COURT FILE NO.: 32186

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

BETWEEN:

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 RESPONDENTS HUTTERIAN BRETHREN OF WILSON COLONY and HUTTERIAN BRETHREN CHURCH OF WILSON PURSUANT TO RULE 42 OF THE RULES OF THE SUPREME COURT OF CANADA

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PART I - STATEMENT OF FACTS

A. Overview

1. The Hutterian Brethren trace their roots to the Anabaptist movement in Moravia and they take their name from Jacob Huter, an early charismatic leader of the movement (1533). Religious intolerance forced the Brethren to flee their homes several times, Moravia to Slovakia and Transylvania (1622), then to Romania (1767) thence to Little Russia (1770), in search of religious freedom. Military conscription forced the Hutterian Brethren to move from Russia to the United States (1874 and 1877). Even in the United States, religious intolerance in the form of super patriotism forced the Brethren to seek a more tolerant society. They found that tolerant society in Canada resulting in an exodus of a greater part of the Brethren into Alberta and Manitoba during World War I. The Canadian government of the day guaranteed the Brethren's right to religious freedom in Canada.

2. Two of the Respondents' religious beliefs are affected by this case:

    1. the Second Commandment prohibits them from willingly allowing their pictures to be taken; and,
    2. the doctrine of communal living.

3. A mandatory photo requirement will mean the Respondents cannot drive. Without the ability to drive the Respondents' communal way of life will cease.

4. The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 (the "*Charter*") guarantees the fundamental rights to freedom of conscience and religion and equality in Canada. Success by the Appellant will force the Respondents to make a choice between 2 of their religious beliefs. Either choice will mean the Respondents cease to be equal citizens under the laws of Canada able to freely practice their religion.

B. Relevant Facts

5. As a religious commune, the arguments set out herein are on behalf of all the members of the Wilson Colony, which also includes the Three Hills Colony which has become a separate entity since the commencement of these proceedings. References to Wilson Members in this brief are references to all the members of the Wilson Colony and Three Hills Colony and not simply to the corporate entity, Hutterian Brethren Church of Wilson.

Current Regulation and Driver's Licences

6. The Appellant began issuing photo drivers' licences in 1974 but issued non photo licences ("Code G Licences") to individuals whose religious convictions prohibited their picture from being taken. This exemption was initially limited to "members of a Hutterite Colony"[1].

7. The status quo changed in 2003 when the Appellant implemented a mandatory photo requirement for all drivers' licences (*Alberta Regulation 320/2002, Operator Licensing and Vehicle Control Regulation* as amended by *Alberta Regulation 137/2003, Operator Licensing and Vehicle Control Amendment Regulation* collectively "s.14(1)(b)"[2]).

8. In 2003, 37 Wilson Members had Code G Licences but due to their refusal to have pictures taken for licence renewals the number had dwindled to 15 by the commencement of this case[3].

9. In 2003, the Wilson Colony and other Hutterian Brethren supporting the Wilson Colony comprised approximately 56% of the total Code G Licences issued and in total there were 453 valid Code G Licences in Alberta[4].

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[1] Affidavit Pendleton July 28, 2005, Exhibit "B"; Appellant's Record Vol II p. 119

[2] Appellant's Authorities, Tab #12 and #13

[3] Affidavit Wurz November 10, 2005, para 21; Appellant's Record Vol II p. 218

[4] Affidavit Wurz November 10, 2005, para 24, 31; Appellant's Record Vol II, p. 218 and 219

10. The number of Alberta driver's licences in 2005 was 2,394,917[5] and there are over 700,000 Albertans without driver's licences[6].

11. Upon issuance or renewal, two separate driver's licences are issued in sequence. The first is a non-photo interim licence and the second is the final photo licence. Interim driver's licences expire at the end of the period set out thereon or when a final driver's licence is issued[7].

12. Several jurisdictions allow for non-photo driver's licences: New Brunswick[8], Manitoba[9], Saskatchewan[10], Ontario (see *Bothwell v. Ontario (Minister of Transportation)*, [2005] O.J. No. 189

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[5] Affidavit of Samuel S. Wurz, affirmed November 10, 2005, para. 30 and Exhibit "B" thereto; Appellant's Record Vol II, p. 219 and 224

[6] Cross exam of Rosemarie Bullock on February 2, 2006, ll. 1-19; Appellant's Record Vol IV, p. 456

[7] Affidavit Wurz November 10, 2005, para 27-29; Appellant's Record Vol II, p. 219; s.14(1)(b) ; Appellant's Authorities Tabs 12 and 13

[8] *New Brunswick Regulation 83-42*, Section 27.01, under the *Motor Vehicle Act*, O.C. 83-170; Appellant's Record Vol II, p. 246

[9] *Manitoba Driver's License Regulation*, Man. Reg. 180/2000, s.6 (registered December 22, 2000); Appellant's Record Vol II, P. 249 - 253

[10] Part III of the *Saskatchewan Driver Licensing and Suspension Regulations*, R.R.S. c.v-2.1 Reg 15 (effective August 1, 1996); Appellant's Record Vol II, P. 254 - 259

(Ont. S.C.)[11]) Arkansas[12], Indiana[13], Kansas[14] (but see paragraph 13 below), Minnesota[15], Missouri[16], Nebraska[17], Oregon[18], Pennsylvania[19], Tennessee[20], and Wisconsin[21].

13. Subsequent to the filing of affidavits, Manitoba[22], Saskatchewan[23], Oregon[24] and Indiana[25] amended their respective regulations but retained their religious exemption from photo drivers

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[11] *Bothwell v. Ontario (Minister of Transportation)*, [2005] O.J. No. 189 p. 1 and 2, Respondents' Authorities, Tab #4

[12] Preamble of the *Arkansas Code of 1987 Annotated*, A.C.A. 27-16-801(b)(2)(2005); Appellant's Record Vol II, p. 225, 226 and 227

[13] Preamble of the *Indiana Code* and section 9-24-11-5; Appellant's Record, Vol II, p. 228, 229, 230, 231 and 232

[14] Preamble to the *Kansas Statutes* Chapter 8, K.S.A 8-243(2005); Appellant's Record, Vol II, p. 233 and 234

[15] Preamble to the *Minnesota Rules of Public Safety Department*, Minn.R.7 410.1810 (2005); Appellant's Record Vol II, p. 235

[16] Preamble to the *Missouri Revised Statutes*, 302.181 R.S.Mo. (2005); Appellant's Record Vol II, p. 236, 237 and 238

[17] Preamble to the *State of Nebraska Statutes*, RRS.Neb. 60-4, 119(2005); Appellant's Record Vol II, p. 239 and 240

[18] Preamble of the *Oregon Revised Statutes*, ORS 807.110 (2003); Appellant's Record Vol II, p. 241 and 242

[19] see footnote #27 below

[20] Preamble of the *Tennessee Code*, Tenn. Code Ann. 55-50-335 (2005); Appellant's Record Vol II, p. 243

[21] Preamble of the *Wisconsin Administrative Code*, Wis. Adm. Code Trans 102.03 (2005); Appellant's Record Vol II, p. 244 and 245

[22] Respondents' Legislation/Amended Regulations, Tab #27

[23] Respondents' Legislation/Amended Regulations, Tab #29

[24] Respondents' Legislation/Amended Regulations, Tab #30

[25] Respondents' Legislation/Amended Regulations, Tab #25

licences. Kansas[26] amended its regulations. The correct portion of the Pennsylvania regulations is attached[27].

The Wilson Colony

14. The Wilson Members sincerely believe in the doctrine of communal property and that the Second Commandment of the Ten Commandments prohibits allowing the capture of one's image[28]. In paragraphs 42, 43, 44 and 45 of its factum, the Appellant refers to a selected portion of the cross examination on the affidavit of Samuel Wurz affirmed August 10, 2005. The un-referenced portions[29] need to be referenced to accurately set out the religious belief of the Wilson Members, as already conceded by the Appellant: "Our belief prohibits us to have pictures taken voluntarily..."[30].

15. The ability to drive is essential for the continuance of the Wilson Members' communal way of life[31]; without drivers' licences the colony will cease to exist[32].

16. With approximately 142 Wilson Members, 8 of whom require specialized medical attention and 48 of whom are children, on average at least one Wilson Member visits doctors or specialists in Lethbridge or Calgary for medical attention per week. Without the ability to drive, it would be

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[26] Respondents' Legislation/Amended Regulations, Tab #26

[27] Respondents' Legislation/Amended Regulations Tab #28

[28] Affidavit Wurz August 10, 2005, para 8; Appellant's Record Vol II, p. 192

[29] Cross exam Wurz; Appellant's Record Vol V, p. 674 ll. 16-24, p. 675 ll. 9-13, p. 676 ll. 3-8, p. 681, ll. 8-17, p. 682 ll. 24-27, p. 683 ll. 1-7, p. 690 ll. 3-7

[30] Cross exam Wurz; Appellant's Record Vol V, p. 681, ll. 15-16

[31] Affidavit Wurz November 10, 2005, para 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 20; Appellant's Record Vol II, p. 215, 216, 217 and 218

[32] Order of Honourable Madam Justice Erb; Appellant's Record Vol I, p. 68; Amended Amended Order of Honourable Madam Justice Erb; Appellant's Record Vol I, p. 72

only a matter of time before a Wilson Member suffers medical harm[33].

17. In January, 2006 the Wilson Colony discovered that two young Wilson Members had obtained photo drivers' licences[34]. Those two young members were dealt with in accordance with the religious beliefs of the Wilson Colony in the same fashion as similar past transgressions of other members[35].

18. The Court record is clear that it is not uncommon for the police to encounter individuals without driver's licences or photo identification and they have methods to deal with such situations[36].

PART II - STATEMENT OF ISSUES

19. The issues before this Honourable Court are as follows:

1. Does s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, as amended by Alta. Reg. 137/2003, infringe s. 2(a) of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Does s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, as amended by Alta. Reg. 137/2003, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably

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[33] Affidavit Wurz November 10, 2005, para 18; Appellant's Record Vol II, p. 217

[34] Affidavit Wurz January 18, 2006, para 11; Appellant's Record Vol III, p. 305

[35] Cross exam Wurz; Appellant's Record Vol V, p. 698 ll 21-27 and 699 ll 1-25; Exhibit "A" Cross exam Wurz ; Appellant's Record Vol V, p. 703

[36] Affidavit of Guy Sorensen, sworn January 10, 2006, para. 3-8; Appellant's Record Vol III, p. 274, 275 and 276; Cross exam Guy Sorensen on February 3, 2006; Appellant's Record Vol V, p. 725 ll. 21-27, p. 726 ll. 1-11

justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

PART III - STATEMENT OF ARGUMENT

A) s. 2(a) *Charter*

20. "An important feature of our constitutional democracy is respect for minorities, which includes, of course, religious minorities...[37]"

21. At each level of court in this litigation, the Appellant has conceded the fact that s.14(1)(b) infringes upon the religious freedom of the Wilson Members and before this Honourable Court, does not contest this infringement.

22. The s. 2 (a) analysis requires the following:

a) a sincere belief in a practice or belief that has a nexus with religion; and

b) interference with the ability to act in accordance with that practice or belief, in a manner that is more than trivial or insubstantial[38].

Sincere Religious Belief

23. It is submitted that the Ten Commandments are so widely known in our society as being based on religion, there can be no argument that the belief of the Wilson Members in this regard has a nexus with religion. The interpretation of the Second Commandment by the Wilson Members, although not a mainstream interpretation within the Christian religion, nonetheless is a sincerely held belief. With the exception of two young members, the Wilson Members have not submitted to having their pictures taken for the renewal of their drivers' licences and have chosen instead to abide by their religious convictions and suffer through not having a valid driver's licence. Of the original 37 drivers only 15 have unexpired drivers' licences. The two young individuals who breached the

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[37] *Amselem*, para 1, Appellant's Authorities, Tab #8

[38] *Amselem*, para 56, 65 Appellant's Authorities Tab #8

Second Commandment were dealt with in accordance with the religious beliefs of the Wilson Members, as were several members who similarly breached the Second Commandment approximately 10 years ago and were made to repent[39].

24. The belief of the Wilson Members in communal living is also a sincerely held religious belief. This Honourable Court specifically found in *Walter v. Alberta (Attorney General)* that the Hutterian Brethren was a religious community which based its communal holding of property on religious principles when analysing the *Communal Property Act*[40].

25. It is submitted that the Wilson Members have established on a balance of probabilities the first stage of the *Amselem* test for both of their religious beliefs.

Interference More Than Trivial or Insubstantial

26. The second stage of the *Amselem* analysis requires the Wilson Members to show that s.14(1)(b) interferes with their exercise of religious freedom in a manner that is more than trivial or insubstantial[41].

27. Requiring the Wilson Members to submit to mandatory photographs when their religious belief prohibits photographs from willingly being taken clearly interferes with the exercise of religious freedom in a manner that is more than trivial or insubstantial.

28. The ability to drive is essential to the proper operation and survival of the communal way of life for the Wilson Members. Without drivers' licences the colony will cease to exist, thereby

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[39] Affidavit Wurz January 18, 2006, para 11; Appellant's Record Vol III, p. 305; Cross exam Wurz; Appellant's Record Vol V, p. 698 ll 21-27 and 699 ll 1-25; Exhibit "A" Cross exam Wurz, Appellant's Record Vol V, p. 703

[40] *Walter v. Alberta (Attorney General)*, [1969] S.C.R. 383 p. 3; Respondents' Authorities, Tab #22

[41] see also *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 para 97, Respondents' Authorities, Tab #12

destroying one of the Wilson Members' sincerely held religious beliefs[42].

29. It is submitted that the record clearly establishes that a breach of s.2(a) of the *Charter* has occurred and why the Appellant has conceded this point.

B) s.15 *Charter*

30. Similar to the s.2(a) issue, the Appellant has conceded throughout this litigation that an infringement under s.15 has occurred.

31. To establish a violation of s.15 (1), the Wilson Members generally must establish:

a) Differential Treatment: law imposes differential treatment between claimant and others, in purpose or effect;

b) Enumerated Grounds: one or more enumerated or analogous grounds are basis for differential treatment; and

c) Discrimination: law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds[43].

32. An important, but not exclusive, purpose of s.15 (1) is the protection of individuals and groups who are vulnerable, disadvantaged or members of "discrete and insular minorities" and the effects of the impugned law as they relate to this purpose should always be a central consideration in the contextual s.15 analysis[44].

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[42] Affidavit Wurz November 10, 2005 para 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 20; Appellant's Record Vol II, p. 215- 218; Order of Honourable Madam Justice Erb; Appellant's Record Vol I, p. 68; Amended Amended Order of Honourable Madam Justice Erb; Appellant's Record Vol I, p. 72

[43] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, Respondents' Authorities, Tab #10

[44] *Law,* para 68, Respondents' Authorities, Tab #10

33. Any demonstration that an impugned law has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society (irrespective of whether that provision corroborates or exacerbates an existing prejudicial stereotype) will suffice to establish an infringement of s.15(1)[45]. The equality guarantee was designed to prevent differential treatment likely to "inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned", and that was likely to decrease their "confidence that they can freely and without obstruction by the state pursue their and their families' hopes and expectations of vocational and personal development..."[46].

34. The focus must always remain upon the central question of whether, viewed from the perspective of the Wilson Members, the differential treatment imposed has the effect of violating human dignity[47].

35. In this analysis, a comparator group needs to be established with the starting point being the comparator group chosen by the applicant, the Wilson Members[48]. It is submitted that the appropriate comparator is:

> residents of Alberta, 18 years of age or older, who qualify under all applicable medical, vision, written and road tests as required by the Traffic Safety Act, but that do not share the same religious belief as the Wilson Members in the Second Commandment.

Law #1

36. Differential Treatment - It is not necessary for s.14(1)(b) to expressly set out differential treatment as differential treatment may occur where the impugned law fails to take into account the

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[45] *Law*, para 64 Respondents' Authorities, Tab #10

[46] *Law*, para 43 Respondents' Authorities, Tab #10

[47] *Law*, para 70 Respondents' Authorities, Tab #10

[48] *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, para 20, Respondents' Authorities, Tab #9

true characteristics of a disadvantaged particular group, for example by treating all persons in a formally identical manner[49].

37. The effect of s.14(1)(b) is to deny issuing driver's licences to Wilson Members resident in Alberta, 18 years or older, who qualify under all applicable medical, vision, written and road tests as required by the *Traffic Safety Act* unless they abandon their sincerely held belief in the Second Commandment, whereas the comparator group can acquire a driver's licence simply because they do not have the same religious belief as the Wilson Members. The religious belief relating to the picture, not any safety, ability or other technical issue related to safely operating a motor vehicle, is the only difference.

38. s.14(1)(b) clearly imposes differential treatment between the Wilson Members who otherwise qualify for a driver's licence and the comparator group.

39. It is further submitted that substantive inequality arises due to the formally identical treatment of the impugned law and consequently, the impugned law also infringes the human dignity of the Wilson Members. Refusing to issue licences to the Wilson Members who otherwise qualify for such licences simply because they refuse to abandon their religious belief in the Second Commandment, but issuing licences to the comparator group simply because they do not share such religious belief, clearly demeans and infringes upon the human dignity of the Wilson Members. This argument, although linked to the first branch of the *Law* test, also satisfies the third branch of the *Law* test[50].

Law #2

40. Enumerated Ground - The second branch of the *Law* test requires that the differential treatment be based on an enumerated or analogous ground. Religion is an enumerated ground

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[49] *Law* para 36, Respondents' Authorities, Tab #10; see also *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 para 67, Respondents' Authorities, Tab #7 and *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 241 para 96 and 124, Respondents' Authorities, Tab #11

[50] *Law* para 82, Respondents' Authorities, Tab #10

specifically set out in s.15(1) of the *Charter*.

Law #3

41. Discrimination - "...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society[51].

42. In determining whether s.14(1)(b) has the effect of demeaning the claimant's dignity, the test is subjective/objective and must be conducted from the perspective of the applicant, the Wilson Members[52].

43. In comparing the Wilson Members to the comparator group, the only difference in why the comparator group can drive and the Wilson Members cannot is the difference in religious beliefs; there is no difference in the actual ability to operate a motor vehicle safely. From the perspective of the Wilson Members, it can be said: "If only we had a different religious belief, then we could drive too." It is submitted that the Wilson Members' dignity is clearly demeaned.

44. It is submitted that the Wilson Members have established on a balance of probabilities that a breach of s. 15 of the *Charter* has occurred.

(C) s.1 of *Charter*

45. The onus of establishing that s.1 justifies the overriding of a guaranteed *Charter* right is on the Appellant. "The presumption is in favour of the right, not the limitation"[53] and given the

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[51] *Law* para 26, Respondents' Authorities, Tab #10

[52] *Law* para 59 and 60, Respondents' Authorities, Tab #10

[53] *Edwards* para 196, Respondents' Authorities, Tab #12

importance of the *Charter* guarantees, the onus is an onerous one[54].

46. The first issue to be determined is whether delegated power in the form of a regulation such as s.14(1)(b) can be viewed as limits "prescribed by law" when the limits ostensibly established by the regulation are unrelated to and not authorised by the enabling statute.[55] Rephrased, the issue to be determined is who should have the constitutional authority to set objectives capable of overriding guaranteed *Charter* rights: our elected representatives or their subordinate bodies.

47. If a regulation is constitutionally capable of setting limits "prescribed by law" which are unrelated to and not authorised by its enabling statute, then we must move on to the *Oakes* analysis. If it cannot, then no *Oakes* analysis is required and s.14(1)(b) is of no force and effect.

Analysis of The *Traffic Safety Act* (Alberta)

48. The *Traffic Safety Act* is a comprehensive legislative scheme covering virtually all aspects of the regulation of highways and motor vehicles in Alberta, the purposes of which are the "regulation of highways and the increase of safety on them"[56]. Nowhere in the Traffic Safety Act is there any mention of preventing ID theft or fraud ("ID Theft"), or rules for the harmonisation of international or interprovincial standards, or the prevention of terrorism (collectively the "Non-statute Objectives"). Despite the silence of the *Traffic Safety Act* on these issues, the Appellant argues that the true objectives of s.14(1)(b) are the Non-statute Objectives.[57]

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[54] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 para 143, Respondents' Authorities, Tab #15; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 p 14-15, Respondents' Authorities, Tab #1

[55] *Multani* para 22, Appellant's Authorities, Tab #3; *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3 para 20 and 25, Respondents' Authorities, Tab #3; *R. v. Zundel*, [1992] 2 S.C.R. 731 p 37-39, Respondents' Authorities, Tab #14

[56] *Thomson v. Alberta (Transportation and Safety Board)*, 2003 ABCA 256 para 5, 6, 46 and 47, Respondents' Authorities, Tab # 18

[57] *R.J.R.-MacDonald Inc.* para 144 Respondents' Authorities, Tab #15

49. The *Traffic Safety Act* went through the normal process of public debate in the Alberta Legislature. This process of public debate provides the checks and balances demanded in a free and democratic society, and consequently provides some assurance that both the purpose and effects have been analysed through our constitutionally mandated legislative system. The same process of public debate does not apply to regulations. In the *Traffic Safety Act*, regulations may be set by the Lieutenant Governor-in-Council or the Minister[58] and no public debate is required. Overriding a guaranteed *Charter* right by legislation created after full public debate is a far different situation than overriding a guaranteed *Charter* right by way of regulation created without any public input or scrutiny.

50. For purposes of statutory interpretation, where the objective of a statute is being determined, the whole of the statute, and not merely portions thereof, must be reviewed and where the provision to be interpreted appears in a regulation, it must be read in the context of both the regulation and the enabling statute as a whole[59].

51. If the rules of statutory interpretation require that the entire statute be read in context in order to determine its objective, by analogy, where the Court needs to look for the objective of an unconstitutional measure for the purposes of justifying overriding a guaranteed *Charter* right, the same approach should be used.

52. The argument of the Appellant to supplant the clear reading of a statute passed by elected representatives with regulations setting out objectives unrelated to the enabling statute and promulgated by unelected officials or subordinate bodies ostensibly governed by that very same enabling statute raises troubling policy considerations. Taken to its logical legal end, when considering the objective for the purposes of the *Oakes* analysis, the Court may look to objectives

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[58] s.18, 64, 81, 100, 105, 116, 129, 156 and 191 *Traffic Safety Act*, Respondents' Legislation/Amended Regulations, Tab #31

[59] *Sullivan and Driedger on the Construction of Statutes* (4th ed) Ruth Sullivan, Butterworths 2002 p. 281 and 282, Respondents' Authorities, Tab #24

unrelated to and not reflected in the wording chosen by the elected officials who drafted the statute. What the Appellant is arguing for is a bifurcated system whereby non-constitutional statutory analysis will be subject to the established rules of statutory interpretation (which focusses on the wording of the statute in question) but for a constitutional analysis, the wording of the statute becomes irrelevant, which would then raise the question: why do we have elected representatives.

53. The Appellant's position sets a dangerous precedent to empower unelected officials such as the Lieutenant Governor-in-Council to "special rendition" any legislation by promulgating regulations to deal with virtually any situation and justify them by claiming a societal concern which is pressing and substantial although entirely unrelated to or authorised by the legislation purportedly enabling the passage of such regulations. For example, rising health care costs are a pressing and substantial societal concern. A regulation under the *Alberta Health Care Insurance Act* denying medical coverage to smokers would certainly reduce health costs. Sexual assault is a horrible crime perpetrated predominantly by men against women. A regulation requiring DNA samples from all males over the age of puberty before health coverage is given under the *Alberta Health Care Insurance Act* would likely have a significant effect on reducing sexual assault. It is submitted that it is not the role of unelected officials or subordinate bodies to make such far reaching policy decisions in a free and democratic society.

54. This Honourable Court has already established the roadmap in this regard: the enabling act sets the broader policy (eg. protecting Canadians from health issues of tobacco use) but the impugned measures set narrower objectives and aim at specific areas within the broader context of the enabling act (eg. mandatory package warning to discourage people seeing the warning from tobacco use)[60].

55. Following this approach, s.14(1)(b) should set narrower objectives and aim at specific areas within the broader context of the *Traffic Safety Act*. It does not. Rather, the Appellant argues that

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[60] *RJR-MacDonald Inc.* para 144, Respondents' Authorities, Tab #15

the regulation charts its own course and sets objectives entirely unrelated to the objective of its enabling statute that are then capable of overriding two guaranteed *Charter* rights. It is submitted that such a state of affairs would create a situation that is discordant with the principles integral to a free and democratic society.

56. Surely the most basic policy decisions, those that override guaranteed rights enshrined in an entrenched *Constitution*, must be made through open debate in a free and democratic society, and not by default by unelected officials or subordinate bodies behind closed doors and without any public debate.

57. It is both telling and a harbinger of things to come that, in the case at bar, the Appellant defends the actions of the subordinate body to not only design its system specifically to override a guaranteed *Charter* right, but when called upon to justify its actions proffers anecdotes and vague allusions to potential harm rather than cogent evidence. It is submitted that this is not the fabric from which our free and democratic society should be tailored.

58. Although there is no guarantee that open debate in the Legislature would have produced a different result, in a free and democratic society we must place faith in our elected representatives to illuminate these types of constitutional shortcomings in open debate thereby causing further consideration or amendments to the proposed law. The Appellant's position is a move towards a controlled style of government reminiscent of planned economies where unelected officials pull the levers of political power. If we are to remain true to s.1 of the *Charter* we must remain vigilant and hold our elected representatives to the high standards mandated by an entrenched *Charter of Rights*.

59. Overriding any guaranteed *Charter* right will always be a difficult decision to make. In a free and democratic society, those "hard" decisions must be made by elected representatives after the normal open debate in the legislative or parliamentary chambers; that is why they are elected. The Appellant wishes to authorise subordinate bodies to make those "hard" decisions without public debate which would provide an incentive for our elected representatives to abdicate their

responsibility, a process that is antithetical to the operation of a free and democratic society. We elect our legislative and parliamentary representatives specifically to make these "hard" decisions for us. They cannot be allowed to abdicate the trust and responsibility placed on them by the electorate.

60. If we are to have confidence as a society in the exercise of the power of legislatures to override our *Charter* rights it must only be on the basis of strict compliance with the constitutional imperatives set out in s.1. Administrative convenience or lack of political will to directly address the hard issue of overriding a *Charter* right should not be recognised as being demonstrably justifiable in a free and democratic society.

61. The Wilson Members are not arguing for a system that would result in a drag on the administration of the government. Clearly, requiring the Legislature to debate all matters that could possibly have the effect of overriding a *Charter* right in our ever evolving multicultural society is neither possible nor desirable. We cannot expect our elected representatives to be omniscient. It is submitted that, as in all constitutional analyses, the matter should use a contextual and nuanced approach, looking at the analysis as parts of a continuum.

62. The first part of the continuum is if our elected representatives feel that it is desirable to override a guaranteed *Charter* right, they must debate the matter in public and upon determination that the *Charter* right should be overridden, set out their decision so that their intent to override is clearly articulated and with clear parameters within which the subordinate bodies are to operate in carrying out this clear intent.

63. The second part of the continuum is when our elected representatives have delegated certain authority to their subordinate bodies, as they are constitutionally capable of doing, if those subordinate bodies realise or reasonably ought to realise that the regulations they are promulgating will have the effect of overriding a *Charter* right, in the absence of clear direction from the elected representatives as set out in paragraph 62 above to do so, then the subordinate bodies should have

the obligation to raise the matter with the elected representatives for further direction. This is the situation in the case at bar.

64. It is submitted that failure to follow the obligations set out in paragraphs 62 or 63 above should result in an inference of unconstitutionality of the impugned law, with such inference carrying greater or lesser weight depending upon the gravity of the breach in constitutional obligations.

65. The third part of the continuum is where both the elected representatives and the subordinate bodies have acted in good faith but did not know nor reasonably should have known that a particular regulation would have the effect of infringing a *Charter* right. It is not reasonable to expect that our elected representatives or their subordinate bodies can always anticipate the truly novel or unanticipated situations which will inevitably arise in our ever evolving multicultural society. That is the nature of the "living tree doctrine": to recognise that society is not static and that there will be incremental changes in the application of constitutional principles to the new situations posed by a dynamic society. In those cases, there cannot be any positive obligation on our elected representatives or subordinate bodies other than to act in good faith, nor should there be any inferences of unconstitutionality of the impugned regulation. As is the case with all common law, the resolution of these novel situations over time will be added in an incremental fashion to the body of constitutional law. As these matters are illuminated and added to the constitutional common law, they will become part of the thought process set out in paragraphs 62 and 63 above since they will no longer be novel.

66. Anything less, it is submitted would have the effect of demeaning the central position played by our *Constitution* as the supreme law of the land.

D. ***Oakes*** **Test**

67. *Oakes*[61] sets out a four part test or set of guidelines to be used by courts in determining

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[61] *R. v. Oakes*, [1986] 1 S.C.R. 103, Respondents' Authorities, Tab #13

whether s. 1 of the *Charter* saves an otherwise unconstitutional law:

1. Objective to be Served

   The objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom.

2. Proportionality Test

   i. measures must be fair and not arbitrary, carefully designed to achieve the object in question and rationally connected to that objective;

   ii. means should impair the right in question as little as possible; and

   iii. must be proportionality between the effects of the limiting measure and the objective.

68. The Appellant argues that its appeal revolves around the necessity for mandatory photographs on driver's licences for the Wilson Members. On closer analysis, this assertion of the Appellant is unfounded.

69. In its argument, the Appellant does not differentiate between identity verification for the purpose of ensuring the integrity of the driver licensing system ("Systemic Security") and use of a driver's licence once issued for purposes of identification by third parties ("Third Party ID").

70. Systemic Security - The argument of the Appellant that the Wilson Members must submit to having their photograph taken in order to secure the integrity of the Appellant's driver licensing system is unfounded. The Appellant's driver licensing system will not be secure simply by requiring a first time applicant, such as a Wilson Member, to have their picture taken. Since no first time applicant will have their picture in the Appellant's driver licensing system, it is impossible to use facial recognition software to ensure that the first time applicant is who they say they are, so other means must be utilised. Therefore, in order for the Appellant to create a secure process to verify the identity of all first time applicants, it must use means other than facial recognition software since first time applicants will never have a picture in the Appellant's driver licensing system.

71. The futility of the Appellant's case is that it is based on the premise of ostensibly having to use facial recognition software for first time applicants such as the Wilson Members when it is impossible to do so since no first time applicant will have a picture in the Appellant's system for comparison purposes.

72. The fact that there must be a non-photo secure process in place to verify the identity of first time applicants whose photo does not yet exist in the system is contemplated in s. 14(1)(b). This point will be addressed in the "objectives to be served" portion of argument.

73. Third Party ID - The second aspect of identity verification relates to the use of a driver's licence for purposes of proving identity to third parties. This part of the Appellant's argument is moot since the reasonable accommodation proffered by the Wilson Members is to have non-photo driver's licences issued that are specifically marked "not to be used for identification purposes". The Appellant cannot reasonably argue that a document specifically marked "not to be used for identification purposes" can somehow be used for identification purposes. This point will be addressed in the "minimal impairment" portion of argument.

Objective to be Served

74. The objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. At a minimum, the objective must address societal concerns which are pressing and substantial in a free and democratic society.

75. If the objective is as set out in *Thomson*[62], then this appeal must be dismissed as the Appellant's argument is entirely based on the Non-statute Objectives being the objective to be served for purposes of the *Oakes* analysis.

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[62] *Thomson*, Respondents' Authorities, Tab #18

76. In the alternative, if it is constitutionally valid for regulations to set objectives unrelated to and not authorised by their enabling statute, then we need to look at whether even the Non-statute Objectives are proper for purposes of the *Oakes* analysis.

77. As stated above (paragraphs 70, 71 and 72), it is submitted that the Appellant has failed to prove that even the Non-statute Objectives are the objectives for purposes of the *Oakes* test. Basing a legal argument on an impossibility cannot be grounds for proving the validity of the Non-statute Objectives as the objectives for purposes of the *Oakes* analysis.

78. Even if the Non-statute Objectives are constitutional candidates to be the objectives for the purposes of the *Oakes* analysis, the Appellant has failed to prove that they are the objectives since its argument is based on a fatal flaw: it is impossible to use facial recognition technology for first time applicants such as the Wilson Members.

Proportionality

79. The 2nd branch of the *Oakes* test requires the Appellant to prove each of 3 elements: rational connection, minimal impairment and proportionality between the effects and objectives. The failure of the Appellant on any of these elements means that s. 1 will not save s.14(1)(b).

Rationally Connected

80. The measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.

81. The purpose of the impugned law is the "regulation of highways and the increase of safety on them"[63]. The photo requirement is not rationally connected and, in the context of its effect, is arbitrary.

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[63] *Thomson*, Respondents' Authorities, Tab #18

82. Even if, arguendo, the Non-statute Objectives are the objectives for purposes of the *Oakes* analysis, the means used are not rationally connected to the Non-statute Objectives, and therefore the Non-statute Objectives will not be furthered[64]. The Appellant has failed to prove that the photo requirement is rationally connected to even the Non-statute Objectives. Each of these alleged objectives will now be analysed.

83. ID Theft - The evidence is overwhelming that ID Theft occurs without the necessity of using a false driver's licence or, for that matter, using photo identification documents at all, and that photo driver's licences are not central to the issue of ID Theft.[65] Except for some of the information created by the Appellant itself, none of this evidence specifically links ID Theft with the use of false drivers' licences[66].

84. It is significant that the Appellant admits that, even though the photo requirement was promulgated in 2003 it is argued by the Appellant to prevent ID Theft, ID Theft continues to increase even today[67]. This admission is a logical consequence of the fact that ID Theft occurs without the use of photo driver's licences. Therefore, there is no rational connection between this part of the Non-statute Objectives and the requirement for photo drivers' licences.

85. International or interprovincial standard harmonisation The Appellant is arguing that international and interprovincial harmonisation is essential to the integrity of its system of issuing drivers licences, and that the system is at risk if all individuals are not required to provide photos for their driver's licences. The onus is on the Appellant to do more than make general assertions to meet

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[64] *Schachter v. Canada*, [1992] 2 S.C.R. 679 p 32-33, Respondents' Authorities, Tab #17

[65] Affidavit Vander Graaf para 5, 6 Appellant's Record Vol III, p. 284 to 286; Affidavit Pendleton July 28, 2005 para 22, 23, 24 Appellant's Record Vo II, p. 98

[66] Affidavit Pendleton July 28, 2005 Ex. C, D, E and F; Appellant's Record Vol II, p. 125 to 186

[67] Cross exam Pendleton, Appellant's Record Vol IV, p. 481

its burden of proof and must prove that allowing the Wilson Members to obtain non-photo drivers' licences will compromise or lead to the demise of the system it has created for issuing drivers' licences. It has failed to do so[68].

86. Even if the Non-statute Objectives are the objectives of the *Traffic Safety Act*, it is the guaranteed *Charter* rights in Canada that are fundamental, not international standards set by foreign bodies devoid of any consideration of our *Charter*. It is submitted the Appellant has already fallen into this trap by accepting and relying upon the ICAO May 21, 2004 Technical Report as the justification for overriding a guaranteed *Charter* right. The Technical Report states: "The photograph (facial image) is already socially and culturally accepted internationally" and "It is non-intrusive"[69]. Taking this evidence proffered by the Appellant contextually, it is clear that the Appellant has given no consideration to accommodate the religious freedom of the Wilson Members. The Appellant has blindly implemented an international standard that totally disregards the religious beliefs of the Wilson Members. The ICAO reports in the Appellant's affidavit relate to MRTDs or "machine readable travel documents. There is no evidence before the court that a bank teller, officer on the beat or any other person relying on the authenticity of the driver's licence will have a "machine" as contemplated by the ICAO report.

87. Terrorism - The Appellant makes vague allusions to terrorism by way of ominous sounding anecdotes, but has not proffered real evidence to support its proposition that overriding religious freedoms will reduce terrorism. As stated in *Multani*:

> "...it is not necessary to wait for harm to be done before acting, but the existence of concern relating to safety must be unequivocally established for the infringement of a constitutional right to be justified. [emphasis added]"[70]

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[68] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 para. 74, 84, 98, 102, 155, 156 and 157, Respondents' Authorities, Tab #5; *Toronto Star Newspaper Ltd. v. Ontario*, [2005] 2 S.C.R. 188 para. 39, 41 and 42 , Respondents' Authorities, Tab #19

[69] Affidavit Pendleton February 1, 2006, Exhibit B p. 17; Appellant's Record Vol III, p. 400

[70] *Multani* para 67, Appellant's Authorities, Tab #3

The Appellant has provided no evidence to support this position. The Appellant only proffers hearsay that a false Alberta driver's licence was not implicated in the arrest of an individual attempting to carry out a terrorist attack.

88. The Appellant also refers to the terrible events of September 11, 2001, but fails to provide any explanation, let alone cogent evidence, of how having a photo driver's licence would have prevented the hijacking and crashing of airplanes by terrorists. It is submitted that the Appellant cannot provide such evidence or explanation since having a photo driver's licence has no bearing on whether an individual is a terrorist or not, and having a photo driver's licence will not prevent an individual bent on self immolation from committing an act of terrorism.

89. It is submitted that the Appellant has not provided unequivocal evidence showing how photo drivers licences will stop terrorism. The Appellant has failed to prove how the measures forward this part of even the Non-statute Objectives.

90. The Appellant uses words throughout its affidavit evidence to conjure up images of apprehended wrong or speculative mischief. If the Appellant were arguing only to support a *quia timet* injunction, it would have the onus of proving a strong probability that the apprehended mischief would in fact arise, that the danger was real and imminent and that the facts relied upon were cogent, precise and material, and that it would be insufficient that they be indefinite or speak only of an intention or amount to mere speculation. It is submitted that the Appellant would fail in this regard even for a *quia timet* injunction[71].

91. The standard to justify overriding a guaranteed *Charter* right must be higher than the standard necessary to be proven to adjudicate ordinary commercial disputes. The Appellant is arguing that, since a third party may try to engage in criminal activity such as ID Theft or terrorism, that

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[71] *Hipwell v. Virden (Town of)* (1987), 47 Man.R. (2d) 25 p.7-9 (Man. Q.B.); Respondents' Authorities, Tab # 8; *Vanswan Properties Inc. v. Peckham*, [1999] O.J.No. 3300 para 16 (Ont. S.C.); Respondents' Authorities, Tab #20

apprehended mischief authorises the Appellant to override the guaranteed *Charter* rights of the Wilson Members. If such a startling proposition that the standard to override a guaranteed *Charter* right is lower than the standard used to adjudicate ordinary private commercial disputes such as in a *quia timet* injunction application, then the rights guaranteed by the *Charter* will be eroded to such an extent as to become meaningless[72].

92. The gist of the Appellant's argument is that our constitutional principles should be lowered simply by raising the spectre of terrorism, that somehow terrorism is a special case that justifies infringing *Charter* rights without the normal requirement of unequivocal evidence linking the infringement with the effect (i.e. reducing the risk of terrorism). Such a loose interpretation of the *Charter* would allow, for example, racial or religious profiling of ordinary, law abiding Canadian citizens simply because they happened to belong to a racial or religious group perceived to be more inclined to be involved in terrorism: unequivocal evidence would be replaced with vague suspicions.

93. It is submitted that the Appellant has failed to satisfy the high standard necessary to prove that the measures are fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.

Minimal Impairment

94. The Appellant must prove that it has seriously accommodated the party whose *Charter* rights are being infringed and the provisions have been carefully tailored to accomplish the objective of the law and minimally impair the *Charter* rights, i.e. the deleterious effects upon the *Charter* rights are limited to the extent necessary to the attainment of the purpose of the law[73].

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[72] *RJR-MacDonald Inc*. Para 143, Respondents' Authorities, Tab #15

[73] *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 para 105 and 108; Respondents' Authorities, Tab #16; *Edwards* para 148; Respondents' Authorities, Tab #12*; B.(R) v. Children's Aid Society of Toronto*, [1995] 1 S.C.R. 315, p. 385, 386; Respondents' Authorities, Tab #2; *Canadian Charter of Rights and Freedoms* (4th Ed) Chap 14; The Equality Rights, William Black and Lynn Smith p. 951, Respondents' Authorities, Tab #23

95. The failure of the Appellant to fulfill its duty to accommodate is made clear by its admission that it developed its computer system in a way that made it impossible to omit or override the necessity to have a photograph taken[74]. Creating a system in which it is impossible to issue a non-photo licence when the matter to be accommodated is non-photo licences goes to the crux of the matter and clearly shows the lack of any consideration by the Appellant to accommodate the religious beliefs and equality of the Wilson Members.

96. The Appellant now attempts to argue using truncated portions of the record that the religious beliefs of the Wilson Members are limited to their concern for the salvation of others. The Wilson Members have clearly articulated their religious belief: "Our belief prohibits us to have pictures taken voluntarily..." something that the evidence on the record clearly reflects (see paragraph 14 above). This portion of the Appellant's argument is unsupported by the record and wholly without merit.

97. The *Charter* is the supreme law of the land to which all other legislated law must comply. The *Oakes* test sets out the criteria by which legislated law is measured to determine its constitutionality. As part of the test, the Appellant has the duty to carefully tailor the law to accomplish the objectives to be achieved and to minimally impair *Charter* rights. This obligation requires that the Appellant consider during the formulation of regulations how to minimally impair *Charter* rights. The Appellant has done the opposite in this case: instead of carefully tailoring the law for minimal impairment, it specifically created a system that ensured total or maximum impairment of the *Charter* rights of the Wilson Members. To allow the Appellant to flout a constitutional imperative placed upon it would fly in the face of the rule of law. If our *Charter* is to have any meaning as an entrenched and supreme law of the land based on the broader principles of the rule of law, this type of wilful disregard for the constitutional law making process cannot be condoned and should result, if not in an automatic striking down of the impugned law, at the least in a strong adverse presumption of invalidity being made (see also paragraph 63 above). As a policy

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[74] Affidavit Bullock, para 4, 5, 8 Appellant's Record Vol II, p. 261 to 263

consideration, if we do not hold the constitutional law making process to the high standard of the rule of law, then how can we expect the non-constitutional law making process to do so?

98. The failure of the Appellant to consider at all how to minimally impair the *Charter* rights is illustrated by its admissions:

1. that drivers' licences are issued to qualified drivers;
2. it has a policy not to issue drivers' licences simply as an identity document to individuals who do not qualify to drive;
3. there is no provision in the *Traffic Safety Act*, or its regulations, to allow the issuance of drivers' licences to individuals who do not qualify to drive simply as an identity document; and
4. it oversees the issuance of identity documents pursuant to the *Government Organization Act* and regulations thereto[75] which is the legislation governing the issuance of identity documentation[76].

The Appellant has simply coat-tailed a regulation designed for identity purposes into the *Traffic Safety Act* rather than the act which deals with identity cards. Administrative convenience rather than consideration of what the enabling statute is to do and how its objectives can be accomplished with minimal impairment of the *Charter* rights, was the only consideration.

99. Clearly a reasonable accommodation which would result in no infringement of the *Charter* right would be:

1. issuing non-photo drivers' licences specifically marked "<u>not to be used for identification purposes</u>" to the Wilson Members who qualify to drive pursuant to the legislation designed for issuing drivers' licences (i.e. the *Traffic Safety Act*) which will have little, if any, use as a breeder document or for ID Theft purposes[77]; and

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[75] *Identification Card Regulation*, Appellant's Authorities Tab 14

[76] Cross exam Bullock, Appellant's Record Vol IV, p. 456 to 461

[77] Vander Graf Affidavit, Appellant's Record, Vol III, para 9, p. 286 and 287

2. leaving the issue of identity documentation to the legislation designed to issue identification documents (i.e. the *Government Organization Act* and its regulation, the *Identification Card Regulation*).

As noted in paragraph 73 above, the Appellant cannot reasonably argue that a driver's licence marked "not to be used for identification purposes" could be used for Third Party ID purposes.

100. The fact that the Wilson Members may not be able to use non-photo drivers' licences as identification to cross the border, board planes, or other privileges[78] relates to identity documents pursuant to the *Government Organization Act* and not to the *Traffic Safety Act* which relates to qualifying to drive a motor vehicle. It is significant that the Appellant acknowledges in its own evidence that "the Alberta driver's licence was never intended as an identification document"[79]. If the Wilson Members cannot use their non-photo driver's licences for Third Party ID purposes, that is an issue personal to the Wilson Members and they will simply be in the same position as all Albertans without a driver's licence or who hold an interim driver's licence.

101. The Appellant asks this Honourable Court to accept that requiring a photograph which is precisely the act that infringes the s. 2(a) and s. 15(1) *Charter* rights of the Wilson Members, is minimal impairment of those *Charter* rights, that is, to accept that a total impairment of the guaranteed *Charter* rights is a minimal impairment, something this Honourable Court has stated should not be done[80].

102. Without driver's licences, not only will the Wilson Members suffer irreparable harm, their communal way of life will cease to exist thereby destroying the ability of the Wilson Members to

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[78] Affidavit Pendleton July 28, 2005 para 40 Appellant' Record Vol II, p. 103

[79] Exhibit H Respondents' Record Vol I, p. 2

[80] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 127, Respondents' Authorities Tab #21

freely practice their religion. Viewed from the perspective of the Wilson Members[81], success by the Appellant will result in a guarantee, not of *Charter* rights, but of irreparable harm, religious intolerance (overriding s. 2(a) rights), and discrimination (overriding s. 15 (1) rights) being visited upon them.

103. It is for this Honourable Court to determine which of these 2 alternatives "falls within a range of reasonable alternatives" and therefore minimally impairs the guaranteed *Charter* rights:[82] the Appellant's alternative which results in total impairment, or the Wilson Members' alternative. It is submitted that the Appellant has failed to satisfy the high standard necessary to prove that the means impair the guaranteed *Charter* right as little as possible.

Proportionality Between Effects and Objective

104. "[T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures."[83]

105. The Appellant argues that other jurisdictions without the security measures implemented by Alberta would be unable to determine if a driver held multiple licences and that if a person obtained a second licence under another name, he or she was practically undetectable.[84] The Appellant further admits that it would ask for and accept a driver' s licence from another jurisdiction when issuing a driver's licence to a new driver.[85] Issuing an Alberta driver's licence

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[81] *Law,* para 70, Respondents' Authorities, Tab #10

[82] *Multani*, para 51, Respondent's Authorities, Tab #3

[83] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 para 95, Respondents' Authorities, Tab #6

[84] Cross exam Pendleton, Appellant's; Record Vol IV, p. 458 to 461; Affidavit Pendleton July 28, 2005 para 10-12, Appellant's Record Vol II, p. 94 and 95

[85] Cross exam Bullock, Appellant's Record Vol IV, p. 450

based on an out of province driver's licence that has a significantly greater chance of being forged and where the system issuing such out of province licence may not be able to detect such forgery does not address even the Non-statute Objectives.

106. The deleterious effects in this case will be to force the Wilson Members to make an impossible choice between 2 of their sincerely held religious beliefs. It is submitted that forcing an individual to choose between two sincerely held religious beliefs is clearly discordant with the principles integral to a free and democratic society.

107. There are negligible or no salutary effects:

1. If the objective is as set in *Thomson*[86]: No salutary effects;
2. If the Non-statute Objectives are used, then:
   i. the measures will have a negligible or nil effect on the prevention of ID Theft since the Wilson Members have suggested that an appropriate accommodation in this regard is to have the driver's licences clearly marked: "not to be used for identification purposes". A driver's licence marked in this fashion would have little, if any, use as a breeder document or for ID Theft purposes[87];
   ii. the effect related to the desire to harmonise international or interprovincial standards will be to override guaranteed *Charter* rights based on rules set by international bodies without any regard to the Canadian *Charter*. This is clearly not a salutary effect;
   iii. the Appellant's argument that having a photograph on a driver's licence may prevent terrorism is without merit. The Appellant has failed to provide any evidence to found this argument and has chosen instead to provide anecdotes.

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[86] *Thomson*, Respondents' Authorities, Tab #18

[87] Affidavit Vander Graaf para 9 Appellant's Record Vol III, p. 286 and 287

108. As part of the contextual analysis we must look at the reality of the situation.

1. if the current 2,394,917 Alberta driver's licences are renewed every 5 years, on average there would be approximately 478,983 driver's licences renewed every year;
2. if such 478,983 renewals occur evenly over the year and a final driver's license is issued within 2 weeks of the issuance of the non-photo interim driver's license, on average there would be 18,422 new non-photo interim driver's licences issued every 2 weeks in Alberta;
3. based on the calculations set out above, on average the Appellant currently issues approximately 18,422 new non-photo interim driver's licences every 2 weeks in Alberta; and
4. the Wilson Members are asking for no more than approximately 37 non-photo driver's licences.

109. What is the harm? Even if the Wilson Members receive non-photo drivers' licences, the worst that could happen is either that:

1. a hypothetical Wilson Member could also potentially receive a photo driver's licence, assuming of course, that the sophisticated system created by the Appellant to verify the identity of all first time applicants somehow fails to detect this fraudulent activity; or
2. a third party fraudster could attempt to obtain a photo driver's licence in the name of the hypothetical Wilson Member.

110. Even if such a hypothetical Wilson Member were able to somehow thwart the security system created by the Appellant for first time applicants, the issuance of a non-photo licence would have no bearing thereon. The probability of such a hypothetical Wilson Member obtaining a photo driver's licence using a false name is the same whether or not he first received a non-photo driver's licence in his real name and he would have the same possibility of obtaining such a false licence as any first time applicant. If the Appellant's security system is incapable of

detecting this type of fraud by first time applicants, then this entire appeal is moot and the Appellant has entirely failed in its argument

111. In the second potential worst case scenario, a third party fraudster could attempt to obtain a photo driver's licence using the name of the Wilson Member. Over 700,000 Albertans do not hold a driver's licence[88]. It is not reasonable for the Appellant to argue that the approximately 37 Wilson Members who do not have photo drivers' licences would pose a greater harm to society by way of fraudsters attempting to impersonate them particularly since whether a fraudster actually was a member of such a distinct, insular minority would be very easily verified, as compared to the risk posed to society by such a fraudster choosing to impersonate one of the over 700,000 Albertans who do not have a driver's licence. The Appellant must be able to answer the question: if 37 individuals pose such a large risk as to warrant overriding their guaranteed *Charter* right, why is the Appellant not insisting that the over 700,000 Albertans without driver's licences submit to having their pictures taken to prevent the speculative harm being argued by the Appellant. It is submitted that the Appellant cannot answer this question since it is patently obvious that the 37 individuals do not pose any significant risk when compared to the same risk posed by over 700,000 individuals without drivers' licences. The same potential risk exists for a third party fraudster to target the remaining 105 Wilson Members without drivers' licences.

112. The proportionality analysis can be stated thus: approximately 37 individuals (453 Code G in total) out of approximately 2.4 million are requesting that they be allowed to drive without the necessity of having their pictures taken for their drivers' licences. By specifically marking such non-photo licences "<u>not to be used for identification purposes</u>", which the Appellant clearly has the power to do, this request:

1. would have no material effect on the ability of the Appellant to harmonise interprovincial and international standards relating to drivers' licences;

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[88] Cross exam Bullock, Appellant's Record Vol IV, p. 455 and 456

2. would not increase the risks on the speculative concern of the Appellant that these particular non-photo drivers' licences, specifically marked "not to be used for identification purposes", could somehow be used for identification purposes as a breeder document for ID Theft purposes; and

3. is irrelevant to the speculative issue of terrorism since any argument that it will have an effect on anti-terrorism is completely unsupported by the evidence.

113. On the other hand, the effect on the Wilson Members in not being allowed to have non-photo drivers' licences means they must sacrifice one of two of their sincerely held religious beliefs.

114. It is submitted that the proportionality between the effects of the limiting measure on the Wilson Members and the objective of the measures is so disproportionate that the Appellant failed to satisfy the high standard necessary for it to prove that the impugned law can be demonstrably justified in a free and democratic society as overriding the guaranteed right to freedom of religion[89].

115. The Canadian *Charter* was designed to allow individuals to have confidence that they can freely and without obstruction by the state pursue their and their families' hopes and expectations of personal development[90].

116. It is respectfully submitted that Canadian society is robust enough and the Canadian *Charter* strong enough to be able to honour the promise of equality and religious freedom originally given to the Hutterian Brethren upon their arrival, such that Canada does not become merely a footnote in the annals of history as one of the countries that the Hutterian Brethren visited in their global search for religious tolerance.

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[89] see Cross exam Sorensen, Appellant's Record Vol V, p. 725 and 726

[90] *Law,* para 43, Respondents' Authorities, Tab #10

PART IV - SUBMISSION ON COSTS

117. The Respondents seek costs in this Honourable Court and all the Courts below.

PART V - RELIEF SOUGHT

118. The Wilson Members respectfully request:

1. an order, pursuant to s.52 of the *Constitution Act, 1982*, s.14(1)(b) as it relates to the necessity to provide a photograph is unconstitutional and of no force or effect;
2. in the further alternative, to "read in" an exemption for the Wilson Members from the application of s.14(1)(b) as it relates to the necessity to provide a photograph in order to obtain a driver's licence[91];
3. in the further alternative, a constitutional exemption for the Wilson Members from the application of s.14(1)(b) as it relates to the necessity to provide a photograph in order to obtain a driver's licence[92];
4. in the further alternative, an order pursuant to s. 24(1) of the *Charter* for an exemption for the Wilson Members from the application of s.14(1)(b) as it relates to the necessity to provide a photograph in order to obtain a driver's licence[93];
5. in the further alternative such further and other relief as this Honourable Court deems just

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 22nd day of May, 2008.

PETERSON & PURVIS LLP

Per: _____

K. Gregory Senda

Solicitor for the Respondents

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[91] *Schachter*, Respondents' Authorities, Tab #17

[92] *Edwards,* para 152, Respondents' Authorities, Tab #12; *Schachter*, Respondents' Authorities Tab #17

[93] *Schachter*, Respondents' Authorities Tab #17

PART VI - TABLE OF AUTHORITIES

PART VII - LEGISLATION/AMENDED REGULATIONS