SCC No.32186

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

Appellant

and

HUTTERIAN BRETHREN OF WILSON COLONY and HUTTERIAN BRETHREN CHURCH OF WILSON COLONY

Respondents

and

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ONTARIO, THE EVANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN LEGAL FELLOWSHIP

Interveners

FACTUM OF THE INTERVENER, ONTARIO HUMAN RIGHTS COMMISSION

OVERVIEW

1. The Ontario Human Rights Commission (the "Commission") submits that:

- the government's burden in meeting the minimal impairment branch under s. 1 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") is analogous to the duty owed in human rights cases to accommodate to the point of undue hardship;
- the speculative and impressionistic evidence put forward by the Appellant does not meet the high threshold of unequivocally establishing that the accommodation sought by the Respondents would cause undue hardship in the form of an intolerable increased risk to public safety;

- this Court's decision in *Syndicat Northcrest v. Amselem* ("*Amselem*") does not prevent the Appellant from conducting legitimate and effective inquiries into the sincerity of claims for religious exemptions.

PART I ~ STATEMENT OF FACTS

2. The Commission relies upon the statements of facts set out in the factums of the Appellant and Respondents. To the extent there is any disagreement between the parties on factual matters, the Commission takes no position on such disagreement.

PART II ~ ISSUES

3. The Appellant concedes that the mandatory photo requirement infringes the Respondents' rights under ss. 2(a) and 15(1) of the *Charter*. The Commission agrees those rights were infringed, but in light of the concessions makes no submissions in this regard. The Commission instead limits its submissions to an argument that the infringement is not a reasonable limit that can be demonstrably justified under s. 1 of the *Charter*.

PART III ~ STATEMENT OF ARGUMENT

A. Section 1 of the *Charter*

4. The onus is on the Appellant to prove that, on a balance of probabilities, the infringement of the Respondents' rights is reasonable and can be demonstrably justified in a free and democratic society. To do so, the Appellant must show (i) that the legislative objective of the infringing measure is sufficiently important to warrant limiting a constitutional right, and (ii) the means chosen are proportional to the objective.

> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at para. 43 ("*Multani*") [Appellant's Authorities, Tab 3].

5. The Commission takes no position as to whether the legislative objectives are effectively limited to matters concerning road safety (as the Respondents argue), or can instead include the prevention of identity theft and other threats to public safety (as the Appellant argues). Nor does the Commission dispute the existence of a rational

connection between the impugned regulation and the objectives, however characterized. Instead, the Commission argues that the Appellant has failed to satisfy its onus with respect to the minimal impairment branch of the justification analysis.

6. In that regard, the Commission agrees with the majority of the Alberta Court of Appeal that the burden on the government with respect to the minimal impairment is comparable to that owed in relation to discrimination. This Court held in *Multani* that there is a "logical" correspondence between the concept of reasonable accommodation, or accommodation short of undue hardship as developed in the human rights jurisprudence, and the concept of minimal impairment in a s. 1 analysis.

> *Multani*, *supra* at para. 53 ("In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty to reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar") [Appellant's Authorities, Tab 3].
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> See also: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 984 (stating that "reasonable accommodation" and accommodation to the point of "undue hardship" are not independent criteria, rather they are alternate ways of expressing the same concept). [Commission's Authorities, Tab 2].

7. Paragraph 41 of the Attorney General of Quebec's Factum argues against this correspondence, submitting that a human rights accommodation analysis, with its focus on the accommodation of individuals in private relationships (*e.g.* employment), does not allow for an appropriate consideration of collective or societal interests. However, this argument overlooks the fact that human rights cases frequently involve considerations of health or safety risks to parties outside of the private relationship that gave rise to the complaint. For but two examples in this Court, see:

> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights*), [1999] 3 S.C.R. 868 ("*Grismer*") at paras. 25-43 (considering whether adjusting the vision standard for drivers would

cause risks to other drivers and impede reasonable highway safety). [A-G of B.C.'s Authorities, Tab 1].

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3 ("*Meiorin*") at paras. 78-82 (considering whether adjusting the aerobic standard for firefighters would cause risks to co-workers or the public at large) [A-G of B.C.'s Authorities, Tab 2].

8. In any event, collective or broad societal interests are generally taken into consideration in parts of the s. 1 test other than the minimal impairment branch - for example when determining the pressing and substantial objectives of the infringing legislation, and/or when weighing the salutary effects of a requirement against its deleterious effects.

B. Principles of Accommodation

9. Once a claimant establishes that a standard or requirement is *prima facie* discriminatory, the onus shifts to a respondent to prove on a balance of probabilities that the discriminatory standard has a *bona fide* and reasonable justification. In order to establish this justification, the respondent must prove that:

1. it adopted the standard for a purpose or goal that is rationally connected to the function being performed;

2. it adopted the standard in good faith in the belief that it is necessary for the fulfillment of the purpose or goal; and

3. the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

Meiorin, *supra* at para. 54 [A-G of B.C.'s Authorities, Tab 2].

10. Though developed in the employment context, this Court determined in *Grismer* that the test for justification applied in all contexts to which human rights legislation applied, including the issuance of drivers' licences by a government body.

Grismer, *supra* at para. 19 [A-G of B.C.'s Authorities, Tab 1].

11. The Commission accepts that freedom to exercise one's religion is not absolute. However, those in a position to accommodate such a right should make all reasonable and good faith efforts to do so. As stated by McIntyre J.:

> While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it. In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others.
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> *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 554 ("*O'Malley*") [Commission's Authorities, Tab 5].

12. An accommodation-provider's obligation to accommodate is also not absolute. It is limited to efforts that do not cause undue hardship. Factors that cause undue hardship are not "entrenched" and such considerations will depend on the particular circumstances and context of every case. Excessive cost or safety concerns could result in undue hardship, but should not be based on impressionistic or anecdotal evidence. Risk can only be considered in an undue hardship analysis and not as an independent justification of discrimination.

> *Grismer, supra* at paras. 32 and 41 [A-G of B.C.'s Authorities, Tab 1].
>
> *Meiorin, supra* at paras. 62, 63 and 79 [A-G of B.C.'s Authorities, Tab 2].
>
> *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202 at 212-13 [Commission's Authorities, Tab 4].

13. The onus on a respondent to establish a *bona fide* and reasonable justification is a stringent one. A respondent always bears the burden of demonstrating that an infringing standard or requirement incorporates "every possible accommodation" to the point of undue hardship, whether that be impossibility, serious risk or excessive cost. It is incumbent on a respondent to establish that it has considered and reasonably rejected all viable forms of accommodation. A respondent alleging "undue hardship" must provide objective, real and direct evidence, and in the case of cost, such evidence must be

quantifiable. A simple statement that a complainant cannot be accommodated, if based upon impressionistic views or evidence, will not suffice to satisfy the onus.

Grismer, supra at paras. 32, 41 and 42 [A-G of B.C.'s Authorities, Tab 1].

14. The use of the term "undue" infers that some degree of hardship for a respondent to bear is acceptable. Mere inconvenience or minor interference with the interests of others will not be sufficient to meet the test.

Renaud, *supra* at 984 [Commission's Authorities, Tab 2].

C. Application to the Case At Bar

15. The Commission submits that the Appellant has not proven that it cannot accommodate the needs of the Hutterian Brethren by allowing its members to obtain non-photo-bearing drivers' licences, without incurring undue hardship.

(i) The Appellant's purpose in implementing a mandatory photo requirement is to improve, not perfect, security of its drivers' licences.

16. The Government of Alberta instituted the mandatory photo requirement in question, along with other improved requirements, as one component of an enhanced security system related to identity verification of Alberta drivers' licence holders. The Appellant sought to improve the security of its drivers' licences in order to hinder individuals (so-called "wrongdoers") from obtaining these licences under false identities and using such fraudulent licences to engage in further identity theft and other acts contrary to public safety, including terrorism.

17. Thus, the level of security sought by the Appellant in this identity verification system is to "make it difficult" or "impede" a wrongdoer from obtaining a driver's licence in another licencee's name or in a false name. The level of security the Appellant seeks to provide by this system is one that is enhanced, but not absolute.

Multani, *supra* at paras. 45-48 (this Court held that the school council's objective was to provide reasonable, not absolute, safety in schools) [Appellant's Authorities, Tab 3].

> *Grismer*, *supra* at paras. 25-26 (this Court held that the government's objective was reasonable road safety, as a goal of absolute safety would have been unfeasible) [A-G of B.C.'s Authorities, Tab 1].

(ii) The Appellant's insistence on a mandatory photo requirement, without exception, is based on an unrealistic assessment of risk.

18. The Appellant argues that the photo requirement must be mandatory because each licensee with a photo not in its database creates an "opportunity for impersonation". Thus, even a single opportunity for impersonation is claimed to be an intolerable safety risk.

19. Risk assessment is part of an undue hardship analysis. Where safety is at issue, both the magnitude of the risk and the identity of those who bear it are relevant to a determination of accommodation to the point of undue hardship. This approach necessarily accepts that a certain level of risk is acceptable in certain circumstances. What is required is an assessment of the risk already accepted or inherent in the context being examined.

> *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at 521 [Commission's Authorities, Tab 1].

20. From the record, it is clear that even with a mandatory photo requirement, there already exist opportunities, and subsequently, risks, that wrongdoers may obtain drivers' licences by falsely assuming the identity of another individual. For example, a wrongdoer who is a new licencee (thus without a photo in the database) could fraudulently assume the identity of another non-licenced Albertan. Based on the evidence, this wrongdoer already has from 700,000 Albertans, who by virtue of being unlicenced, do not appear in the database, to choose in terms of assuming a false identity to obtain a driver's licence. What is the likelihood that a wrongdoer will choose a stolen identity from one of a discrete group of individuals who have received a religious exemption, and not from the larger group of unlicenced Albertans? The risk posed by granting an exemption to the Respondents would be the marginal increase in this "pool" of non-photographed Albertans by approximately 450.

21. The Commission concurs with the majority of the Court of Appeal that exempting the Respondents from the mandatory photo requirement would not amount to undue hardship on the basis that the licencing system already assumes a level of risk or vulnerability that is only marginally affected by an exemption for religious reasons.

22. Further, the risk engaged must be "serious" to meet the test of undue hardship. Though it is not necessary for harm to be done before acting or legislating in a particular area, the evidence of concerns relating to safety must be unequivocally established before the infringement of a constitutional right can be justified.

Multani, *supra* at para. 67 [Appellant's Authorities, Tab 3].

23. Throughout its Factum (for example on page 12 and para. 74), the Appellant argues that a photo exemption introduces a vulnerability to the security of the system by individuals who already hold a licence (thus having their picture in the database) and seek to obtain a second, fraudulent licence by (i) assuming the identity of someone who has obtained a religious exemption and holds a non-photo licence, or (ii) fraudulently claiming a religious exemption, thereby avoiding a second photo being taken.

24. However, the Appellant has been unable to point to any evidence of licences being obtained fraudulently in the manner suggested above. As held by the majority of the Court of Appeal, the exemption existed in Alberta for 29 years without harm, and with no known cases of this kind of fraud occurring. The evidence therefore fails to meet the *Multani* requirement that risks be "serious" and "unequivocally established", as opposed to merely speculative or impressionistic.

(iii) This Court's Decision in Amselem Does Not Create Additional Risk

25. The Appellant and other intervening Attorneys General suggest that by protecting sincere personal religious beliefs, without requiring objective verification (for example through evidence that the personal beliefs are consistent with the individual's past practices, or are recognized as valid by other adherents or religious officials or experts),

Amselem and *Multani* effectively create an absolutist approach that presumptively entitles any person to claim a religious exemption. They speculate this will lead to a significant expansion in the number of people seeking and obtaining religious exemptions, thereby compounding vulnerabilities in the licensing system and causing undue hardship.

> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 ("*Amselem*") [Appellant's Authorities, Tab 8].
>
> *Multani*, *supra* [Appellant's Authorities, Tab 3].

26. These arguments fail to recognize the considerable leeway this Court has left for legitimate inquiries into the sincerity of a professed religious belief. In this regard, the majority of the Alberta Court of Appeal properly recognized that the government is fully entitled to conduct an evidentiary inquiry to ensure that a belief has a nexus with religion, is held in good faith, is neither fictitious nor capricious, and is not an artifice. It cited *Amselem* in stating that the permitted inquiry is one of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony, and an analysis of whether the alleged belief is consistent with other current practices.

27. The Commission agrees that there is no need to revisit or narrow *Amselem* and *Multani*, as they provide ample tools for inquiring into the sincerity of claims for accommodation based on religion. For example, it would be open to the Appellant to (i) require claimants to provide evidence concerning the nature of their beliefs, and to answer questions about whether those beliefs are consistent with current practices, (ii) invite claimants to provide evidence from third party references (whether from family, friends, colleagues or otherwise) to verify their current practices; and/or (iii) invite claimants to provide evidence from other adherents or religious officials or experts concerning their beliefs (although an inability to provide this evidence would not in itself render a belief unworthy of protection). The Appellant would then be able to review the totality of information received and make the permitted conclusions concerning the sincerity of the request for a religious exemption to the mandatory photo requirement. As the majority of the Court of Appeal properly held, there is no persuasive evidence that relying on such a process would be ineffective or cause undue hardship.

28. Indeed, contrary to what the Appellant and others suggest, there are at least two reported instances where such inquiries have led to findings that a professed religious belief was not sincerely held:

- In *Bothwell v. Ontario*, a fundamentalist Christian tried to claim the benefit of the existing religious exemption from Ontario's mandatory photo requirement for driver's licences. Applying *Amselem*, the Ontario Divisional Court found Mr. Bothwell had not met his burden of proving that his refusal to be photographed was linked to a sincere religious belief. The Court based its conclusion on, among other things, inconsistencies in his evidence concerning his purported beliefs and current practices, and statements from Mr. Bothwell demonstrating that his objection lacked the required nexus to religion. (Interestingly, Mr. Bothwell appears to have received temporary non-photo licences from 1998 to 2002 while the government processed his exemption requests - something that Ontario was apparently able to tolerate without suffering undue hardship).

  Bothwell v. Ontario, [2005] O.J. No. 189 at paras. 13, 25 and 52-64 (Div. Ct.) [Respondents' Authorities, Tab 4].

- In *Nijjar v. Canada 3000 Airlines Ltd.*, a practicing Sikh challenged an airline policy prohibiting the wearing of kirpans longer than four inches. Although the case was decided before *Amselem*, the Tribunal took the same subjective approach, focusing on the sincerity of Mr. Nijjar's beliefs, rather than their correspondence with the teachings of Sikhism. The Tribunal dismissed the complaint, in part because Mr. Nijjar's testimony showed that wearing a kirpan longer than four inches was a matter of personal preference, not religious belief.

  Nijjar v. Canada 3000 Airlines Ltd. (1999), 36 C.H.R.R. D/76 at paras. 43 and 47-51 (C.H.R.T.) [Commission's Authorities, Tab 3].

29. By contrast, there is no evidence in the record of anyone having successfully duped a motor vehicle registry into giving a religious exemption where it was not warranted, whether in the 29 years that an exemption existed in Alberta (1974 to 2003), or in the 22 years to date that an exemption has existed in Ontario (1986 to the present), including in the four years since *Amselem* was decided in 2004.

30. In the circumstances, the majority was right to reject the Appellant's claim that restoring the religious exemption would lead to a dramatic increase in the number of applicants. The majority observed that there were only 453 non-photo licence holders in Alberta in 2003, representing just 0.02% of all licence holders, and that there was no

indication this was an aberration as compared to previous years. It is also noteworthy that in the larger province of Ontario there have only been approximately 80 applications for the existing permanent religious exemption since 1986 (see para. 6 of the Factum of the Attorney General of Ontario). Since the best predictor of the future is the past, this Court should not rely on the speculation that *Amselem* and *Multani* "could", "might" or "may" open the floodgates to religious claims, fraudulent or otherwise.

PART IV ~ COSTS

31. The Commission makes no submissions with respect to costs.

PART V ~ ORDER REQUESTED

32. The Commission seeks an order finding that the impugned regulation infringes the Respondents' rights under ss. 2(a) and 15(1) of the *Charter* and is not saved by s. 1, but otherwise makes no submissions on the particular form of relief to be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Toronto, September 22, 2008.

Kikee Malik
Counsel for the Intervener,
Ontario Human Rights Commission

Brian Smith
Counsel for the Intervener,
Ontario Human Rights Commission

PART VI ~ TABLE OF AUTHORITIES

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3	*Nijjar v. Canada 3000 Airlines Ltd.* (1999), 36 C.H.R.R. D/76 (Can. Trib.).	28
4	*Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202.	12
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