Alberta v. Hutterian Brethren of Wilson Colony (2009)

The Supreme Court of Canada's decision in *Alberta v. Hutterian Brethren of Wilson Colony*[1] explores the limits on freedom of religion. The catalyst of this suit was a regulation adopted by Alberta in 2003 which requires all drivers' licenses, without exception, to include a photo of the licensee. Alberta introduced photo driver's licenses in 1974, but until 2003 it was possible to apply to the Registrar for a discretionary exemption from the photo requirement. The members of Wilson Colony were granted such an exemption on the grounds that their religious beliefs included a prohibition on having their photographs taken.

The new 2003 regulation required the Wilson Colony Hutterites to choose between holding a valid driver's license or following their sincerely held religious convictions. The members of Wilson Colony claimed that the photo requirement was an unjustifiable infringement of their freedom of religion. Both the trial court and court of appeal agreed and deemed the regulation unconstitutional.[2]

A narrow majority of the Supreme Court disagreed, and ruled that the new regulation is in fact constitutional. Hutterites who want to drive must now have their photographs taken.

Rights and Freedoms are Not Absolute

The *Wilson Colony* case is not about whether the Hutterites' freedom of religion was infringed. All parties, at all levels of court, acknowledged that the Alberta regulation "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 substantial*" (emphasis added), which is the established test for an infringement of freedom of religion as protected by section 2(a) of the *Charter*.[3]

The case is more essentially an examination of section 1 of the *Charter*, which reads:

> *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.*

In other words, *Wilson Colony* is about the justifiable limits on constitutional rights and freedoms. Justifying a limit that has been challenged as unconstitutional first requires that it be "prescribed by law." At the Alberta Court

of Appeal there was some concern about "overextension of regulatory authority" and the fact that regulations are adopted "without legislative debate."[4] The Supreme Court's response was that "hostility to the regulation-making process is out of step with this Court's jurisprudence and with the realities of the modern regulatory state." The Court said that regulations "are the life blood of the administrative state and do not imperil the rule of law." Therefore the impugned regulation is "prescribed by law."[5]

The second step in justifying a challenged law is that it must be "demonstrably justified in a free and democratic society." This justification is achieved by demonstrating "proportionality." The concept of proportionality belongs to a well-established international legal and philosophical tradition.[6] In Canadian jurisprudence, analysis of proportionality in law is guided by the test articulated by former Chief Justice Dickson in *R. v. Oakes*.[7]

The *Oakes test* is divided into two broad inquires. The first is whether the impugned law has a sufficiently important objective to justify limiting a *Charter* right. The second is the proportionality inquiry. Proportionality in the impugned law is determined through three sub-questions:

- (1) Is there a rational connection between the impugned law and the law's objective?
- (2) Is the law minimally impairing of the *Charter* right?
- And, (3) balancing the positive and negative effects of the law, is there overall proportionality?

The Majority's Application of the *Oake*s Test

The majority decision was written by Chief Justice McLachlin, joined by Justices Binnie, Deschamps and Rothstein. Addressing the first question of the *Oakes* test, whether the purpose of the regulation is pressing and substantial, they conclude: "Maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft is clearly a goal of pressing and substantial importance, capable of justifying limitations on rights."[8] Thus the majority is satisfied that the first hurdle of the *Oakes* test has been crossed.

The first question in the proportionality inquiry is whether the new regulation is rationally connected to the pressing goal of preventing identity theft. The majority stresses that the government does not need to prove that the new regulation will certainly achieve its goal. Instead, the government only has to show that it is "reasonable to suppose" that the regulation is likely to achieve its goal.[9] The majority was satisfied that the government showed that the regulation is not merely an arbitrary limitation on rights, but is rationally related to the pressing

goal.[10]

The second proportionality question is whether the new regulation minimally impairs freedom of religion. The regulation must be "reasonably tailored" but need not meet a standard of "unrealistic exacting precision." Furthermore, the Court deems it appropriate to give a measure of deference to legislative and regulatory bodies when it comes to crafting laws that respond to complex social issues.[11]

In its effort to achieve its goal while minimizing the impact on Wilson Colony members, the government proposed measures that would insulate the colony members from direct contact with the photographic images attached to their driver's licenses. These proposals were rejected by the colony, which in turn proposed a photo-less license marked as not to be used for identification purposes. The majority accepted the government's argument that the proposal put forward by the colony would not work towards achieving the goal of preventing identity theft. Thus, the regulation in its current form was accepted as minimally impairing.[12]

The final question in the proportionality analysis is whether the effects of the regulation are proportionate. It is at this stage that the majority decision is most clearly at odds with the dissenting reasons of Justices Abella, LeBel and Fish. The majority claims that it is only at this final step that a court should take full account of the "severity of the deleterious effects of a measure on individuals or groups." Prior to this step, only the law's purpose should be examined.[13]

Turning first to the salutary (or useful) effects, the majority says that it is not necessary to "await proof positive" that the beneficial effects will be realized. Rather, reason and evidence that a public good will be achieved is enough. The beneficial effects that are reasonably expected to come out of the regulation are threefold: (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.[14]

Consideration of the deleterious (or harmful) effects involves the regulation's limitation on freedom. The essential question posed by the majority is "whether the limit leaves the adherent with a meaningful choice to follow his or her beliefs and practices."[15] Certain legislation will impose some burdens of monetary cost and inconvenience, but "a limit on a right that exacts a cost but nevertheless leaves the adherent with a meaningful choice" is acceptable. The Wilson Colony Hutterites have options, says the majority. They can hire a driver or find other alternative transportation. The regulation may impose a financial cost and inconvenience but it does not take away all meaningful choice that allows them to

remain faithful to their religion. Therefore in the final balancing of effects, the majority finds that the limitation of the colony members' freedom of religion is proportionate.[16]

Dissenting Interpretations of the *Oakes* Test

Three dissenting justices wrote two different sets of reason, but all three agree that the majority went astray in its proportionality analysis by treating the steps as "watertight compartments."[17] While the majority maintains that a contextual analysis is only appropriate in the final step, the dissenting justices hold that "context should be considered at the outset of the analysis in order to determine the scope of deference of courts to government."[18] In the words of Justice LeBel, "there should not be a sharp distinction between the steps;"[19] the analysis should be "holistic."[20]

Justice Abella agrees with the majority that the goal of the regulation is pressing and substantial and that there is a rational connection between the regulation and the goal.[21] Her disagreement with the majority begins at the minimal impairment stage of the analysis. Essentially, Abella contends that the government has not shown why the significantly less intrusive measure proposed by the Wilson Colony members was not chosen. Abella says that there is no evidence that a driver's license marked as not to be used for ID purposes would significantly interfere with the government's objective.[22]

The brunt of Abella's criticism of the majority decision comes in the final stage where positive and negative effects of the regulation are balanced. Contrary to the majority's contention that "proof positive" of the regulation's positive effects are unnecessary, Abella cites Supreme Court precedent to argue that only salutary effects that "actually result" must be weighed in the balance.[23] She finds that "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."[24]

Abella goes on to question the effectiveness of the facial recognition technology, maintaining that because the system is not "fool-proof" a few hundred photo-less driver's license will not have a noticeable impact on the system's effectiveness.[25] Furthermore, "700,000 Albertans are without drivers licenses."[26] Therefore, the salutary effects of adding 250 Hutterites to the system are "slight and largely hypothetical."[27]

The deleterious effects, according to Abella, are more severe. The regulation "threatened the autonomous ability of the Hutterites to maintain their communal way of life." Self-sufficiency is an essential element of the Hutterite faith, and

thus having to hire an outside driver is much more than an inconvenience or financial cost.[28] In fact, the effect on the Wilson Colony is a significant sacrifice. And, "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."[29] Abella says that "the mandatory photos 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."[30] The result is a disproportionate limitation that achieves minimal beneficial effects and significant negative effect.[31]

Jim Young (July 31, 2009)

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[1] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 ("*Wilson Colony*").
[2] *Hutterian Brethern of Wilson Colony v. Alberta, Hutterian Brethren of Wilson Colony v. Alberta, 2007 ABCA 160.*, 2006 ABQB 338;
[3] *Wilson Colony* at para. 32.
[4] *Ibid*. at para. 40; see also 2007 ABCA 160 at para 24.
[5] *Wilson Colony* at para. 40.
[6] *Ibid*. at para. 184.
[7] *R. v. Oakes*, [1986] 1 S.C.R. 103.
[8] *Wilson Colony* at para. 42.
[9] *Ibid* at para. 48.
[10] *Ibid*. at paras. 48-52.
[11] *Ibid*. at para. 37.
[12] *Ibid*. at paras. 53-71.
[13] *Ibid*. at para. 76.
[14] *Ibid*. at paras. 79-85.
[15] *Ibid*. at para. 88.
[16] *Ibid*. at para. 86-103.
[17] *Ibid*. at para. 134.
[18] *Ibid*. at para. 186.
[19] *Ibid*. at para. 191.
[20] *Ibid*. at para. 195.
[21] *Ibid*. at paras. 140 & 142
[22] *Ibid*. at paras. 143-148.
[23] *Ibid*. at para. 150.
[24] *Ibid*. at para. 154.
[25] *Ibid*. at paras. 155-156.

[26] *Ibid.* at para. 158.
[27] *Ibid.* at para. 162.
[28] *Ibid.* at para. 164-167.
[29] *Ibid.* at para. 167.
[30] *Ibid.* at para. 170.
[31] *Ibid.* at paras. 174-176.