Alberta v. Hutterian Brethren of Wilson Colony: A walk through and brief case analysis
By Don Hutchinson

Some have regarded this decision as a hard loss. It's true that we would have preferred a different result from the application of the law by the Supreme Court of Canada in this situation. A colleague suggested that at least the glass was half full as the court provided some encouraging and strong language in regard to the concept of the "collective aspect" of the right to freedom of religion in Canada. On reading, reviewing and assessing the decision I prefer to see the glass as about 70% full. The court has provided healthy language in the course of reviewing the concept, advancing it significantly beyond the almost passing reference it was given in a 1986 decision of the court. Of course we are disappointed in the final application of the section 1 analysis in this case, but we strongly affirm the advancement of the jurisprudence on this concept of the religious freedom of a community of religious believers that takes place in the written deliberations of the court. It is hoped that this analysis, walking through some of the key paragraphs of the decision will assist you to see the fuller glass as well.

[Unless otherwise noted, all quotations referenced in this analysis are from the Supreme Court of Canada's decision in *Alberta v. Hutterian Brethren of Wilson Colony*.]

In *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, the Supreme Court of Canada decided in a 4 to 3 split to endorse the Province of Alberta's regulatory initiative making photo driver's licences mandatory for all drivers in Alberta, including the Hutterian Brethren, an identifiable minority exempted from existing provincial photo identification requirements for 29 years because of their religious beliefs. In assessing the decision, many have reflected on the issue of two colonies of Hutterian Brethren stating they are giving consideration to leaving Alberta – possibly leaving Canada – because of this violation of their religious beliefs. Others have reflected on those Hutterian Brethren who do not share the interpretation of scripture that prohibits being voluntarily photographed, wondering why the colonies would have different understandings. In both of these analyses, there is a failure to consider the written deliberations of the Supreme Court on the subject of freedom of religion at the community rather than simply the individual level. Having participated in the intervention that specifically asked the court to consider the "collective aspects" of religious freedom, my analysis will examine not simply the immediate question of the decision of the court to uphold the Alberta legislation, but the underlying assessment of freedom of religion as a Charter right applicable to groups, communities, congregations and denominations in addition to its application to the individual exercising his or her fundamental freedom of religion under Canada's constitution.

Key to this consideration is the unanimous agreement of the Supreme Court of Canada on one point, an affirmation of Dickson C.J.'s statement in *R v. Edwards Books*, [1986] 2 S.C.R. 713, that "religious freedom," as understood in context of the Canadian Charter of Rights and Freedoms ("Charter"), has "both individual and collective aspects."

My colleague Abella J. notes at para. 130 that "freedom of religion has 'both individual

> and collective aspects'". She asserts that "both ... are engaged in this case". While I agree that religious freedom has both individual and collective aspects, I think it is important to be clear about the relevance of those aspects at different stages of the analysis in this case. The broader impact of the photo requirement on the Wilson Colony community is relevant at the proportionality stage of the s. 1 analysis, specifically in weighing the deleterious and salutary effects of the impugned regulation. The extent to which the impugned law undermines the proper functioning of the community properly informs that comparison. Community impact does not, however, transform the essential claim — that of the individual claimants for photo-free licences — into an assertion of a group right.
>
> - McLachlin C.J. at paragraph 31

This paragraph from the majority decision both affirms unanimity on the point and notes where the court will divide on the question of the analysis of the limitation imposed (not imposed?) on the government in infringing the right to freedom of religion under the Charter. In this case, both the majority and the minority give consideration to clarifying the meaning of the collective aspects of religious freedom. It is in the consideration of that point under section 1 analysis that the majority (McLachlin, C.J, Binnie, Deschamps and Rothstein JJ. Concurring) and the minority (Abella, LeBel and Fish JJ.) part ways.

The minority (written reasons of Abella J. and LeBel J., concurring with Abella J., and by Fish J. concurring with both) proceed through an analysis that recognizes the communal belief and the communal impact of the Alberta legislation. In essence, the minority recognized that upholding the law may force this colony of Hutterian Brethren – as distinct from any other religious group, including other colonies of Hutterian Brethren, which may have a different understanding of Scripture – to relocate to a jurisdiction which would permit them to continue their current drivers' licensing practices which are tied to a communal religious belief.

The minority, in a strong dissent of a court split 4 to 3 on a panel of seven rather than nine justices, also provide a fuller consideration of the rights of the religious group or community. The panel was sitting as seven because of the retirement of Bastarache J. who had not yet been replaced. The court sits in odd numbered panels, hence the absence of Charon J.

It is the robust recognition and consideration of the concepts pertaining to the "collective aspects" of the section 2(a) right to the "fundamental freedom" of freedom of religion that is significant in the assessment of the decision in this case.

As LeBel J. states,

> Perhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of religion for the purposes of the *Charter*. One might have thought that the guarantee of freedom of opinion, freedom of conscience, freedom of expression and freedom of association could very well have been sufficient to protect freedom of religion. But the framers of the *Charter* thought fit to incorporate into the *Charter* an express guarantee of freedom of religion, which must be given meaning and effect.

> That decision reflects the complex and highly textured nature of freedom of religion. The latter is an expression of the right to believe or not. It also includes a right to manifest one's belief or lack of belief, or to express disagreement with the beliefs of others. It also incorporates a right to establish and maintain a community of faith that shares a common understanding of the nature of the human person, of the universe, and of their relationships with a Supreme Being in many religions, especially in the three major Abrahamic faiths, Judaism, Christianity and Islam.
>
> Religion is about religious beliefs, but also about religious relationships. The present appeal signals the importance of this aspect. It raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations. As Justice Abella points out, the regulatory measures have an impact not only on the respondents' belief system, but also on the life of the community.
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> - LeBel J. at paragraphs 180, 181 and 182 [emphasis added]

The majority give consideration to the broader community impact in the proportionality stage of their analysis under section 1 of the Charter but distinguish the nature of the claim as pertaining to the impact on individuals, despite only the collective religious groups – the Wilson Colony and Church of Hutterian Brethren – and no individuals having been named in the litigation or identified as being impacted by the proposed regulation. In the course of their decision, the majority rely heavily on the intent of the regulation to record individual photographs and McLachlin C.J. makes frequent reference to giving "deference" to the legislature's efforts to ensure minimal impairment of the constitutional right to religious freedom when giving consideration to the regulation in question.

The starting point for analysis by both the majority and the minority is agreement among the parties and by the court that the Alberta mandatory photo driver's license regulation infringes on the religious belief of the Hutterian Brethren of Wilson Colony and their Church that they not willingly allow themselves to be photographed (considered a violation of their understanding of the second commandment, "Thou shalt make no graven image") and their religious belief that they are required to live, work and worship in a community with all property, etc held in communal ownership.

McLachlin C.J., writing for the majority in regard to what constitutes an infringement of the Charter right to freedom of religion states:

> An infringement of s. 2(*a*) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, and *Multani*. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct. As

explained in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, *per* Dickson C.J.:

> The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(*a*) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314. [Emphasis added.]
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> - McLachlin C.J. at paragraph 32 [reference to *Multani* is to *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6]

In assessing the section 2(a) right, Abella J., in dissent, also emphasized comments made by then Chief Justice Dickson in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295:

> [t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.
>
> . . .
>
> [A]n emphasis on individual conscience and individual judgment . . . lies at the heart of our democratic political tradition. [p. 346]

It is the centrality of the rights associated with freedom of individual conscience that

> underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.
>
> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [p. 346]
>
> - Abella J. at paragraph 127

Abella J. also references decisions of the European Court of Human Rights which recognized a similar concept of freedom of religion and applies these concepts to the religious group, i.e. the collective aspects of religion, quoting from the partial dissent of Wilson J. in *Edwards*

Books – endorsing the individual and collective aspects of religion – and the decision of the European Court of Human Rights in *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, ECHR 2001-XII:

> [T]he right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection [of religious freedom]. . . .
>
> In addition, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets. [para. 118]
>
> - Abella J. at paragraph 131

This understanding represents a significant advancement in jurisprudence on the concept of the group or collective aspect of freedom of religion. Had Alberta not conceded the first part of the section 2(a) test and the court agreed to proceed as if the second part was also conceded, as that is how the lower courts had proceeded without objection from Alberta, there might have been additional comment on the right itself. However, with the point conceded the court moved on to consider whether the limitation/infringement of the section 2(a) right to religious freedom was justified under section 1 of the Charter. In the analysis of both the majority and the minority there is further development of the concept of the group right.

The format for analysis when a Charter right is found to be impugned was established in *Big M Drug Mart*, and further developed in *R v. Oakes*, [1986] 1 S.C.R. 103. Section 1 of the Charter states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The burden of proof to establish that a Charter right has been infringed, rests with the claimant of that right. Once it is established that a Charter right has been infringed, the burden of proof to justify that infringement shifts to the government, and/or other parties, seeking to support the law in question. The application of the test to the analysis of an impugned Charter right takes place in several stages:

i) Is the limit prescribed by law?
ii) Is the purpose for which the limit is imposed pressing and substantial in a free and democratic society (i.e., is the objective sufficiently important to justify limiting a Charter right)? (*Oakes* test 1)
iii) Are the means by which the legislative goal is furthered reasonable and demonstrably justified (the proportionality test)?
    a. Is the limit rationally connected to the purpose? (*Oakes* test 2)
    b. Does the limit minimally impair the right? (*Oakes* test 3)

c. Is the law proportionate in its effect (i.e., is there proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified)? (*Oakes* test 4)
    i. What are the salutary effects or benefits of the legislative goal?
    ii. What are the deleterious effects on the exercise of the right?
    iii. Balancing the salutary and deleterious effects.

LeBel J. notes that it is important to establish a context for the analysis at the outset.

> One part of this context should not be forgotten: the constitutional context itself. The *Charter* is designed to uphold and protect constitutional rights. The justification process under s. 1 is not designed to sidestep constitutional rights on every occasion. Rather, it seeks to define and reconcile these rights with other legitimate interests or even between themselves. The burden of justification rests on the state
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> - LeBel J. at paragraph 187

i) Is the limit prescribed by law?

The court held that this proposed new regulation was an extension of existing legislative provisions for photo drivers' licenses and was thus a limit prescribed by law rather than an effort to pursue a purpose through regulation that was not intended by the original legislation.

ii) Is the purpose for which the limit is imposed pressing and substantial in a free and democratic society (i.e., is the objective sufficiently important to justify limiting a Charter right)?

The court found that ensuring the integrity of the driver's licensing system was a pressing and substantial objective.

iii) Are the means by which the legislative goal is furthered reasonable and demonstrably justified (the proportionality test)?

a. Is the limit rationally connected to the purpose?

> The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.
>
> - McLachlin C.J. at paragraph 48

The court found the universal photo requirement was rationally related to the purpose of protecting the integrity of the driver's licensing system.

b. Does the limit minimally impair the right?

> Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a

> measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.
>
> - McLachlin C.J. at paragraph 53

The Chief Justice noted in her decision the need for the courts to differentiate between whether they are dealing with a human rights legislation case or a constitutional Charter case. McLachlin C.J. noted it appropriate application of the "reasonable accommodation" test is in matters of human rights legislation violations and that the reasonable accommodation test is distinct from the minimal impairment test to be applied to Charter violations occasioned by legislative initiatives.

> Reasonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties – most commonly an employer and employee – adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party.
>
> - McLachlin C.J. at paragraph 68

This is an important distinction. Many fail to recognize that the Charter's application is only as between government – federal, provincial, municipal, school boards, etc – and citizens as a single national standard. Human rights legislation is applicable to government and private relationships – employment, accommodation, etc – in the applicable jurisdiction of the human rights legislation (e.g. provincial human rights legislation applies only within its province in regard to matters identified as provincial under the *Constitution Act, 1867* and the *Canadian Human Rights Act* applies only to those areas of federal jurisdiction under the *Constitution Act, 1867*).

"Where the validity of a law is at stake," the Chief Justice states in paragraph 66, "the appropriate approach is a s. 1 *Oakes* analysis. Under this analysis, the issue at the stage of minimum impairment is whether the goal of the measure could be accomplished in a less infringing manner."

> A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe *Charter* rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is

> justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.
>
> - McLachlin C.J. at paragraph 69

The majority concluded that the proposed regulation was a minimal impairment of the right in question as it fell "within a range of reasonable options available to address the goal of preserving the integrity of the driver's licensing system." [paragraph 62]

> Freedom of religion cases may often present this "all or nothing" dilemma. Compromising religious beliefs is something adherents may understandably be unwilling to do. And governments may find it difficult to tailor laws to the myriad ways in which they may trench on different people's religious beliefs and practices. The result may be that the justification of a limit on the right falls to be decided not at the point of minimal impairment, which proceeds on the assumption the state goal is valid, but at the stage of proportionality of effects, which is concerned about balancing the benefits of the measure against its negative effects.
>
> - McLachlin C.J. at paragraph 61

Abella J., in dissent, focused more on the beliefs and the impact of the regulation on the affected community of believers,

> The harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. Their inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community.
>
> - Abella J. at paragraph 114

In her reasoning in regard to minimal impairment, Abella J. states:

> The government must therefore show that the measure impairs the right as little as reasonably possible in order to achieve the legislative objective. To be characterized as minimal, the impairment must be "carefully tailored so that rights are impaired no more than necessary" (*RJRMacDonald*, at para. 160).
>
> …
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> It is not difficult for the state to argue that only the measure it has chosen will *maximize* the attainment of the objective and that all other alternatives are substandard or less effective.
>
> …
>
> In this case, all of the alternatives presented by the government involve the taking of a photograph. This is the very act that offends the religious beliefs of the Wilson Colony members. The requirement therefore completely extinguishes the right, and is, accordingly, analogous to the complete ban in *RJR-MacDonald*. It is therefore difficult to conclude that it minimally impairs the Hutterites' religious rights.
>
> - Abella J. at paragraphs 145, 147 and 148

c. *Is the law proportionate in its effect (i.e., is there proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified)?*

> This leaves a final question: are the overall effects of the law on the claimants disproportionate to the government's objective?
>
> - McLachlin C.J. at paragraph 73

The Chief Justice poses and answers the question of how a law which passes the requirements of the other stages of analysis could fail to pass the assessment of the proportionality of its effects by commenting that only this branch of the tests "takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'." [paragraph 76] In other words, "the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law." [paragraph 76] Or, "whether the benefits of the impugned law are worth the cost of rights limitation." [paragraph 77]

The proportionality test is conducted in stages.

i. *What are the salutary effects or benefits of the legislative goal?*

The primary benefit of the new regulation was identified as "the enhancement of the security or integrity of the driver's licensing scheme." [paragraph 80] In assessing this effect, McLachlin C.J. distinguished this case from *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, and *Amselem*, both cases in which the court found the potential risk to religious believers was too speculative. In so doing, the Chief Justice affirmed those decisions, which had been challenged at the hearing by at least one intervening provincial government.

The majority found there were other potential benefits, such as, assisting police officers in roadside identification and the possible future harmonization with other licensing systems. Having determined the salutary effects of the regulation, they were ready for an examination of the deleterious effects.

In dissent, Abella J. notes that fewer than 250 drivers are currently exempt from the photo requirements, that Alberta has not presented evidence of their stated security concerns, the existing system has operated without concern for 29 years, and there is no harmonized licensing system in place with another jurisdiction, stating, at paragraph 154,

> … the government has not discharged its evidentiary burden or demonstrated that the salutary effects in these circumstances are anything more than a web of speculation

ii. *What are the deleterious effects on the exercise of the right?*

> … the seriousness of the limit on freedom of religion varies from case to case, depending on "the nature of the right or freedom violated, the extent of the violation, and the degree

to which the measures which impose the limit trench upon the integral principles of a free and democratic society"

- McLachlin C.J. at paragraph 87

With recognition that the "seriousness of a particular limit must be judged on a case-by-case basis" [paragraph 91], the Chief Justice embarks on an assessment of the seriousness of the limitation in this case.

> The deleterious effects of a limit on freedom of religion requires us to consider the impact in terms of *Charter* values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy … The most fundamental of these values, and the one relied on in this case, is liberty — the right of choice on matters of religion. As stated in *Amselem*, *per* Iacobucci J., religious freedom "revolves around the notion of personal choice and individual autonomy and freedom" (para. 40). The question is whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices.
>
> - McLachlin C.J. at paragraph 88 [emphasis added]

It is at this point that the majority begins to part from a full consideration of the impact of the proposed legislation on the religious community in question, rather than the impact on individuals who would acquire driver's licences if not required to submit to having their photograph taken. The Chief Justice reflects on the individual and communal aspects of religion and the difficulty in assessing degrees of sacredness in regard to practices of faith. The minority continue with a focus on the community. Both continue to expand the concepts to be considered in regard to freedom of religion of the community, and individuals within the community. The following paragraphs from the decision provide a reflection of the analysis undertaken.

> There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.
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> - McLachlin C.J. at paragraph 89 [emphasis added]

> Because religion touches so many facets of daily life, and because a host of different religions with different rites and practices co-exist in our society, it is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application … In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multireligious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs. The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit for purposes of the

proportionality analysis. Indeed to end the inquiry with such an assertion would cast an impossibly high burden of justification on the state. We must go further and evaluate the degree to which the limit actually impacts on the adherent.

- McLachlin C.J. at paragraph 90 [emphasis added]

Canadian law reflects the fundamental proposition that the state cannot by law directly compel religious belief or practice.

- McLachlin C.J. at paragraph 92

The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice: see *Edwards Books*. Or the government program to which the limit is attached may be compulsory, with the result that the adherent is left with a stark choice between violating his or her religious belief and disobeying the law: *Multani*. The absence of a meaningful choice in such cases renders the impact of the limit very serious.

However, in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue. The *Charter* guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion.

- McLachlin C.J. at paragraphs 94 and 95 [emphasis added]

Although distinguished from previous cases, the final decision seems not to recognize the full import of the loss of individual drivers to the community as a whole.

This is not a case like *Edwards Books* or *Multani* where the incidental and unintended effect of the law is to deprive the adherent of a meaningful choice as to the religious practice. The impugned regulation, in attempting to secure a social good for the whole of society — the regulation of driver's licences in a way that minimizes fraud — imposes a cost on those who choose not to have their photos taken: the cost of not being able to drive on the highway. But on the evidence before us, that cost does not rise to the level of depriving the Hutterian claimants of a meaningful choice as to their religious practice, or adversely impacting on other *Charter* values.

- McLachlin C.J. at paragraph 96

The Chief Justice gives consideration to economic factors and reverses the established evidentiary burden from the government to the Hutterian Brethren during this final stage of the section 1 analysis, but in doing so offers a valuable insight into the need for those claiming the Charter right of religious freedom to think through potential court considerations in establishing an evidentiary foundation for their claim:

> … the evidence does not support the conclusion that arranging alternative means of highway transport would end the Colony's rural way of life. The claimants' affidavit says that it is necessary for at least some members to be able to drive from the Colony to nearby towns and back. It does not explain, however, why it would not be possible to hire people with driver's licences for this purpose, or to arrange third party transport to town for necessary services, like visits to the doctor. Many businesses and individuals rely on hired persons and commercial transport for their needs, either because they cannot drive or choose not to drive. Obtaining alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency. But there is no evidence that this would be prohibitive.
>
> - McLachlin C.J. at paragraph 97 [emphasis added]

The conclusion seems harsh in light of the considerable effort expended to provide an evidentiary basis for the relevant sincerely held religious beliefs of the Hutterian Brethren of Wilson Colony and their Church congregation.

> On the record before us, it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion. The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver's licence must permit a photo to be taken for the photo identification data bank. Driving automobiles on highways is not a right, but a privilege. While most adult citizens hold driver's licences, many do not, for a variety of reasons.
>
> I conclude that the impact of the limit on religious practice imposed by the universal photo requirement for obtaining a driver's licence is that Colony members will be obliged to make alternative arrangements for highway transport. This will impose some financial cost on the community and depart from their tradition of being self-sufficient in terms of transport. These costs are not trivial. But on the record, they do not rise to the level of seriously affecting the claimants' right to pursue their religion. They do not negate the choice that lies at the heart of freedom of religion.
>
> - McLachlin C.J. at paragraphs 98 and 99 [emphasis added]

iv. Balancing the salutary and deleterious effects.

Having made the finding noted under the deleterious effects analysis, balancing by the majority was a reinforcement of the position that the new regulation would stand.

The minority take a different approach.

> The salutary effects of the infringing measure are, therefore, slight and largely hypothetical. The addition of the unphotographed Hutterite licence holders to the system seems only marginally useful to the prevention of identity theft.
>
> On the other hand, the harm to the religious rights of the Hutterites weighs more heavily.

> The majority assesses the Wilson Colony members' freedom of religion as being a choice between having their picture taken or not having a driver's licence which may have collateral effects on their way of life. This, with respect, is not a meaningful choice for the Hutterites.
>
> - Abella J. at paragraphs 162 and 163

Abella J. also engages in a review of an earlier decision of the court pertaining to Hutterian Brethren and a study of Hutterian Brethren conducted as part of book on minorities in Canada and states, at paragraph 167,

> To suggest, as the majority does, that the deleterious effects are minor because the Colony members could simply arrange for third party transportation, fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community. When significant sacrifices have to be made to practise one's religion in the face of a state imposed burden, the choice to practise one's religion is no longer uncoerced.

And, following at paragraph 170,

> The mandatory photo requirement is a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community, a community that has historically preserved its religious autonomy through its communal independence.

LeBel J. concludes, in paragraphs 200 and 201,

> Religious rights are certainly not unlimited. They may have to be restricted in the context of broader social values. But they are fundamental rights protected by the Constitution. The Government of Alberta had to prove that the limitations on the religious right were justified. Like Justice Abella, I believe that the Government of Alberta has failed to demonstrate that the regulation is a proportionate response to the identified societal problem of identity theft.
>
> Moreover, the driver's licence that it denies is not a privilege. It is not granted at the discretion of governments. Every would-be driver is entitled to a licence provided that he or she meets the required conditions and qualifications. Such a licence, as we know, is often of critical importance in daily life and is certainly so in rural Alberta. Other approaches to identity fraud might be devised that would fall within a reasonable range of options and that could establish a proper balance between the social and constitutional interests at stake. This balance cannot be obtained by belittling the impact of the measures on the beliefs and religious practices of the Hutterites and by asking them to rely on taxi drivers and truck rental services to operate their farms and to preserve their way of life.

The decisions of Abella J. and LeBel J. represent a strong dissent which develops the concepts of the collective aspect of freedom of religion beyond that of the majority, and yet in step with the majority on the basic concepts of the right itself. The more strongly developed foundation

for the right may account for the different approach to the section 1 analysis or it may be a result of the analysis conducted by the majority. Either way it reflects a greater deference toward the religious beliefs of the complainants rather than the legislative intent of the government.

The development of the concept of religious freedom for the group in the written reasons of McLachlin C.J., Abella J. and LeBel J. will have an impact on future cases dealing with principles of the right to freedom of religion for groups in both Charter and human rights jurisprudence. It is rare to have two strongly written dissenting opinions and a statement of agreement with the dissenting judges on such a key concept in a constitutional case. It is the second time that such agreement has been found on the concept of the collective aspect of freedom of religion (see *Edwards Books*, Dickson C.J. and Wilson J.). With this agreement reaching across more than two decades, one can, I think, reasonably anticipate that the concept will bear more fruit in cases where the understanding of the group right is central to the ability to adjudicate on the religious freedom matter before the court.

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