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**Divided over Deference to the Regulatory State:
A Comment on the Canadian Supreme Court's Decision in *Hutterian Brethren***

by

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1. Introduction

In *Alberta v. Hutterian Brethren of Wilson Colony*¹, the Supreme Court narrowly upheld (4-3) the constitutionality of an Alberta regulation requiring anyone seeking a driver's license to be photographed. The majority deferred to the state's need to have recourse to universally applicable regulatory laws in addressing collective problems like, as here, identity theft. This comment analyzes three central aspects of the Court's thinking in *Hutterian Brethren*. First, the Court distinguishes *Multani v. Commission scolaire du Margeurite-Bourgeois*² in limiting the ambit of "reasonable accommodation" to private-law contexts. Second, the Court defers to the government's definition of its policy objective in applying the *Oakes*³ test. By considering a policy to have the goal of being maximally effective, the majority makes it easier for laws to survive the minimal impairment stage. The Court makes the final step of *Oakes* decisive for one of the first times.⁴ Third, and finally, the effect of the Court's decision on freedom of religion rights will be addressed. Now that quite significant costs have been upheld as the consequences of belief, rather than prohibitive constraints on the right, religious minorities will find it harder to litigate a path to exemptions from general laws unless Court's track shifts.

2. Facts

In 2002, the Alberta government amended a regulation to require that all drivers be photographed in the process of becoming licensed. The Province sought to compile a comprehensive photo database so as to obtain maximal effect from facial recognition software that impeded the fraudulent obtainment of drivers' licenses and associated

¹ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*].

² *Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, para. 53, [*Multani*].

³ *R. v. Oakes*, [1986] 1 S.C.R. 103.

⁴ Hogg, Peter W. *Constitutional Law of Canada*. 5th ed. (Scarborough, Ont.: Carswell, 2007).

identity theft. Although they reside in separate communities and strive for self-sufficiency, the Hutterians of Wilson Colony require the use of vehicles on a regular basis. On religious grounds, they object to being photographed and, under the old regulation, they were exempted from that requirement.

Wilson Colony argued the new regulation was an unjustified infringement of their religious freedom, and should be overturned, because it effectively forced them to choose between two tenets of their religion. Although the province conceded that its regulation violated s. 2(a) of the *Charter*, it sought a finding that the regulation was justified under s. 1. The Province offered to modify the photo requirement in order to mitigate the harm to the respondents' religious freedom, but both of its alternatives still required every licensee to be photographed. The Hutterians' proposed that they receive non-photo licenses marked to the effect that the licenses were not valid personal identification.

3. Lower Courts

A) Trial Level

The chambers judge found the new regulation unconstitutional. Applying the *Multani* standard⁵, he found that the regulation was not minimally impairing because “the government had not accommodated the ‘distinctive character of the burdened group ... to the point of undue hardship.’”⁶

B) Court of Appeal

The appellate court upheld the lower court's ruling (2-1) on the ground that the province's scheme was not minimally impairing.⁷ However, the majority's analysis was

⁵ *Supra* note 2.

⁶ *Hutterian Brethren*, *supra* note 1 at para 16.

⁷ *R. v. Hutterian Brethren of Wilson Colony*, 2007 ABCA 160 at para 42 [ABCA].

strongly flavoured by considerations of proportionality.⁸ The dissent argued that “[a] free and democratic society can more easily tolerate statutes” that deny applicants exemptions from requirements for “statutory privileges,” than more restrictive ones.⁹

4. *The Supreme Court of Canada*

A) *The Majority Decision*

The majority framed its s. 1 analysis by arguing that the regulatory state must be accorded “a measure of leeway” in policymaking.¹⁰ In applying the *Oakes* test, the majority narrowly defined the government’s objective as “minimizing the risk of driver’s licenses being used for purposes of identity theft.”¹¹ McLachlin C.J. was convinced that only a photo database without exemptions satisfied this goal.¹² She recognized that as a result of the regulation, “Colony members will be obliged to make alternative arrangements for highway transport.”¹³ However, they would still be able to “live in accordance with their beliefs,” although it would be costlier to do so.¹⁴

B) *The Minority Decisions*

The minority opinions differ over the definition of the objective. Abella J. is concerned that the state can always argue that “only the measures it has chosen will *maximize* the attainment of the objective.”¹⁵ LeBel J. notes that “the Province’s stated purpose is not set in stone and does not need to be achieved at all costs.”¹⁶ Since some 700,000 Albertans’ identities would remain just as insecure as those of the Hutterians

⁸ *Ibid.* at paras 44 and 46.

⁹ *Ibid.* at para 77.

¹⁰ *Hutterian Brethren*, supra note 1 at para 35.

¹¹ *Ibid.* at para 42.

¹² *Ibid.* at para 101.

¹³ *Ibid.* at para 99.

¹⁴ *Ibid.* at para 102.

¹⁵ *Ibid.* at para 147.

¹⁶ *Ibid.* at para. 201.

whom the government claimed it could not exempt, Abella J. adjudged the new regulation to be only marginally useful.¹⁷ Majority and minority also differ over the severity of costs, whether the religion or the state truly imposes them, and the overall effect on free exercise. Abella J. writes that “when significant sacrifices have to be made to practice one’s religion in the face of a state imposed burden, the choice to practice one’s religion is no longer uncoerced.”¹⁸

5. Analysis

A) Distinguishing *Multani* - The court reads down reasonable accommodation

In *Multani*, the Court held that when individuals are adversely affected by facially neutral policies, “there is a duty to make reasonable accommodation” up to the point of “undue hardship to the party who must perform it.”¹⁹ Charron J. held that administrative authorities’ ability to set standards is constrained by the need to adjust one-size-fits-all policies in order to make them minimally discriminatory to minorities. The lower courts, in deciding *Hutterian Brethren*, and the parties, presumed that the state bore this obligation in the passage of laws. Both the Province and the respondents cleaved to a model of negotiated concession, offering accommodations and counter-accommodations in a bargaining-like relationship. But McLachlin C.J. was decisive in holding that the relationship between citizens and lawmakers is different than that between private policymakers. *Multani* has now distinguished; it seems to apply only in private-law contexts. Significantly, she did not require the Province to prove it gave forethought to balancing its regulation’s effect on minorities (as opposed to merely retroactive

¹⁷ As McLachlin C.J. sees it, the *reductio ad absurdum* of this analysis is that, while the government could compel each and every Hutterite to be photographed as part of a universal ID scheme, it cannot make being photographed mandatory as one of the conditions of being licensed.

¹⁸ *Ibid.* at para 167.

¹⁹ *Multani*, *supra* note 2.

justification); quite the opposite, she implied that doing so was impracticable.²⁰ This is particularly telling because the law in question was a regulation, not an Act (hence it arose from executive-branch committee, an arm of government arguably better suited for technocratic policy design than the Legislature). Religious minorities may well have a harder time getting the government to proactively consider less infringing alternatives.

B) Application of the Oakes Test

With respect to *Oakes*, the most influential aspect of the majority's decision is its narrow definition of the government's objective as the "setting up [of] a system that *minimizes* the risk of identity theft associated with driver's licenses" [emphasis added].²¹ P.W. Hogg has recognized that the government's objective "can be expressed at various levels of generality," and is tightly linked to the finding of what means are necessary to accomplish it.²² McLachlin C.J. does not consider alternative means at the minimal impairment stage, since "[l]ess drastic means which do not actually achieve the government's objective are not considered at this stage."²³ In the past, however, the Court has recognized that most (if not all) laws would be more effective if they eliminated exceptions.²⁴ Policy efficacy and infringement of rights inversely co-vary along parallel continuums. As a result, the Court has considered the degree of inclusiveness of the law that substantially achieved the government's goal while moderating the concomitant infringement of rights. Such considerations of proportionality, if they are to be considered at all, will now be considered at the final

²⁰ *Hutterian Brethren*, *supra* note 1 at para 99.

²¹ *Ibid.* at para 4.

²² Hogg, *Constitutional Law*, *supra* note 4, p.38-19.

²³ *Hutterian Brethren*, *supra* note 1 at para 54.

²⁴ This trade-off was, ironically, made most explicit in McLachlin J.'s (as she then was) opinion in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

stage of *Oakes*; “the first three stages of *Oakes* are anchored in an assessment of the law’s purpose.”²⁵

Applying a label that will probably stick, Abella J. calls the majority’s the “watertight compartments” approach.²⁶ Her definition of the objective leaves ‘maximization’ out, and is more consistent with past jurisprudence. The Court should “not assess whether the infringing measure fulfills the government’s objective more perfectly than any other.”²⁷ Or, as LeBel has it, the objective of s. 1 is “to preserve constitutional rights, by looking for a solution that will reach a better balance, even if it demands a more restricted understanding of the scope and efficacy of the objectives of the measure.”²⁸

C) *Where freedom of religion stands after Hutterian Brethren*

The majority and minority opinions are animated by a concern with what level of state-imposed cost to practicing one’s religion unacceptably violates free exercise rights. Obviously, this is a question of balancing against the measure of the good to be achieved through the policy that imposes costs. The court’s use of this fourth and final stage of *Oakes* to perform this balancing will no doubt lead Peter Hogg to revise his conclusion that proportionality “can be safely ignored.”²⁹

The Court’s decisions in *R.B. v. Children’s Aid Society of Metropolitan Toronto*³⁰ and *Syndicat Northcrest v. Anselem*³¹ categorically rejected any internal limits on the

²⁵ *Hutterian Brethren*, *supra* note 1 at para 76

²⁶ *Ibid.* at para 134.

²⁷ *Ibid.* at para 147.

²⁸ *Ibid.*, at para 197.

²⁹ Hogg, *Constitutional Law*, *supra* at note 4, p. 38-44.

³⁰ *R.B. v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

³¹ *Syndicat Northcrest c. Anselem*, [2004] 2 SCR 55.

right to freedom of religion. Religious freedom encompasses denying consent to medically-necessary treatment for one's children, and "sincere belief" is the subjective threshold of religion. These decisions extended Dickson C.J.'s liberal and purposive interpretation to freedom of religion in *R. v. Big M Drug Mart Ltd*³² and *R. v. Edwards Books*³³ to its outer bounds, fully embracing the *R. v. Therens*³⁴ principle that rights can be interpreted broadly because s. 1 will limit them. McLachlin C.J.'s deference in *Hutterian Brethren* explicitly takes the overall effect of these decisions into account: there are numerous religious minorities, and "[g]iving effect to each of their religious claims could seriously undermine the universality of many regulatory programs ... to the overall detriment of the community."³⁵ Clearly, then, the majority decision signals a more restrained approach to "giving effect" to religious claims for exemption.

Given that "deleterious effects" in the proportionality stage are "measured by the values underlying the *Charter*,"³⁶ clearly McLachlin C.J. is not simply suggesting that religious rights must be sacrificed because, otherwise, "responsible, creative solutions to difficult problems would be threatened."³⁷ As Dickson C.J. held in *Edwards Books*, the effects of the measures "must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights."³⁸ The majority holds that freedom of religion is not unacceptably violated because the Hutterians are not being forced to violate their practice by the cost of not being licensed. Choice defines the core of freedom of religion, as Dickson C.J. held in

³² *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

³³ *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

³⁴ *R. v. Therens*, [1985] 1 S.C.R. 613.

³⁵ *Ibid.*

³⁶ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para 125.

³⁷ *Hutterian Brethren*, *supra* note 1 at para 37.

³⁸ *Supra* at note 33.

Edwards Books, but the costs of being unable to become licensed does “not negate the choice that lies at the heart of the freedom of religion.”³⁹

McLachlin C.J. is markedly *undeferal* to the chambers judge’s finding that the Colony’s “continued existence”⁴⁰ depended on some members being able to operate motor vehicles, whereas Abella and LeBel JJ. accept this as the probable outcome. The dissenting justices expound a view of the vital importance of collective religious expression. These practitioners meaningfully exercise their religion by living communally apart from separate from broader society. LeBel makes this point quite central to his dissent, arguing that “the maintenance of communities of faith” and quasi-cultural means “of living that faith” are an “aspect of the guarantee of freedom of religion.”⁴¹ Since independence is an aspect of the Colony’s chosen manifestation of its beliefs, forcing them to choose between independence and violating their belief against photography imposes an undue degree of state coercion. McLachlin C.J. is silent on this point because she categorizes the need to hire transportation as a cost that religion imposes on these practitioners—one which is more than “trivial” but less than “prohibitive” —but which will not end their separate existence. Just as Abella J. was willing to constrain freedom of religion for policy grounds in *Bruker v. Marcovitz*, since the appellant there had freely chosen to restrain his future choice, here, choice has also been constrained, so long as it remains meaningfully intact, for policy reasons.⁴²

6. Conclusion

³⁹ *Hutterian Brethren*, *supra* note 1 at para 99.

⁴⁰ *ABCA*, *supra* note 7 at para 14.

⁴¹ *Hutterian Brethren*, *supra* note 1 at para 182.

⁴² *Bruker v. Marcovitz*, 2007 SCC 54.

In *Hutterian Brethren*, a secular, regulatory law of general application, promulgated without a discriminatory purpose in the name of a diffuse but valuable social benefit, was regarded as justified in a free and democratic society, notwithstanding the significant ‘costs’ it imposed on religious minorities. The Court rejected the mediated model of reasonable accommodation as an acceptable framework for the relationship between lawmakers and those bound by laws, limiting it to private law relationships. The Court also took a restrained view of its institutional competence as a policy evaluator, which will make it harder for religious minorities to avoid the government’s writ through recourse to their s. 2(a) rights. Whereas in other decisions the Court essentially considered what other means, less infringing upon rights, could achieve gains for the public interest *comparable* to those effected by the government’s chosen means, here the court simply asked whether other means accomplished *identical* ends. Despite, or perhaps because of, the broad scope of s. 2(a) rights, in the context of the modern regulatory state, the Court has shown itself quite willing to justify government policies that make it much costlier to exercise freedom of religion.