent with a position that the impugned regulation is *intra vires*. Regulations can have collateral unauthorized purposes (such as the non-traffic purposes in this case) without being *ultra vires*. As Keyes explains in *Executive Legislation*:

> [...] the effect of collateral unauthorized purposes on executive legislation that is made for an authorized purpose [...] depend[s] on the significance of the collateral purpose relative to the authorized purpose. If the authorized purpose provides the principal motivating force for the executive legislation, the collateral purpose will have no impact on its validity.[38]

(b) No Proportionality Between Means and Ends

(i) *No Minimal Impairment of the Respondents' Freedom of Religion*

23. Even if the impugned regulation is rationally connected to its traffic safety or non-traffic safety objectives, it does not minimally impair the respondents' freedom of religion. In this case, Alberta has a duty to reasonably accommodate to the point of undue hardship those adversely affected by the categorical rule.[39]

24. If the objectives of the impugned regulation are the traffic safety purposes, then there is no question that the regulation does not minimally impair the respondents' freedom of religion. Alberta conceded that "if the requirement for photographs was just a matter of traffic safety, the system could tolerate a few licences without photographs".[40]

25. Even if the objectives of the impugned regulation are broadened to include the non-traffic safety purposes, Alberta still failed to prove that it could not reasonably accommodate the respondents' freedom of religion without undue hardship.

26. This Court has applied the evidentiary requirement under s. 1 carefully and sensitively when considering infringements of freedom of religion, consistently refusing to allow

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[38] John Mark Keyes, *Executive Legislation [:] Delegated Law Making By The Executive Branch* (1992), p. 224. See also Donald J.M. Brown and Hon. John M. Evans, *Judicial Review of Administrative Action in Canada* (July 2008-), 14:3351, pp. 14-150 to 14-152 and 14:4262, pp. 14-189; and Denys C. Holland and John M. McGowan, *Delegated Legislation in Canada* (1989), pp. 219-220.

[39] *Multani*, above, note 20, paras. 50-52.

[40] Reasons of Slatter J.A. (dissenting), para. 110: *Appellant's Record*, vol. I, p. 49.

speculative concerns that lack a proper evidentiary basis to override fundamental rights. Security concerns must be based on "concrete" or "specific" evidence of a "real risk", rather than merely "speculative evidence".[41]

27. The evidence does not support Alberta's claim of an unacceptable risk of harm. Alberta relies on "the ability of digital photos and facial recognition analysis to impede wrongdoers who would commit fraud or threaten public safety by abusing the driver's licences' currency as an identity document".[42] However, the evidence is that in 30 years of religious accommodation, there is not a single incident of Hutterites abusing their non-photo driver's licence as an identity document or otherwise. The historical record also convincingly refutes any concern about fraudsters claiming to be Hutterites to claim the religious exemption. The majority of the Court of Appeal correctly found "absolutely no evidence of a problem".[43] Indeed, the respondents' proposed accommodation (marking such licences "Not to be used for identification purposes") would eliminate the risk of such licences being used as "breeder" documents to obtain other forms of identification. In short, there is no evidence of abuse by Hutterites.

28. The issue thus boils down to whether it has been unequivocally established that there are any real risks of abuse by non-Hutterites if Hutterites are accommodated with non-photo licences. Put another way, would it constitute an undue hardship if Alberta's facial recognition database were only 99.98984% complete? While it is theoretically possible that a non-Hutterite could seek to appropriate the identity of one of the 252 Hutterites who had been issued a non-photo licence and that such fraud would not be detected by the facial recognition software, Alberta has failed to show that forms of fraud detection *other than the facial recognition database would not be available*. Nor can this risk be described as "real" or "serious" or as amounting to undue hardship when there are over 700,000 other Albertans without driver's

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41 *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, paras. 19, 32, 35, 38, 42. See also *Amselem*, above, note 15, paras. 88-89 (security concerns must be "soundly established").

42 Factum of the Crown in Right of Alberta, para. 51.

43 Reasons of Conrad J.A., para. 47: *Appellant's Record*, vol. I, p. 30.

licences whose identities are also open to theft and would also not be caught by the facial recognition database.[44] As such, Alberta has failed to meet the minimal impairment requirement.

(ii) *The Deleterious Effects of the Categorical Rule Outweigh The Salutary Effects*

29. The final branch of the proportionality test requires a weighing of the deleterious and salutary effects of the impugned regulation. It asks whether the *Charter* infringement is "too high a price to pay for the benefit of the law".[45] Here, Canada's commitment to religious toleration must be weighed against Alberta's desire for an 'absolutely complete' facial recognition database (although, as noted, it will still exclude over 700,000 Albertans). Canadians rightly place a very high premium on freedom of religion. As this Court recently noted in *Multani*, "[r]eligious toleration is a very important value of Canadian society [and] at the very foundation of our democracy".[46] The CCLA submits that, in this case, "tearing apart the fabric" of a religious community and ending their communal way of life exacts too high a price for the benefit of including 252 Hutterites in Alberta's database.

PART IV – ORDER SOUGHT

30. The CCLA submits that Alberta has failed to demonstrate that the impugned regulation is a reasonable limit on the right to freedom of religion. The CCLA does not seek costs, and asks that no costs be awarded against it. The CCLA requests leave to present oral argument.

September 17th, 2008

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[44] Reasons of Conrad J.A., para. 40: *Appellant's Record*, vol. I, p. 28; Transcript of Cross-examination of Rosemarie Bullock, February 2, 2006, p. 22: *Appellant's Record*, vol. IV, p. 456.

[45] Hogg, above, note 35, heading 38.12, p. 38-43.

[46] *Multani*, above, note 20, para. 76.

PART V – LIST OF AUTHORITIES