

The Top Five 2009

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37

<http://scc.lexum.org/en/2009/2009scc37/2009scc37.html>

This case addressed whether the new licensing requirements in the province of Alberta, requiring every driver's license to contain a photograph of the licensee, violates freedom of religion under s. 2(a) of the Charter.

Date released: July 24, 2009

The Facts

The province of Alberta requires everyone who drives a motor vehicle to hold a driver's license. Since 1974, every license has had a photograph of the license holder, with exemptions made for individuals who objected to having their photographs taken for religious reasons. Those exempted would be granted a license without a photograph. In 2003, the province adopted a new regulation under s.14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, which made the photo a requirement, without exception, for every driver's license. Photographs taken at the time of issuance of the license would be placed in the province's facial recognition data bank and scanned using facial recognition software. There were about 450 non-photo licenses in Alberta, 56 percent of which were held by members of Hutterian Brethren colonies.

The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. They sincerely believe that the Second Biblical Commandment—you shall not make yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth—prohibits them from having their photograph willingly taken. Under the new law, Colony members holding licenses without photographs must have images taken when renewing their licenses.

The province proposed two measures to accommodate the Hutterian's objections; however, the Colony rejected both revisions as they still required the taking of a photo. The members of the Colony challenged the constitutionality of the regulation, alleging an unjustifiable breach of their religious freedom. This case proceeded on the basis that the universal photo requirement violated s. 2(a) of the *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:
 - (a) Freedom of conscience and religion

At trial, the Colony claimants asserted that if members of their colony could not carry out their responsibilities because of not being able to renew/obtain a license, it would negatively affect the viability of their communal lifestyle. The Province argued that the new system was connected to provincial efforts aimed at minimizing identity theft associated with driver's licenses, and that the new facial recognition data bank was aimed at reducing the risk of this type of fraud. Both the trial judge and the majority of the Alberta Court of Appeal held that the new law violated the Colony's freedom of religion, and that the infringement was not justified under s. 1 of the *Charter*. The Province appealed to the Supreme Court of Canada (SCC).

Canadian Charter of Rights and Freedoms

1. 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 Decision

All seven judges of the SCC agreed that the regulation infringed s. 2(a), but they were split 4 to 3 on whether the limit could be justified under s.1. The majority of the SCC held that the new photo requirement was a justified limitation on the s. 2(a) right to freedom of religion.

In determining whether the infringement of s. 2(a) was justified under s. 1 of the *Charter*, the Court applied the *R. v. Oakes* test, which is used to weigh whether a particular limitation on an individual's rights and freedoms should be allowed in a free and democratic society. It seeks to balance the benefits of the purpose of the law with the harmful effects of the infringement. The *Oakes* test requires the government to convince the court that the law is justified:

- (1) There is a "pressing and substantial" objective that justifies infringement of the right;
- (2) The way it has chosen to obtain the objective is reasonable, which involves a three-step "proportionality test":
 - a. The measure used must be carefully designed, or "rationally connected", to achieve the objective;
 - b. The measure used should impair the right as minimally as possible; and
 - c. The negative effects of the measure must be balanced by the actual benefits of that result from it.

Chief Justice McLachlin, writing for the majority of the court (Binnie, Deschamps and Rothstein JJ. concurring), held that the objective of a universal photo requirement is to have a complete digital bank of facial photos to prevent wrongdoers from using driver's licenses for identity theft, and ensuring that no individual has more than one license. The majority held that this objective was of pressing and substantial importance.

The majority held that the universal photo requirement is rationally connected to the government's goal of protecting the integrity of the driver's licensing system, and reducing the likelihood of identity theft. The Court ruled that the non-photo identification card proposed by the Colony did

not meet the government's objective of preventing identity fraud because it lacked a photo to be entered in the data bank. This type of license would not prevent a person from assuming someone's identity using the license in conjunction with other fraudulent documents. The majority held that the photo requirement ensures that no person holds more than one license, enhancing the security of the licensing system and therefore being rationally connected to the objective of the provision.

The majority also found that the new regulation minimally impaired the Colony member's s. 2(a) rights as there were viable alternatives available to the Colony. The majority was of the view that it is possible to hire other individuals with driver's licenses or to arrange third party transport for necessary services.

In determining whether the effects of the new regulation were proportionate with the government's objectives, the court identified three major benefits associated with the universal photo requirement:

- (1) Enhancing the security of the driver's licensing scheme;
- (2) Assisting in roadside safety and identification; and
- (3) Eventually harmonizing Alberta's licensing scheme with those in other jurisdictions.

The harmful effects identified by the majority were primarily financial. The impact of the regulation would be to impose an additional cost on the community, as they would likely have to hire drivers to help them gather supplies and conduct business outside of their community. While the majority acknowledged that these costs would not be minor, they held that the costs did not deprive the Hutterites of the ability to pursue their religion. Therefore, the limit on religious practice associated with the universal photo requirement for obtaining a driver's license is proportionate to the government's objectives.

The Dissent

Justice Abella (Lebel and Fish JJ. Concurring) dissented on the issues of minimal impairment and proportional effects. They concluded that the inability to drive severely compromised the independence of the Hutterites' religious community, and that this regulation failed to minimally impair the Hutterites' freedom of religion. The dissent held that a license is of critical importance, especially in rural Alberta, and there are other approaches separate from the universal photo requirement which would establish a better balance between the societal and constitutional interests at stake.

With regard to proportionality, the dissent held that the benefits to the province were greatly disproportionate to the harm the Hutterites would suffer as a result of the regulation. They concluded that the benefit of requiring the Hutterites to be photographed for the purpose of reducing identity theft is trivial, based on the fact that hundreds of thousands of Albertans do not have a driver's licence and would therefore not be part of the proposed facial recognition database. The 250 Hutterites' photos in the database would not significantly enhance the government's objective, compared to the *Charter* intrusion.

The dissent disagreed with the majority that third party arrangements could be made for transport, as this view fails to appreciate the significance of the self-sufficiency of the Hutterites' religious community. The photo requirement forced the Hutterites to choose between compliance with their religious beliefs and the self-sufficiency of their community, a community that has preserved its religious autonomy through its communal independence.

Discussion Issues

1. Do you feel that the problem of identity theft is an important problem for the government to solve? Why or why not?
2. Before trial, the government of Alberta proposed two alternative measures for the Hutterites. The first was that the license display a photo, but that it be carried in a sealed envelope indicating it as provincial property, and the digital photo placed in the facial recognition bank. The second was that the digital photo be placed in the bank, but the license issued without a photo. These suggestions aimed to lessen the impact on the Hutterian Brethren by removing the need for colony members to have any direct contact with the photographs. The Colony proposed that no photograph be taken and that licenses be issued to them marked "Not to be used for identification purposes".

What do you think of the alternatives proposed by government and the Hutterites? Do you think that the two alternatives proposed by the province of Alberta passed the minimal impairment test in s. 1 of the *Charter*? Can you think of any ways in which the government could have altered the law in order to achieve their stated goal without violating the Hutterites' religious beliefs?

3. The SCC held that the financial cost of hiring driving services would not deprive the Hutterite community of the choice to practice their religion. Do you agree with this? Why or why not?
4. Do you agree with Justice Abella's assertion that forcing the Hutterites to abide by s.14(1)(b) would not reduce identity theft because many Albertans do not have driver's licenses and are therefore absent from the photo imaging system? Why or why not?
5. Chief Justice McLachlin acknowledged in the majority decision that because of the diversity of religions and practices in the world today, that it is "inevitable that some... will come into conflict with laws... of general application." Do you think that the Courts adequately balanced the need for public safety with freedom of religion under the *Charter*? Why or why not? If you were a judge on the SCC, how would you have decided this case?