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Alberta v Hutterian Brethren of Wilson Colony

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In *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC 37[1] the Supreme Court of Canada upheld legislation requiring photographs on all drivers licences, despite arguments from those who believe they are biblically-prohibited from having their photograph taken.[2] In *Hutterian Brethren* the majority of the Court expressly differentiated between human rights and constitutional approaches to rights protection, placed significant emphasis on a hitherto largely-ignored step in the test for determining whether a limitation on rights is justified, and arguably minimized the seriousness of harms caused incidentally in the furtherance of broader societal goals.

The two main systems of rights protection in Canada are the *Canadian Charter of Rights and Freedoms*,[3] which forms part of the constitution, and human rights legislation, which exists in every province and at the federal level as well. While both systems protect against rights violations, there are significant differences. First, the *Charter* applies only to the government, while both the state and individuals are bound by human rights requirements. Secondly, because the *Charter* is constitutionally entrenched and thus part of the supreme law of Canada, legislation which unjustifiably infringes a *Charter* right may be struck down by the courts. By way of contrast, while other legislation is, where possible, to be read in harmony with human rights acts, an incompatible statute cannot be struck down as inoperative under the human rights scheme. Thirdly, it is in the human rights context that the concept of a duty to accommodate has been most fully developed, although until *Hutterian Brethren* accommodation was sometimes also seen as relevant to a consideration of whether or not state restriction of a *Charter* right was justifiable. In Canada, most complaints of human rights violations are not about direct discrimination (such as job advertisement that says, 'No Catholics need apply') but about indirect discrimination (for instance, a requirement that all employees be available to work on Saturday, which has an adverse effect on those who celebrate Saturday as their holy day). In the latter situation, if an employee alleges discrimination on the basis of religion, the question would be whether

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[1] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 SCR 567.
[2] This belief is based on the second commandment, which states: 'You shall not make for yourself an image in the form of anything in heaven above or on the earth beneath or in the waters below." Exodus 20:4.
[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

the employer could accommodate the employee in question, without causing undue hardship to the business and to other employees.

The province of Alberta has required photographs on its drivers' licences since 1974, but for several decades it exempted those, like the Hutterian Brethren, who objected on religious grounds.[4] When Alberta decided to make the photograph requirement universal in an effort to combat identity theft, it proposed that photographs need not appear on the licences of religious objectors, but every driver would have to have a photograph taken for entry into the central facial-recognition data bank. The Hutterian Brethren instead suggested that religious objectors be issued non-photograph licences, stamped with the words, 'Not to be used for identification purposes'.[5] When no compromise could be found, the religious exemption was simply eliminated and the Hutterian Brethren challenged the new approach as a restriction on religious freedom.

Freedom of religion is protected in Canada under section 2(a) of the *Canadian Charter of Rights and Freedoms*.[6] A party claiming that the state has violated freedom of religion must show that he or she

> sincerely believes in a belief or practice that has a nexus with religion, and … 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.[7]

Section 1 of the *Charter* states that the rights and freedoms set out in it are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The Supreme Court of Canada has developed an analysis (known as the *Oakes*[8] test) to determine whether section 1 has been met: legislation infringing a *Charter* right will be upheld if it is in furtherance of a pressing and substantial purpose, and if the means used to achieve that purpose are proportionate. The inquiry into proportionality asks whether the limit is rationally related to the purpose, whether the limit minimally impairs the right or freedom in question, and whether the benefits of the law outweigh the harms to the claimants' rights.

In *Hutterian Brethren*, the province had conceded a section 2(a) infringement, thus focusing the dispute on whether the infringement was justifiable. Applying the *Oakes* test, all seven of the Supreme Court judges hearing the case agreed that the goal of reducing identity theft was pressing and substantial, and that the requirement of a photograph was rationally related to that goal. The three dissenting judges parted

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[4] *Hutterian Brethren*, para 5.

[5] *Hutterian Brethren*, para 13.

[6] Section 2 of the *Charter* states "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion …". *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.

[7] *Hutterian Brethren*, para 32, citing *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 (Supreme Court of Canada).

[8] *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No 7.

company from the majority on the final two steps of the *Oakes* analysis: minimal impairment, and the weighing of salutary and deleterious effects.

The lower courts had approached the question of minimal impairment by asking whether the state could accommodate religious objectors without unduly undermining the purpose of the legislation. Since 'the claimants had enjoyed an exemption from the requirement for close to 30 years, with no evidence of resultant harm'[9] the Court of Appeal concluded that the new approach did not 'reasonably accommodate Colony members" section 2(a) religious freedom'[10] and therefore, did not meet the test of minimal impairment. The majority of the Supreme Court rejected this approach, holding that human rights concepts of reasonable accommodation should not be imported into a constitutional discussion of justifiable infringement. Writing for the majority, Chief Justice McLachlin stated that '[m]inimal impairment and reasonable accommodation are conceptually distinct'[11] because 'laws of general application are not tailored to the unique needs of individual claimants'.[12] A court must decide 'whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement to a particular claimant could be envisioned'.[13]

The majority found that the requirement for photographs on drivers' licences was 'reasonably tailored to the pressing and substantial goal'[14] of 'minimizing the risk of misuse of driver's licences for identity theft'.[15] Further, the Hutterian Brethren proposal of photograph-free licences, stamped 'Not to be used for identification purposes', would 'significantly compromise' the province's objective and 'neutralize' the central data bank.[16] In response to the argument that the central data bank was far from universal, given the 700,000 Albertans without a licence, the Chief Justice stated that a court 'must take the government's goal as it is'.[17] The province was not aiming to eliminate all identity theft. Instead, it had the more 'modest goal' of minimizing identity theft associated with the system of licensing drivers.[18] This goal could not be achieved if some drivers were allowed exemptions; therefore the restriction on religious freedom was minimally impairing.

According to the dissenting judges, there was 'no cogent or persuasive evidence'[19] that the Hutterian Brethren proposal would significantly undermine the goal of preventing

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[9] *Hutterian Brethren*, para 22, citing *Hutterian Brethren of Wilson Colony v Alberta*, 2007 ABCA 160, [2007] 9 WWR 459 (Alberta Court of Appeal).
[10] *Hutterian Brethren* [22], citing *Hutterian Brethren of Wilson Colony v Alberta*, 2007 ABCA 160, [2007] 9 WWR 459 (Alberta Court of Appeal).
[11] *Hutterian Brethren*, para 68.
[12] *Hutterian Brethren*, para 69.
[13] *Hutterian Brethren*, para 69.
[14] *Hutterian Brethren*, para 53.
[15] *Hutterian Brethren*, para 59.
[16] *Hutterian Brethren*, para 59–60.
[17] *Hutterian Brethren*, para 63.
[18] *Hutterian Brethren*, para 63.
[19] *Hutterian Brethren*, para 146.

identity theft. Therefore, the test of minimal impairment was not met. The dissenting judges did not comment directly on the majority's view that a requirement of reasonable accommodation plays no part in the question of whether a restriction on rights can be justified under the *Charter*; however, their focus on whether a system aimed at reducing identity theft could survive having a small number of exemptions does suggest they were willing to consider 'whether a more advantageous arrangement for a particular claimant could be envisioned'.[20]

Hutterian Brethren marked the first time that the Supreme Court explicitly excluded questions of reasonable accommodation from the constitutional analysis. As noted above, there are differences between human rights protections and constitutional protection in Canada; however, concepts of accommodation do not seem inherently incompatible with an inquiry into what is permissible in a free and democratic society. In fact, in an early *Charter* decision on the constitutionality of legislation requiring stores to be closed on Sunday, the Supreme Court upheld the law at least in part because it provided some accommodation for store owners who did not celebrate a Sunday Sabbath.[21]

Hutterian Brethren is also noteworthy for its treatment of the final step of the *Oakes* test, which requires a court to weigh the deleterious and beneficial effects of the impugned legislation. In *Oakes*, the Supreme Court stated, '[t]he more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society',[22] yet this stage in the analysis had rarely affected the outcome of constitutional challenges. This changed with *Hutterian Brethren* where the Chief Justice stated:

> 'Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law.'[23]

She went on to say 'this is a case where the decisive analysis falls to be done at the final stage of *Oakes*.'[24] In considering the deleterious effects of the requirement that all drivers' licences must have a photograph, the Chief Justice outlined three ways in which freedom of religion might be restricted by the state. First, and most drastically, the state might 'directly compel religious belief or practice'.[25] Second, the state might require individuals to make the 'stark choice' between disobeying his or her religious precepts and breaking the law.[26] Finally, legislation might simply have an 'incidental effect' on

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[20] *Hutterian Brethren*, para 146.
[21] *R v Edwards Books & Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1 (Supreme Court of Canada).
[22] *Oakes* (n 7) [139]–[40].
[23] *Hutterian Brethren*, para 76.
[24] *Hutterian Brethren*, para 78.
[25] *Hutterian Brethren*, para 92. Such a limit would not reflect a pressing and substantial purpose and thus would not pass even the first step of the *Oakes* analysis.
[26] *Hutterian Brethren*, para 94.

believers, imposing burdens 'in terms of money, tradition or inconvenience'.[27] While the Hutterian Brethren would 'be obliged to make alternate arrangements for highway transport',[28] this would not prevent them from practicing their religion, or living in accordance with their beliefs. So, while there was some diminution of religious freedom,[29] this fell at the more minor end of the scale, and was outweighed by the benefits of the legislation, which included 'enhanc[ing] the security or integrity of the driver's licensing scheme'[30] and in time 'harmonizing' Alberta's licensing system with other provinces or countries. According to the majority, these 'important social goal[s] … should not be lightly sacrificed'.[31]

The dissenting judges agreed that the weighing of harm and benefit should be given greater significance than in the past jurisprudence, but disagreed with the majority on how to characterize the harms and benefits in this particular case. Justice Abella, who wrote the main dissent, found that the 'slight and largely hypothetical' benefits of the legislation[32] were outweighed by the fact that having to rely on outsiders for transport would interfere with the integrity of a community 'that has historically preserved its religious autonomy through its communal independence'.[33]

By giving independent weight to the last stage of the *Oakes* analysis, *Hutterian Brethren* makes a valuable contribution to the jurisprudence. Courts need to be able to step back and ask whether, overall, the limits placed on an entrenched right or freedom are justifiable in light of what the state hopes to achieve. However, the majority's implication that 'incidental effect[s]' on believers need not weigh heavily on the scales is a concern. In Canada, legislation compelling belief or practice is unlikely to be passed in the first place, and legislation that leaves believers no choice but to violate their religious beliefs or break the law would be fairly rare. Most freedom of religion cases in Canada involve harms which fall within the third category identified by the majority. As the majority stated in *Hutterian Brethren*, '[m]uch of the regulation of the modern state could be claimed by various individuals to have a more than trivial impact on sincerely held religious beliefs'.[34] Not every such impact can bring the legislative activity of the state to a halt, but where legislation places greater burdens on some individuals than others because of their religious faith, the deleterious effects should not be minimized simply because such legislation is not at the most coercive end of the spectrum.

Hutterian Brethren is to be commended for giving real weight to the final stage of the Oakes analysis, where courts balance the harms and benefits caused by a restriction on entrenched rights; however, the way in which the majority undertook that balancing

[27] *Hutterian Brethren*, para 95.
[28] *Hutterian Brethren*, para 99.
[29] *Hutterian Brethren*, para 85.
[30] *Hutterian Brethren*, para 80.
[31] *Hutterian Brethren*, para 101.
[32] *Hutterian Brethren*, para 154.
[33] *Hutterian Brethren*, para 170.
[34] *Hutterian Brethren*, para 36.

should be treated with some caution. Arguably the majority minimized the harms to the Hutterian Brethren way of life by labelling them merely incidental, and by refusing to ask whether the state could have attained its legislative purpose while allowing exemptions for religious objectors.