

PART I – STATEMENT OF FACTS

1. The Interveners, the Evangelical Fellowship of Canada¹ and the Christian Legal Fellowship² (jointly “These Interveners”), were granted leave to intervene in this appeal by the Order of the Honourable Mr. Justice Rothstein dated August 22, 2008, do not dispute the facts as set out in the facts of the Appellants and Respondents.
2. These Interveners, either on their own or in association with other groups, have been active in advocating their positions before this Court in a number of cases.
3. The Appellants have conceded, from the outset, that the introduction of the photo-license requirement violates the freedom of religion of the Respondents, however they submit that it can be saved through a s. 1 analysis. As such, These Interveners will focus on the s. 1 analysis required in a case where a *Charter* right has been violated.
4. These Interveners will make submissions on the following issues raised by this appeal:

PART II – ISSUES

- a. Must the nature and scope of the violated *Charter* right be defined and put into context before performing the *Oakes* test?
- b. What is the nature and scope of the violated rights and what is their context?

¹ The Evangelical Fellowship of Canada (“EFC”) is a national association of Protestant denominations, churches, church-related organizations and educational institutions. The EFC is interdenominational and represents a constituency of 41 denominations, approximately 125 other organizations and colleges and over 1,000 individual churches. It is estimated that there are approximately 3.3 million Protestant Evangelicals in Canada, representing approximately 10% of the Canadian population, of which approximately 1.5 million are members or adherents of EFC affiliated organizations.

² The Christian Legal Fellowship (“CLF”) is a national non-profit association of lawyers, law students, professors, friends and other legal professionals who support its work. Among other things, the CLF explores the complex interrelationships between the practice and theory of law and the Christian faith. While having no direct denominational affiliation, the CLF has over 500 active members from over 30 Christian denominations working in association.

- i. It is conceded by the Appellants that the individual s. 2a) *Charter* rights of the Wilson Members have been violated;
 - ii. The question remains whether the s. 2a) *Charter* rights of all Wilson Members, as a group, have been violated.
- c. Does the photo-license requirement minimally impair the Wilson Members' freedom of religion?

PART III – ARGUMENT

First Issue: Must the nature and scope of the violated *Charter* right be defined and put into context before performing the *Oakes* test?

5. The Appellant in this matter has conceded, from the outset, that the Wilson Members' s. 2a) *Charter* rights have been violated and as such, it becomes necessary to perform the *Oakes* test. To properly apply the *Oakes* test however, the Court must first establish the nature and scope of the rights that have been violated. Those rights must then be put into context to establish what consequences flow from the violation.
6. In *Multani v. Commission scolaire Marguerite-Bourgeois*³, LeBel J. recognized the importance of first considering the violated right before applying the s. 1 analysis:

In such circumstances, it becomes very tempting to go directly to the stage of s. 1 justification, which provides courts, tribunals and litigants with the advantage of a familiar, well-established framework. However, in applying the *Canadian Charter*, not everything can be resolved under s. 1. To begin with, it is still necessary to analyse the right in issue, define its content and, where relevant, consider the scope of competing rights. The definition of the content of a right does not correspond systematically to a limit that must be justified by means of the approach developed in the cases on s. 1.

A question that arises in the initial stages of the review of an alleged violation of a constitutional right is that of the nature and scope of the right. What the right is must be determined, and its boundaries must be

³ *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256 [*Multani*], Book of Authorities of the Intervenors, EFC & CLF, [*EFC Authorities*], Tab # 4.

established. Establishing these boundaries requires consideration of the guaranteed right's relationship with competing rights and sometimes leads to the necessary finding that rights come with corresponding obligations. We not only have rights, we also have obligations. How the *Canadian Charter* is applied, and the flexibility with which it is applied, are an acknowledgment of this reality. The application of the *Canadian Charter* does not always involve solely the relationship between the guaranteed rights of individuals and the government action limiting those rights. The relationship is often more complex, as it could have been in the instant case.⁴

7. In the instant case, the Wilson Members' freedom of religion is not competing with another *Charter* protected right and, therefore, no balancing of rights is required.
8. Without a proper appreciation of the nature and scope of the rights that have been violated and the consequences that flow from that violation, it is impossible to properly perform the *Oakes* analysis. Indeed, in *Canada (Human Rights Commission) v. Taylor*⁵, Dickson C.J. (as he then was) also recognized the importance of appreciating the violated right in each particular case:

What is of utmost importance is a recognition that s. 1 both guarantees and limits *Charter* rights and freedoms by reference to principles fundamental in a free and democratic society. This analysis requires an approach sensitive to the context of a given case, it being necessary to explore the nature and scope of constitutionally entrenched human rights in light of the facts at hand.⁶

9. In *R. v. Big M. Drug Mart Ltd.*⁷, Chief Justice Dickson stated:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee

⁴ *Multani* at paras. 146 & 147, EFC Authorities, Tab # 4.

⁵ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 [*Taylor*], EFC Authorities, Tab # 1.

⁶ *Taylor* at 916, EFC Authorities, Tab # 1.

⁷ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [*Big M*], EFC Authorities, Tab # 6.

and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this court's decision in *L.S.U.C. v. Skapinker* illustrates, be placed in its proper linguistic, philosophic and historical contexts.⁸

10. Finally, Mr. Justice Lamer, concurring, confirmed in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*⁹[hereinafter *B.(R.)*] that in order to preserve the coherence of the entire constitutional text and to maintain the integrity of the intention of Parliament, the courts must consider specific factors in identifying the purpose of a protected right:

Thus, the wording of the provision, its structure, the context in which it is found, the relationship there may be between it and the other provisions, as well as the historical context in which the *Charter* was adopted, are all factors that must be taken into consideration in seeking to identify the purpose of a protected right or freedom, in order to preserve the coherence of the entire constitutional text and maintain the integrity of the intention of Parliament. A proper and prudent interpretation of the *Charter* is especially necessary because it is a constitutional document of great import that cannot be altered by a mere statutory amendment if this Court were to misunderstand or err as to the scope of the rights and freedoms to which exceptional protection is afforded.¹⁰

11. The notion of "freedom of religion" predates the *Charter*, receiving recognition in Canadian and international law¹¹. The underlying significance of religious belief, historically and philosophically, is evidenced in the preamble to the *Charter*¹², s. 2a) of the *Charter* and in all provincial human rights legislation.

12. It is crucial, therefore, that before embarking on a s. 1 analysis, the Court begins by

⁸ *Big M* at 344, EFC Authorities, Tab # 6.

⁹ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [*B.(R.)*], EFC Authorities, Tab # 2.

¹⁰ *B.(R.)* at para 17, EFC Authorities, Tab # 2.

¹¹ See *Hasan and Chaush v. Bulgaria*, (2000), Eur. Ct. H.T. 2000-XI, 34 E.H.R.R. 554 at para. 62, EFC Authorities, Tab # 3; also see Article 9 of the European Commission of Human Rights *Convention for the Protection of Human Rights and Fundamental Freedoms* as amended by Protocol No. 11, Rome, 4.XI.1950, EFC Authorities, Tab # 14; also see Article 18 of the *United Nations International Covenant on Civil and Political Rights*, EFC Authorities, Tab # 15; and see *Big M*, EFC Authorities, Tab #6.

¹² The preamble to the *Charter* reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law", EFC Authorities, Tab # 13.

defining the nature and scope of the rights being violated, and subsequently puts those rights in context so that it may proceed with a proper application of the s. 1 analysis.

13. The above comments from *B.(R.)* also demonstrate that to properly define the nature and scope of the violated right, courts must take into consideration the relationship the right has with other provisions of the *Charter*. As such, it is necessary for this Honourable Court to consider those sections of the *Charter* that may assist it in its interpretation of s. 2a) such as s. 27,¹³ as well as those sections that confer rights which are integral to proper freedom of religion such as ss. 2b)¹⁴ and 2d)¹⁵.
14. It is These Interveners' position that when defined and put into context, s. 2a) of the *Charter* protects group rights, as well as individual rights, and as such, the s. 1 analysis must be performed with consideration of the effects the photo-license requirement will have on all Wilson Members' freedom of religion collectively as a colony.

Second Issue: What is the nature and scope of the violated rights and what is their context?

15. Section 27 of the *Charter* requires that the *Charter* be interpreted in a manner that preserves the multicultural heritage of Canada. The term "multiculturalism" has been defined as "various ways of life [...] rooted in the authentic life of a people seen as a community bound together by pervasive traditions and moral ties"¹⁶. As such, the *Charter* must be interpreted to protect the rights of groups as well as individuals.
16. Religion is by definition, and in practice a personal commitment manifest in and

¹³ Section 27 of the *Charter* reads: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.", EFC Authorities, Tab # 13.

¹⁴ Section 2b) of the *Charter* reads: "Everyone has the following fundamental freedoms: [...] freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;", EFC Authorities, Tab # 13.

¹⁵ Section 2d) of the *Charter* reads: "Everyone has the following fundamental freedoms: [...] freedom of association", EFC Authorities, Tab # 13.

¹⁶ Howard Brotz, 'Multiculturalism in Canada: A Muddle' (1980) 6 Can. Pub. Pol. 41 at 41-42, EFC Authorities, Tab # 10.

through community. In the Christian tradition, for example, this communal dimension of belief is manifest in the very concepts of being members of the body of Christ, being brothers and sisters, one with another, and the concept of church. Other world religions also manifest their beliefs in and through communal ways of life.

The history of civilization shows how men and women who want to commit themselves to a religious, cultural or social ideal bond together to live out that vision, to find the structures that are necessary for what they want to do, and to give mutual support and care for each other. Such small groups have generally occurred within the world's great religions, where people come together with a common purpose.¹⁷

17. The communal dimension of religion is manifest in religious communities, organizations, and orders. These communal expressions and structures are necessary and integral to religion. Religious communities, groups and organizations have long been recognized in Canadian and international law.¹⁸

18. Religious beliefs form an integral part of many cultures and are often the glue that holds cultures or cultural communities together. Indeed, the Hutterian culture and way of life are rooted in biblical principles¹⁹. If the courts are to interpret the *Charter* in a manner that preserves and enhances the multicultural heritage of Canada, they must extend fundamental freedoms like that of freedom of religion to cultural, ethnic and religious groups or communities, especially where the religious beliefs are central to the group's cultural being.

19. Indeed, when writing for the majority in *R. v. Edwards Books and Art Limited*²⁰, Dickson C.J. (as he then was), stated:

In this context, I note that freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects. Legislatures are

¹⁷ Jean Vanier, *Becoming Human* (Toronto: House of Anansi Press Limited, 1998) at 53, EFC Authorities, Tab # 12.

¹⁸ *Supra* note 11.

¹⁹ Acts 4:32 of the Bible reads: "All the believers were one in heart and mind. No one claimed that any of his possessions was his own, but they shared everything they had." (NIV), EFC Authorities, Tab # 9.

²⁰ *R. v. Edwards Books and Art Limited*, [1986] 2 S.C.R. 713 [*Edwards Books*], EFC Authorities, Tab # 7.

justified in being conscious of the effects of legislation on religious groups as a whole, as well as on individuals.²¹

20. In *Edwards Books*, Wilson J. argued that an interpretation of s. 2a) that protects the religious freedoms of individuals but not the groups they belong to is precluded by s. 27:

Yet it seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the *Charter* expressly precluded by s. 27 which requires the *Charter* to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians"²².

21. Indeed, Professor W.S. Tarnopolsky (as he then was) has opined and agreed with Wilson J.'s argument in stating that the *Charter* protects group rights:

There are at least two fundamental distinctions which must be emphasized for the sake of clarity. The first is that an assertion of an individual right emphasizes the proposition that everyone is to be treated the same regardless of his or her membership in a particular identifiable group. The assertion of group rights, on the other hand, bases itself upon a claim of an individual or a group of individuals because of membership in an identifiable group [...] [t]his leads to the second distinction [...] [t]he guarantee of an individual right like free expression essentially requires the non-interference of the state.²³

22. The Wilson Members sincerely believe that the Bible requires them to live on rural colonies as a community, therefore they cannot exercise their religion individually; it must be exercised as a group²⁴.

²¹ *Edwards Books* at 781, EFC Authorities, Tab # 7.

²² *Edwards Books* at 808 & 809, EFC Authorities, Tab # 7.

²³ W.S. Tarnopolsky, 'The Equality Rights in the Canadian Charter of Rights and Freedoms' (1983) *Can. Bar Rev.* 242 at 259 & 260, EFC Authorities, Tab # 11.

²⁴ Acts 2:44, 46-47 of the Bible reads: "All the believers were together and had everything in common. [...] Every day they continued to meet together in the temple courts. They broke bread in their homes and ate together with glad and sincere hearts, praising God and enjoying the favor of all the people. And the Lord added to their number daily those who were being saved." (NIV), EFC Authorities, Tab # 9.

23. Indeed, Bastarache J. has noted, in *R. v. Beaulac*²⁵, that certain individual rights are justified by the existence of a community composed of similar individuals:

“In interpreting *Charter* provisions, this Court has firmly endorsed a purposive approach.” [...] These pronouncements are a reflection of the fact that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees;²⁶

24. When applying the reasoning in *Beaulac* to the instant case, it is apparent that the Wilson Members each individually have the right to freedom of religion due principally to the very existence of the Hutterian Brethren of Wilson Colony as a group. If there is no Wilson Colony, then there can be no Wilson Member. Therefore, in order for the Wilson Members to exercise their freedom of religion, they must do it in community because the community is the means by which they can exercise their s. 2a) rights.

25. As such, the court must appreciate that the photo-license requirement violates the Wilson Members’ s. 2a) rights in that it requires them to be photographed, which they sincerely believe to be a sin or, in the alternative, to forgo their option to obtain a driver’s license, which would inevitably result in the community and all its individuals not having the means to freely exercise freedom of religion.

26. These Intervenors submit that Bastarache J.’s reasoning in *Beaulac* may therefore be applied to the instant case by replacing references to language rights with references to freedom of religion, as demonstrated below:

²⁵ *R. v. Beaulac*, [1999] 1 S.C.R. 768 [*Beaulac*], EFC Authorities, Tab # 5.

²⁶ *Beaulac* at paras. 16 and 20, EFC Authorities, Tab # 5.

[...] there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of religious communities. The objective of protecting freedom of religion of groups is realized by the possibility for all members of the group to exercise independent, individual rights which are justified by the existence of the community. (underlining demonstrates our revisions).

Third Issue: Does the photo-license requirement minimally impair the Wilson Members' freedom of religion?

27. As discussed, before embarking on a s. 1 analysis, the Court must first define the nature and scope of the violated right and put that right into context. Having ascertained that the Wilson Members' s. 2a) rights must include the right to freedom of religion of the entire group, because the group itself is the means by which the individual Wilson Members can exercise their s. 2a) *Charter* rights, we can proceed to the s. 1 analysis.
28. The *Oakes* test, developed by this Court in *R. v. Oakes*²⁷ sets out a two-part test by which the courts can determine if the infringement of a *Charter* right can be saved by s. 1 of the *Charter*²⁸.
29. Although it is These Interveners' position that the Appellants have not established any of the components set out in the *Oakes* test, These Interveners submit that the photo-license requirement cannot, in law, meet the second and third components of the proportionality test.
30. Before arriving at the minimal impairment stage of the s. 1 analysis, the Court must appreciate the impairment caused by the violation. The effect of photo-licence requirement goes beyond forcing those Wilson Members seeking a driver's license to commit a sin. It also consequently infringes upon the s. 2a) *Charter* rights of all

²⁷ *R. v. Oakes*, [1986] 1 S.C.R. 103, [*Oakes*], EFC Authorities, Tab # 8.

²⁸ *Oakes* at 138 & 139, EFC Authorities, Tab # 8.

Wilson Members since it would deprive them of the ability to live on rural Hutterian colonies as they sincerely believe is required by the Holy Scriptures.

31. As already established, the Wilson Members' communal way of life is the means by which they can freely exercise their s. 2a) *Charter* rights. As such, the impairment caused by the violation is not minimal in that it takes away the means by which the Wilson Members, and the colony itself, can exercise their right to freedom of religion and, therefore, violates their s. 2a) *Charter* right to freedom of religion.

32. These Interveners ask that they be permitted to make a joint oral argument of 15 minutes at the hearing of this appeal.

PART IV – COSTS

33. These Interveners do not seek costs and ask that no costs be ordered against them.

PART V – ORDER SOUGHT

34. These Interveners respectfully submit that when the nature and scope of the Wilson Members' s. 2a) rights are defined and put into context, that the photo-license requirement cannot be saved under s. 1 of the *Charter* and as such, that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd day of September 2008.

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ALBERTOS POLIZOGOPOULOS