SUPREME COURT OF CANADA

CITATION: Alberta *v.* Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567

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BETWEEN:

Her Majesty the Queen in Right of the Province of Alberta
Appellant
and
Hutterian Brethren of Wilson Colony and
Hutterian Brethren Church of Wilson
Respondents
- and -
Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of British Columbia,
Canadian Civil Liberties Association, Ontario Human Rights Commission,
Evangelical Fellowship of Canada and Christian Legal Fellowship
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 109)	McLachlin C.J. (Binnie, Deschamps and Rothstein JJ. concurring)
DISSENTING REASONS: (paras. 110 to 177)	Abella J.
DISSENTING REASONS: (paras. 178 to 202)	LeBel J.
DISSENTING REASONS: (para. 203)	Fish J.

Alberta *v*. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567

Her Majesty The Queen
in Right of the Province of Alberta *Appellant*

v.

Hutterian Brethren of Wilson Colony and
Hutterian Brethren Church of Wilson *Respondents*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
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Indexed as: Alberta *v.* Hutterian Brethren of Wilson Colony

Neutral citation: 2009 SCC 37.

File No.: 32186.

2008: October 7; 2009: July 24

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Freedom of religion — New regulation requiring photo for all Alberta driver's licences — Members of Hutterian Brethren sincerely believing that Second Commandment prohibits them from having their photograph willingly taken — Whether regulation infringed freedom of religion — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(a) — Operator Licensing and Vehicle Control Regulation, Alta. Reg. 320/2002, s. 14(1)(b) (am. Alta. Reg. 137/2003, s. 3).

Constitutional law — Charter of Rights — Right to equality — Discrimination based on religion — New regulation requiring photo for all Alberta driver's licences — Members of Hutterian Brethren sincerely believing that Second Commandment prohibits them from having their photograph willingly taken — Whether regulation infringed right to equality — Canadian Charter of Rights and Freedoms, s. 15 — Operator Licensing and Vehicle Control Regulation, Alta. Reg. 320/2002, s. 14(1)(b) (am. Alta. Reg. 137/2003, s. 3).

Alberta requires all persons who drive motor vehicles on highways to hold a driver's licence. Since 1974, each licence has borne a photograph of the licence holder, subject to exemptions for people who objected to having their photographs taken on religious grounds. Religious objectors were granted a non-photo licence called a Condition Code G licence, at the Registrar's discretion. In 2003, the Province adopted a new regulation and made the photo

requirement universal. The photograph taken at the time of issuance of the licence is placed in the Province's facial recognition data bank. There were about 450 Condition Code G licences 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 Commandment prohibits them from having their photograph willingly taken and objected to having their photographs taken on religious grounds. The Province proposed two measures to lessen the impact of the universal photo requirement but, since these measures still required that a photograph be taken for placement in the Province's facial recognition data bank, they were rejected by the members of the Wilson Colony. They proposed instead that no photograph be taken and that non-photo driver's licences be issued to them marked "Not to be used for identification purposes". Unable to reach an agreement with the Province, the members of the Wilson Colony challenged the constitutionality of the regulation alleging an unjustifiable breach of their religious freedom. The case proceeded on the basis that the universal photo requirement infringes s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. The claimants led evidence asserting that if members could not obtain driver's licences, the viability of their communal lifestyle would be threatened. The Province, for its part, led evidence that the adoption of the universal photo requirement was connected to a new system aimed at minimizing identity theft associated with driver's licences and that the new facial recognition data bank was aimed at reducing the risk of this type of fraud. Both the chambers judge and the majority of the Court of Appeal held that the infringement of freedom of religion was not justified under s. 1 of the *Charter*.

Held (LeBel, Fish and Abella JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, Deschamps and Rothstein JJ.: The regulation is justified under s. 1 of the *Charter*. Regulations are measures "prescribed by law" under s. 1, and the objective of the impugned regulation of 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 limits on rights. The universal photo requirement permits the system to ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence. The Province was entitled to pass regulations dealing not only with the primary matter of highway safety, but also with collateral problems associated with the licensing system. [39] [42] [45]

The regulation satisfies the proportionality test. First, the universal photo requirement is rationally connected to the objective. The Province's evidence demonstrates that the existence of an exemption from the photo requirement would materially increase the vulnerability of the licensing system and the risk of identity-related fraud. Second, the universal photo requirement for all licensed drivers minimally impairs the s. 2(*a*) right. The impugned measure is reasonably tailored to address the problem of identity theft associated with driver's licences. The evidence discloses no alternative measures which would substantially satisfy the government's objective while allowing the claimants to avoid being photographed. The alternative proposed by the claimants would significantly compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage. Without the licence-holder's photograph in the data bank, the risk that the identity of the holder can be stolen and used for fraudulent purposes is significantly increased. Although there are over 700,000 Albertans who do not hold driver's licences and whose pictures do not appear in the data bank, the objective of the

driver's licence photo requirement is not to eliminate all identity theft in the province, but rather to maintain the integrity of the driver's licensing system so as to minimize identity theft associated with that system. Within that system, any exemptions, including those for religious reasons, pose real risk to the integrity of the licensing system. Lastly, where the validity of a law of general application is at stake, the doctrine of reasonable accommodation is not an appropriate substitute for a proper s. 1 *Oakes* analysis. The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects. [50] [52] [59-60] [62-63] [71]

Third, the negative impact on the freedom of religion of Colony members who wish to obtain licences does not outweigh the benefits associated with the universal photo requirement. The most important of these benefits is the enhancement of the security or integrity of the driver's licensing scheme. It is clear that a photo exemption would have a tangible impact on the integrity of the licensing system because it would undermine the one-to-one and one-to-many photo comparisons used to verify identity. The universal photo requirement will also assist in roadside safety and identification and, eventually, harmonize Alberta's licensing scheme with those in other jurisdictions. With respect to the deleterious effects, the seriousness of a particular limit must be judged on a case-by-case basis. While the impugned regulation imposes a cost on those who choose not to have their photographs taken — the cost of not being able to drive on the highway — that cost does not rise to the level of depriving the claimants of a meaningful choice as to their religious practice, or adversely impacting on other *Charter* values. To find 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. 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. When the deleterious effects are balanced against the salutary effects of the impugned regulation, the impact of the limit on religious practice associated with the universal photo requirement is proportionate. [4] [79-80] [82] [91] [96-98] [100] [103]

The impugned regulation does not infringe s. 15 of the *Charter*. Assuming it could be shown that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is therefore no discrimination within the meaning of s. 15. [108]

Per Abella J. (dissenting): The government of Alberta did not discharge its burden of demonstrating that the infringement of the Hutterites' freedom of religion is justified under s. 1 of the *Charter*. [176]

The purpose of the mandatory photo requirement and the use of facial recognition technology is to help prevent identity theft. An exemption to the photo requirement for the Hutterites was in place for 29 years without evidence that the integrity of the licensing system was harmed in any way. In addition, more than 700,000 Albertans have no driver's licence and are therefore not in the facial recognition database. The benefit to that system therefore, of adding the photographs of around 250 Hutterites who may wish to drive, is only marginally useful to the prevention of identity theft. While the salutary effects of the mandatory photo requirement are therefore slight and largely hypothetical, the mandatory photo requirement seriously harms the

religious rights of the Hutterites and threatens their autonomous ability to maintain their communal way of life. The impugned regulation and 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. This makes the mandatory photo requirement 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. [148] [155-156] [158] [162-164] [170] [174]

The harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. On the other hand, the benefits to the province of requiring the Hutterites to be photographed are, at best, marginal. This means that the serious harm caused by the infringing measure weighs far more heavily on the s. 1 scales than the benefits the province gains from its imposition on the Hutterites. The province has therefore not discharged its onus of justifying the imposition of a mandatory photo requirement on the members of the Wilson Colony. [114-116]

Per LeBel J. (dissenting): Abella J.'s comments on the nature of the guarantee of freedom of religion under s. 2(*a*) of the *Charter* and her opinion that the impugned regulation, which limits freedom of religion, has not been properly justified under s. 1 of the *Charter* are both agreed with. The regulatory measures in issue have an impact not only on the Hutterites' belief system, but also on the life of the community. The majority's reasons understate the nature and importance of this aspect of the guarantee of freedom of religion. [178] [182]

Under s. 1, courts have only rarely questioned the purpose of a law or regulation or found that it does not meet the rational connection requirement of the proportionality analysis, but this does not mean that courts will never or should never intervene at these earlier stages. It is generally at the minimal impairment and the balancing of effects stages that the means are questioned and their relationship to the law's purpose is challenged and reviewed. It is also where the purpose itself must be reassessed with regard to the means chosen by Parliament or the legislature. The proportionality analysis thus depends on a close connection between the final two stages of the *Oakes* test. The court's goal is essentially the same at both stages: to strike a proper balance between state action on the one hand, and the preservation of *Charter* rights and the protection of rights or interests that may not be guaranteed by the Constitution but that may nevertheless be of high social value or importance on the other. The proportionality analysis reflects the need to leave some flexibility to government in respect of the choice of means. But the review of those means must also leave the courts with a degree of flexibility in the assessment of the range of alternatives that could realize the goal, and also in determining how far the goal ought to be attained in order to achieve the proper balance between the objective of the state and the rights at stake. The stated objective is not an absolute and should not be treated as a given and alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective. An alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity. A court must assess the objectives, the impugned means and the alternative means together, as necessary components of a seamless proportionality analysis. [188] [190-191] [195-196] [199]

In this case, the Government of Alberta has failed to demonstrate that the regulation is

a proportionate response to the identified societal problem of identity theft. The driver's licence that it denies is not a privilege as it is not granted at the discretion of governments. Such a licence 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 transportation services to operate their farms and to preserve their way of life. Absolute safety is probably impossible in a democratic society. A limited restriction on the Province's objective of minimizing identity theft would not unduly compromise this aspect of the security of Alberta residents and might lie within the range of reasonable and constitutional alternatives. [200-201]

Per Fish J. (dissenting): For the reasons given by LeBel J., the disposition of the appeal as suggested by Abella J. and LeBel J. is agreed with. [203]

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By McLachlin C.J.

Applied: *R. v. Oakes*, [1986] 1 S.C.R. 103; **referred to:** *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Irwin Toy Ltd. v.*

Quebec (Attorney General), [1989] 1 S.C.R. 927; *R. v. Therens*, [1985] 1 S.C.R. 613; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; Eur. Court H. R., *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641; *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

By Abella J. (dissenting)

R. v. Oakes, [1986] 1 S.C.R. 103; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; Eur. Court H. R., *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A; *Şahin v. Turkey* [GC], No. 44774/98, ECHR 2005-XI; *Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, ECHR 2001-XII; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Bothwell v. Ontario (Minister of Transportation)* (2005),

24 Admin. L.R. (4th) 288; *Hofer v. Hofer*, [1970] S.C.R. 958; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

By LeBel J. (dissenting)

R. v. Oakes, [1986] 1 S.C.R. 103; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

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APPEAL from a judgment of the Alberta Court of Appeal (Conrad, O'Brien and Slatter JJ.A.), 2007 ABCA 160, 417 A.R. 68, 410 W.A.C. 68, 283 D.L.R. (4th) 136, [2007] 9 W.W.R. 459, 156 C.R.R. (2d) 234, 77 Alta. L.R. (4th) 281, 49 M.V.R. (5th) 45, [2007] A.J. No. 518 (QL), 2007 CarswellAlta 622, affirming a decision of LoVecchio J., 2006 ABQB 338, 398 A.R. 5, 269 D.L.R. (4th) 757, [2006] 8 W.W.R. 190, 141 C.R.R. (2d) 227, 57 Alta. L.R. (4th) 300, 33 M.V.R. (5th) 16, [2006] A.J. No. 523 (QL), 2006 CarswellAlta 576. Appeal allowed, LeBel, Fish and Abella JJ. dissenting.

Roderick S. Wiltshire and *Randy Steele*, for the appellant.

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Donald J. Rennie and *Sharlene Telles-Langdon*, for the intervener the Attorney General of Canada.

Robert E. Charney and *Michael T. Doi*, for the intervener the Attorney General of Ontario.

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Leah Greathead and *Tyna Mason*, for the intervener the Attorney General of British Columbia.

Mahmud Jamal, *Colin Feasby* and *David Grossman*, for the intervener the Canadian Civil Liberties Association.

Kikee Malik and *Brian Smith*, for the intervener the Ontario Human Rights Commission.

Charles M. Gibson, *Albertos Polizogopoulos*, *Don Hutchinson* and *Faye Sonier*, for the interveners the Evangelical Fellowship of Canada and the Christian Legal Fellowship.

The judgment of McLachlin C.J. and Binnie, Deschamps and Rothstein JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The Province of Alberta requires all persons who drive motor vehicles on highways to hold a driver's licence. Since 1974 each licence has borne a photograph of the licence holder, subject to exemptions for people who objected to having their photos taken on religious grounds. In 2003 the Province made the photo requirement universal in order to reduce the risk of driver's licences being used for identity theft, a growing problem in Alberta and the country. All licence holders are now required to have their photos taken for purposes of placement in the Province's facial recognition data bank.

[2] The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. They object on religious grounds to having their photographs taken. After the religious exemption to the photo requirement was revoked in 2003, Colony members began these proceedings against the Alberta government, alleging a breach of their religious freedom. The Province has offered to lessen the impact of the universal photo requirement by issuing special licences without photos, relieving Colony members of the need to carry their photos. However, it insists that their photos be taken for purposes of placement in the central data bank. The members of the Wilson Colony have rejected this proposal.

[3] The case has proceeded on the basis that the universal photo requirement constitutes a limit on the freedom of religion of Colony members who wish to obtain a driver's licence and thus infringes s. 2(*a*) of the *Canadian Charter of Rights and Freedoms.* The issue on this appeal is whether this limit is a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter.* If not, the regulation is inconsistent with the *Charter* and is null and void pursuant to s. 52 of the *Constitution Act, 1982*.

[4] I conclude that the evidence led by the Province establishes that the universal photo requirement is justified under s. 1 of the *Charter* on the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. The goal of setting up a system that minimizes the risk of identity theft associated with driver's licences is a pressing and important public goal. The universal photo requirement is connected to this goal and does not limit freedom of religion more than required to achieve it. Finally, the negative impact on the freedom of religion of Colony members who wish to obtain licences does not outweigh the benefits associated with the universal photo requirement. Accordingly, I would allow the appeal and uphold the regulation as constitutional.

II. Facts

[5] Alberta began issuing driver's licences with photos in 1974. Until 2003, however, religious objectors were granted a non-photo licence called a Condition Code G licence, at the Registrar's discretion.

[6] Driver's licences in Alberta are governed by the *Traffic Safety Act*, R.S.A. 2000, c. T-6, and regulations made under it. The power of the Registrar to grant exceptions to the photo requirement which existed previously in s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, was eliminated in May 2003 (*Operator Licensing and Vehicle Control Amendment Regulation*, Alta. Reg. 137/2003, s. 3). The new s. 14(1)(b) now requires that the Registrar "must require an image of the applicant's face, for incorporation in the licence, be taken". The amendment also added s. 14(3) which provides for use of the photo thus

taken for "facial recognition software for the purpose of the identification of, or the verification of the identity of, a person who has applied for an operator's licence".

[7] Members of the Wilson Colony, like many other Hutterites, believe that the Second Commandment prohibits them from having their photograph willingly taken. This belief is sincerely held.

[8] Although the Colony attempts to be self-sufficient, some members need driver's licences so that they can travel outside the Colony to do business and attend to the needs of members. Under the 2003 regulation, members currently holding Condition Code G licences are required to have their photograph taken upon renewal of their licences, resulting in a violation of their religious beliefs. The Colony claimants led evidence asserting that if members could not obtain driver's licences, the viability of their communal lifestyle would be threatened. Mr. Samuel Wurz, the Colony's Secretary-Treasurer, deposed that each Colony member has a specific set of responsibilities assigned to him or her, some of which require the member to drive. If a Colony member cannot carry out these responsibilities, it "causes our religious commune to function improperly, thereby eroding the fabric of our social, cultural and religious way of life". In his view, the Province is effectively "attempting to force the Hutterian Brethren to make a choice between two of our religious beliefs", a choice they feel they should not have to make.

[9] The Province, for its part, led evidence that the adoption of the universal photo requirement in 2003 was connected to a new system aimed at minimizing identity theft associated with driver's licences. The evidence showed that identity theft is a serious and growing problem

in Alberta and elsewhere, and that drivers' licences, the most commonly used and accepted form of identification, could be and were being used for identity theft. The new facial recognition data bank was aimed at reducing the risk of this type of fraud.

[10] Under the new system a digital photograph of every licensed driver is placed in a facial recognition data bank. This data bank is connected to facial recognition software which analyses the digital photographs of people who apply for licences. The software performs two kinds of comparison: one-to-one and one-to-many. The one-to-one comparison allows the government to be sure that the person trying to renew or replace a licence is the same person represented by the existing photo in the data bank. The one-to-many comparison allows it to be satisfied that a person applying for a new licence does not already hold another licence in another person's name.

[11] A comprehensive photo requirement, whereby all valid licences are associated with a photo in the data bank, is essential to ensuring the efficacy of these mechanisms. To the extent that licences exist without holder photos in the central photo bank, others can appropriate the identity of the licence holder without detection by the facial recognition software. The Province also led evidence that this system was adopted with a view to harmonization with international and interprovincial standards for photo identification.

[12] The Province has proposed measures to accommodate the Hutterian claimants' objection to the universal driver's licence photo requirement. The first is that the licence display a photo, but that the licence be carried in a sealed envelope or folder marked with the indication that it is the property of the Province, and that a digital photo be placed in the Province's facial recognition bank.

The second is simply that a digital photo be placed in the bank, with no photo accompanying the driver's licence. The aim of these proposals is to minimize the impact of the universal photo requirement on religious beliefs by removing the need for Colony members to have any direct contact with the photos.

[13] The Colony claimants reject both alternatives on the ground that they require a member to have a photo taken. It proposes that no photo be taken, and that non-photo driver's licences be issued to them, marked "Not to be used for identification purposes".

III. History of Proceedings

A. *Alberta Court of Queen's Bench (LoVecchio J.)*, 2006 ABQB 338, 57 Alta. L.R. (4th) 300

[14] The chambers judge proceeded on the basis that the universal photo requirement limited Colony members' right to freedom of religion under s. 2(*a*) of the *Charter*. He went on to find that this limit was not shown to be justified under s. 1 of the *Charter*.

[15] The chambers judge defined the government's objective as being "to prevent identity theft or fraud and the various forms of mischief which identity theft may facilitate, and . . . the harmonization of international and interprovincial standards for photo identification" (para. 10), associated with the issuance of motor vehicle driver's licences. He concluded that the objective of preventing identity theft associated with driver's licences, while limited, was "pressing and substantial" (para. 14).

[16] The chambers judge found that "the implementation of mandatory photographic licences, together with facial recognition software, is rationally connected to the objective of safeguarding the system of issuing operator's licences from fraud and for that mat[t]er the larger objective of limiting identity theft" (para. 16). He went on to find, however, that the requirement of minimal impairment was not met, in that the government had not accommodated the "distinctive character of the burdened group . . . to the point of undue hardship" (para. 18), citing *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256. The accommodations offered by the Province would still require members to have their photos taken and offend the right. On the other hand, the Colony claimants' proposal that the driver's licence be marked "Not to be used for identification purposes" would satisfy the Colony members' concerns and also meet the government's objectives, since an individual seeking to impersonate the holder would be "significantly limited in the extent to which he or she could use the licence" (para. 28).

[17] Although it was unnecessary, in view of his finding on minimal impairment, the chambers judge went on to consider proportionality of effects. He observed that while the requirement of photos combined with facial recognition software "may safeguard the system of issuing licences against fraud, and thereby constitute a useful tool against identity theft in general", this did not "safeguard the identity of the thousands of other individuals to whom operators' licences are never issued because they do not qualify to drive" (para. 31). He concluded: "In this regard, the effects of the measure appear somewhat limited when weighed against the acknowledged incursion upon the religious beliefs of the members of the applicant Colony" (para. 32).

[18] The chambers judge concluded that the regulation is inconsistent with the *Charter* "to the extent that it renders a digital photograph mandatory for individuals who claim a valid religious objection" (para. 39). Accordingly, he held that the amendment removing the regulation's discretionary religions exemption was of no force and effect.

B. *Alberta Court of Appeal*, 2007 ABCA 160, 77 Alta. L.R. (4th) 281

[19] The majority, *per* Conrad J.A. (O'Brien J.A. concurring), dismissed the appeal.

[20] Conrad J.A. characterized the purpose of the photo requirement narrowly as preventing licence duplication in order to permit the ready identification of licensed drivers at the roadside and minimize the number of disqualified people operating motor vehicles. Reasoning that the regulation, enacted under the *Traffic Safety Act*, was confined to enhancing traffic safety, she held that the goals of preventing identity theft, fraud and threats to public safety, could not be considered under s. 1. If the Province wished to assert these goals, in her view it should have enacted a law going specifically to these risks. She also noted the absence of legislative debate on the issue, suggesting that this rendered the regulation suspect.

[21] Conrad J.A. expressed doubt about whether the photo requirement was rationally connected to the objective of identification associated with traffic safety. Since over 700,000 unlicensed Albertans are not in the facial recognition data bank, granting a few hundred Hutterites an exemption from the photo requirement would not have a significant impact on the number of identities available for unlawful appropriation.

[22] However, Conrad J.A. went on to dispose of the case on the ground that the universal photo requirement did not minimally impair the right, because it did not reasonably accommodate Colony members' s. 2(*a*) religious freedom. She noted that the claimants had enjoyed an exemption from the requirement for close to 30 years, with no evidence of resultant harm. The result, according to Conrad J.A., was that "the impugned regulation offers only a very slight protection against the risk that a licence will be issued to an individual in a name other than his or her own, while completely infringing the respondents' rights" (para. 46). Conrad J.A. added that the effects of the regulation were disproportionate, in that "the mandatory photo requirement forces the Hutterian Brethren to either breach a sincerely held religious belief against being photographed or to cease driving", which would also have severe practical consequences for individuals in the community (para. 54).

[23] Slatter J.A., dissenting, defined one of the goals of the universal photo requirement as maximizing the reliability and integrity of driver's licences as a widely used and respected method of personal identification. He found that the limit on freedom of religion imposed by the photo requirement, while it might not eliminate all identity theft, was rationally connected to the objective of "[m]aking forgery or unauthorized driving more difficult" (para. 99).

[24] On minimal impairment, Slatter J.A. proceeded on the basis that the government must show that it has accommodated the right to the point of undue hardship. The accommodations offered by the Province, while they would still limit the Colony members' religion freedom, would go some way to fulfilling the requirements of the Second Commandment, since members would not

have to look at their photos. He held that the accommodation proposed by the Colony claimants — driver's licences marked "Not to be used for identification purposes" — was no accommodation at all, but simply "an assertion that nothing which infringes the second commandment can ever be justified" (para. 121). In addition, it would prevent police officers from using non-photo licences for the basic function of driver identification. Slatter J.A. found that the Colony claimants' proposal would reduce the efficacy of the system with respect to identity theft. After alluding to harmonization with other systems, Slatter J.A. concluded that "[t]o require the [Province] to accommodate any further would require it to significantly compromise a central feature of the security of the licencing system, and would amount to undue hardship" (para. 124).

[25] Slatter J.A. concluded that the salutary effects of having the photos of all licence holders in the data bank — regulating traffic safety and ensuring the integrity and reliability of the driver's licence system to the benefit of Albertans — outweighed the deleterious effects on Colony members' freedom of religion. He observed that the Colony members object only to having their photos taken *voluntarily*, and suggested that the element of state compulsion implied by the photo requirement would "considerably diminish any disobedience to their religious tenets" (para. 126). For those reasons, he took the view that "[i]n a free and democratic society minor infringements of this kind on religious doctrine can be tolerated" (para. 126).

[26] Slatter J.A. accordingly concluded that the appeal should be allowed.

IV. Issues

[27] A. Freedom of religion

1. The nature of the limit on the s. 2(*a*) right;

2. Is the limit on the s. 2(*a*) right justified under s. 1 of the *Charter*?

(a) Is the limit prescribed by law?

(b) Is the purpose for which the limit is imposed pressing and substantial?

(c) Is the means by which the goal is furthered proportionate?

(i) Is the limit rationally connected to the purpose?

(ii) Does the limit minimally impair the right?

(iii) Is the law proportionate in its effect?

(d) Conclusion on justification

B. The claim under s. 15

V. Analysis

A. *Freedom of Religion*

(1) The Nature of the Limit on the Section 2(*a*) Right

[28] Section 2(*a*) of the *Charter* states that "[e]veryone has . . . freedom of conscience and religion".

[29] The members of the Colony believe that permitting their photo to be taken violates the Second Commandment: "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4). They believe that photographs are "likenesses" within the meaning of the Second Commandment, and want nothing to do with their creation or use. The impact of having a photo taken might involve censure, such as being required to stand during religious services.

[30] Given these beliefs, the effect of the universal photo requirement is to place Colony members who wish to obtain driver's licences either in the position of violating their religious commitments, or of foregoing driver's licences. Without the ability of some members of the Colony to obtain driver's licences, Colony members argue that they will not be able to drive to local centres to do business and obtain the goods and services necessary to the Colony. The regulation, they argue, forces members to choose between obeying the Second Commandment and adhering to their rural communal lifestyle, thereby limiting their religious freedom and violating s. 2(*a*) of the *Charter*.

[31] My colleague Abella J. notes at para. 130 that "freedom of religion has 'both individual and collective aspects'". She asserts that "[b]oth . . . 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.

[32] 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.]

[33] The Province concedes the first element of this s. 2(*a*) test, sincere belief in a belief or practice that has a nexus with religion. The chambers judge described the concession in the following terms:

> The Attorney General does not dispute that the Applicants hold sincere religious beliefs that conflict with the requirement that those who obtain or renew an Alberta operator's licence must permit a digital photograph to be taken and that those beliefs are honestly held. [para. 6]

[34] The record does not disclose a concession on the second element of the test — whether the universal photo requirement interferes with Colony members' religious freedom in a manner that is more than trivial or insubstantial. In order for such a determination to be made, it would need to be shown that the claimants' "religious beliefs or conduct might reasonably or actually be threatened" by the universal photo requirement: see *Edwards Books*, at p. 759. Evidence of a state-imposed cost or burden would not suffice; there would need to be evidence that such a burden was "capable of interfering with religious belief or practice": *Edwards Books*, at p. 759. In the present case, however, the courts below seem to have proceeded on the assumption that this requirement was met. Given this assumption, I will proceed to consider whether the limit is a reasonable one, demonstrably justified in a free and democratic society.

(2) Is the Limit on the Section 2(*a*) Right Justified Under Section 1 of the *Charter*?

[35] This Court has recognized that a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter*. Often, a particular problem or area of activity can reasonably be remedied or regulated in a variety of ways. The schemes are typically complex, and reflect a multitude of overlapping and conflicting interests and legislative concerns. They may involve the expenditure of government funds, or complex goals like reducing antisocial behaviour. The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights.

[36] Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community.

[37] If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening

the liberty of the accused. Courts recognize that the issue of identity theft is a social problem that has grown exponentially in terms of cost to the community since photo licences were introduced in Alberta in 1974, as reflected in the government's attempt to tighten the scheme when it discontinued the religious exemption in 2003. The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate: *Edwards Books*, at pp. 781-82, *per* Dickson C.J., and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 43, *per* McLachlin C.J.

[38] With this in mind, I turn to the question of whether the limit on freedom of religion raised in this case has been shown to be justified under s. 1 of the *Charter*.

(a) *Is the Limit Prescribed by Law?*

[39] Section 1 requires that before a proportionality analysis is undertaken, the court must satisfy itself that the measure is "prescribed by law". If a limit on a *Charter* right is not "prescribed by law" it cannot be justified under s. 1. Rather, it is a government act, attracting a remedy under s. 24 of the *Charter*. Regulations are measures "prescribed by law" under s. 1 of the *Charter*: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 981; *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 645.

[40] The majority of the Court of Appeal expressed concern that the challenged measure was adopted by regulation and therefore without any legislative debate, pursuant to an Act with very different objectives. The respondents take this position much further and advance a general

proposition that *Charter*-infringing measures may only be adopted by primary legislation. Concern about overextension of regulatory authority is understandable. Governments should not be free to use a broad delegated authority to transform a limited-purpose licensing scheme into a *de facto* universal identification system beyond the reach of legislative oversight. However, that is not what has happened here. A photo requirement has been an accepted part of the motor vehicle licensing scheme for decades. It is not a stand-alone identification divorced from the public-safety purpose of the authorizing legislation. Moreover, hostility to the regulation-making process is out of step with this Court's jurisprudence and with the realities of the modern regulatory state: see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 71; D.J. Mullan, *Administrative Law: Cases, Text and Materials* (5th ed. 2003), at p. 948. Regulations, passed by Order in Council and applied in accordance with the principles of administrative law and subject to challenge for constitutionality, are the life blood of the administrative state and do not imperil the rule of law. Whether the impugned measure was passed into law by statute or regulation is usually of no consequence for the s. 1 analysis.

(b) *Is the Purpose for Which the Limit Is Imposed Pressing and Substantial?*

[41] The chambers judge defined the government's objective in imposing a universal photo requirement as being "to prevent identity theft or fraud and the various forms of mischief which identity theft may facilitate, and . . . the harmonization of international and interprovincial standards for photo identification" (para. 10). This objective is part of the larger goal of ensuring the integrity of the system for licensing drivers. As Slatter J.A. explained:

> Driver's licences are an important part of the overall regulation of traffic safety. They have become a near universal form of identification. The integrity and reliability of the driver's licence system benefits all Albertans who require, on a routine basis, proof of their identity. The presence of photographs is an important part of the integrity of the system. There unfortunately are significantly large groups of people who seek to exploit the identities of others for financial or other purposes. The overall cost of the activities of this group are very large, and the [Province] (and all Albertans) have an obligation to do whatever they can to minimize the opportunities for identity theft. Photographs on driver's licences will not eliminate all misuse, and the value of the savings that will result are hard to measure. They are likely however to be significant. [para. 127]

[42] 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 limits on rights. The purpose of a universal photo requirement is to have a complete digital data bank of facial photos to prevent wrongdoers from using driver's licences as breeder documents for purposes of identity theft. As discussed above (para. 10), the requirement permits the system to ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence.

[43] The chambers judge found that the universal photo requirement was also aimed at harmonization of international and interprovincial standards for photo identification. The evidence supports the Province's contention that other provinces and nations are moving toward harmonization, and that a feature of this harmonization is likely to be a universal photo requirement for all licence holders. While the fact that other provinces have not yet moved to this requirement arguably undercuts the position that a universal photo requirement is necessary in Alberta now, governments are entitled to act in the present with a view to future developments. Accordingly, harmonization may be considered as a factor relevant to the Province's goal of ensuring the integrity of the licensing system by reducing identity theft associated with the system.

[44] The majority of the Court of Appeal suggested that the goal of the universal photo requirement should be confined to purposes related to traffic safety, since that was the subject of the authorizing Act. However, government regulations may deal both with the primary goal of an enabling law and with collateral concerns resulting from measures adopted to achieve this goal. As Slatter J.A. put it, "[i]t is the height of formality to suggest that the prevention of the misuse of a driver's licence is not one of the purposes of the *Traffic Safety Act*. Provisions that attempt to prevent the misuse or abuse of an enactment are well within the objectives of the enactment" (para. 90).

[45] In this case, the government's primary goal is traffic safety, as denoted by the title of the Act. To further this goal, the Act puts in place a system of licensing drivers. A collateral effect of the licensing system is that the driver's licences issued under this system have become generalized identification documents, with the attendant risk that they might be misused for identity theft and the various mischiefs that flow from identity theft. The Province was entitled to pass regulations dealing not only with the primary matter of highway safety, but with collateral problems associated with the licensing system. It was therefore entitled to adopt a regulation requiring photos of all drivers to be held in a digital photo bank, thereby minimizing the risk of identity theft to the extent possible.

[46] Finally, as explained above, the fact that the specific objectives of the impugned regulation were not debated or ratified by the legislature does not render them invalid for the purposes of s. 1. If a regulation is validly enacted pursuant to delegated legislative authority, its

objective can properly be evaluated under the test established in *Oakes*.

[47] I conclude that the Province has established that the goal of ensuring the integrity of the driver's licensing system so as to minimize identity theft associated with that system is pressing and substantial. Having established that the limit on the right is a measure "prescribed by law" and that the asserted purpose of the limit is pressing and substantial, the remaining issue is whether the limit is proportionate, in the sense that it is rationally connected to the goal, limits the right as little as reasonably necessary, and is proportionate in its effects.

(c) *Is the Means by Which the Goal Is Furthered Proportionate?*

(i) Is the Limit Rationally Connected to the Purpose?

[48] At this stage, the Province must show that the universal photo requirement is rationally connected to the goal of preserving the integrity of the driver's licensing system by minimizing the risk of identity theft through the illicit use of driver's licences. To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. 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.

[49] The government argues that a universal system of photo identification for drivers will

be more effective in preventing identity theft than a system that grants exemptions to people who object to photos being taken on religious grounds. The affidavit evidence filed by the government supports this view.

[50] Alberta's evidence demonstrates the ways in which the existence of an exemption from the photo requirement would increase the vulnerability of the licensing system and the risk of identity-related fraud. As Mr. Joseph Mark Pendleton, Director of the Special Investigations Unit of the Alberta Ministry of Government Services, put it in his affidavit supporting Alberta's position, "[o]pportunities for fraud are as numerous as criminals are clever and resourceful". The existence of non-photo licences in the system raises the possibility that a person could hold multiple licences in different names, as long as no more than one of them was a regular photographic licence. As stated by Alberta, "each licensee whose photo is not entered in our database creates an opportunity for impersonation by wrongdoers, because that person's licence can be renewed or replaced by a wrongdoer without being detected by [facial recognition]". A non-photo licence can be obtained and used to obtain credit or enter into other commercial relationships to the detriment of the other parties to the transactions. Without the photographs of all licence holders in the photo identification bank, the assurance of a one-to-one correspondence between individuals and issued licences is lost, and the possibility of driver's licence-based fraud would be increased.

[51] The majority of the Alberta Court of Appeal, while deciding the case on the basis of minimum impairment, expressed doubt on whether the universal photo requirement for all holders of driver's licences is rationally connected to the goal of preserving the integrity and security of the driver's licensing system. Conrad J.A. pointed out that many Albertans do not hold driver's licences

and concluded that the risk flowing from exempting a few hundred Hutterites from the requirement was "minimal". These concerns confuse rational connection with proportionality of negative and positive effects of the measure. The issue at the stage of rational connection is simply whether there is a rational link between the infringing measure and the government goal. The balance between positive and negative effects of the measure falls to be considered at the final stage of the s. 1 analysis.

[52] I conclude that the Province has established that the universal photo requirement is rationally related to its goal of protecting the integrity of the driver's licensing system and preventing it from being used for purposes of identity theft.

(ii) Does the Limit Minimally Impair the Right?

[53] The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. 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.

[54] In *RJR-MacDonald*, the minimal impairment analysis was explained as follows, at para. 160:

> As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . . . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Emphasis added; citations omitted.]

In this manner, the legislative goal, which has been found to be pressing and substantial, grounds the minimum impairment analysis. As Aharon Barak, former President of the Supreme Court of Israel, puts it, "the rational connection test and the least harmful measure [minimum impairment] test are essentially determined against the background of the proper objective, and are derived from the need to realize it": "Proportional Effect: The Israeli Experience" (2007), 57 *U.T.L.J.* 369, at p. 374. President Barak describes this as the "internal limitation" in the minimum impairment test, which "prevents it [standing alone] from granting proper protection to human rights" (p. 373). The internal limitation arises from the fact that the minimum impairment test requires only that the government choose the least drastic means *of achieving its objective*. Less drastic means which do not actually achieve the government's objective are not considered at this stage.

[55] I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*,

quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. As I will explain, in my view the record in this case discloses no such alternative.

[56] The purpose of the limit in this case, I earlier concluded, is to maintain the integrity of the driver's licensing system by minimizing the risk of driver's licences being used for purposes of identity theft, so as to prevent fraud and various other misuses of the system. The regulation is part of a complex regulatory scheme and is aimed at an emerging and challenging problem. The question, therefore, is whether the means chosen to further its purpose — the universal photo requirement for all licensed drivers — is reasonably tailored to address the problem of identity theft associated with driver's licences.

[57] The Province proposes alternatives which maintain the universal photo requirement, but minimize its impact on Colony members by eliminating or alleviating the need for them to carry photos. This would permit the Province to achieve its goal of a maximally efficient photo recognition system to combat fraud associated with driver's licences, while reducing the impact on the members' s. 2(*a*) rights.

[58] However, the Hutterian claimants reject these proposals. For them, the only acceptable

measure is one that entirely removes the limit on their s. 2(*a*) rights. They object to any photo being taken and held in a photo data bank. For them, the only alternative is a driver's licence issued without a photo, stamped with the words, "Not to be used for identification purposes".

[59] The problem with the claimants' proposal in the context of the minimum impairment inquiry is that it compromises the Province's goal of minimizing the risk of misuse of driver's licences for identity theft. The stamp "Not to be used for identification purposes" might prevent a person who comes into physical possession of such a licence from using it as a breeder document, but it would not prevent a person from assuming the identity of the licence holder and producing a fake document, which could not be checked in the absence of a photo in the data bank. As Slatter J.A. pointed out, without the photo in the bank, the bank is neutralized and the risk that the identity of the holder can be stolen and used for fraudulent purposes is increased. The only way to reduce that risk as much as possible is through a universal photo requirement. The claimants' argument that the reduction in risk would be low, since few people are likely to request exemption from the photo requirement, assumes that some increase in risk and impairment of the government goal may occur, and hence does not assist at the stage of minimal impairment.

[60] The claimants' proposal, instead of asking what is minimally required to realize the legislative goal, asks the government to significantly compromise it. An exemption for an unspecified number of religious objectors would mean that the one-to-one correspondence between issued licences and photos in the data bank would be lost. As shown by the Province, this disparity could well be exploited by wrongdoers. Contrary to the suggestion of LeBel J. (para. 201), the evidence discloses no alternative measures which would substantially satisfy the government's

objective while allowing the claimants to avoid being photographed. In short, the alternative proposed by the claimants would *significantly* compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage.

[61] This is not to suggest the Colony members are acting improperly. 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.

[62] I conclude that the universal photo requirement minimally impairs the s. 2(*a*) right. It falls within a range of reasonable options available to address the goal of preserving the integrity of the driver's licensing system. All other options would significantly increase the risk of identity theft using driver's licences. The measure seeks to realize the legislative goal in a minimally intrusive way.

[63] Much has been made of the fact that over 700,000 Albertans do not hold driver's licences. The argument is that the risk posed by a few hundred potential religious objectors is minuscule as compared to the much larger group of unlicensed persons. This argument is accepted by the dissent. In my view, it rests on an overly broad view of the objective of the driver's licence

photo requirement as being to eliminate all identity theft in the province. Casting the government objective in these broad terms, my colleague Abella J. argues that the risk posed by a few religious dissenters is minimal, when compared to the general risk posed by unlicensed persons. But with respect, that is the wrong comparison. We must take the government's goal as it is. It is not the broad goal of eliminating all identity theft, but the more modest goal of maintaining the integrity of the driver's licensing system so as to minimize identity theft *associated with that system*. The question is whether, within that system, any exemptions, including for religious reasons, pose real risk to the integrity of the licensing system.

[64] The implication of Justice Abella's reasoning is that because the province tolerates the identity theft risk posed by unlicensed Albertans, it must therefore tolerate the risk associated with non-photographed licensees. On this logic, the province would be required to take the more radical approach of requiring photographic identification for every Albertan, which would directly contravene the respondents' religious beliefs, before it could rely upon a security risk argument in the context of the narrower driver's licensing program. In my opinion, the province has a legitimate interest in ensuring the integrity of its driver's licensing system and guarding against the risk that it will be used to perpetrate fraud. In order to accomplish this goal, it should not be forced to undertake broader measures that it might have resisted for other policy reasons.

[65] The courts below approached minimum impairment in a different fashion. First, they conducted the balancing inquiry at the stage of minimal impairment. Second, drawing on this Court's decision in *Multani*, the courts below applied a reasonable accommodation analysis instead of the *Oakes* test.

[66] In my view, a distinction must be maintained between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1 justification analysis that applies to a claim that a law infringes the *Charter*. Where the validity of a law is at stake, 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. The balancing of effects takes place at the third and final stage of the proportionality test. If the government establishes justification under the *Oakes* test, the law is constitutional. If not, the law is null and void under s. 52 insofar as it is inconsistent with the *Charter*.

[67] A different analysis applies where a government *action* or administrative *practice* is alleged to violate the claimant's *Charter* rights. If a *Charter* violation is found, the court's remedial jurisdiction lies not under s. 52 of the *Constitution Act, 1982* but under s. 24(1) of the *Charter*: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61. In such cases, the jurisprudence on the duty to accommodate, which applies to governments and private parties alike, may be helpful "to explain the burden resulting from the minimal impairment test with respect to a particular individual" (emphasis added): *Multani*, at para. 53, *per* Charron J.

[68] Minimal impairment and reasonable accommodation are conceptually distinct. 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. In *Multani*, Deschamps and Abella JJ. explained:

> The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs. [para. 131]

[69] 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.

[70] Similarly, "undue hardship", a pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws. In the human rights context, hardship is seen as

undue if it would threaten the viability of the enterprise which is being asked to accommodate the right. The degree of hardship is often capable of expression in monetary terms. By contrast, it is difficult to apply the concept of undue hardship to the cost of achieving or not achieving a legislative objective, especially when the objective is (as here) preventative or precautionary. Though it is possible to interpret "undue hardship" broadly as encompassing the hardship that comes with failing to achieve a pressing government objective, this attenuates the concept. Rather than strain to adapt "undue hardship" to the context of s. 1 of the *Charter*, it is better to speak in terms of minimal impairment and proportionality of effects.

[71] In summary, where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis based on the methodology of *Oakes*. Where the government has passed a measure into law, the provisions of s. 1 apply. The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects.

(iii) Is the Law Proportionate in Its Effect?

[72] The third and final step of the proportionality analysis is to determine proportionality of effects. We have seen that the regulation advances an important objective; that its limitation on the Colony members' religious freedom is rationally connected to that goal; and that the means chosen to achieve the government objective — the universal photo requirement — meet the requirement of minimal impairment.

[73] This leaves a final question: are the overall effects of the law on the claimants disproportionate to the government's objective? When one balances the harm done to the claimants' religious freedom against the benefits associated with the universal photo requirement for driver's licences, is the limit on the right proportionate in effect to the public benefit conferred by the limit?

[74] In *Oakes*, Dickson C.J. explained the function of this third and final step of the proportionality analysis:

> Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of 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. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The 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. [pp. 139-40]

[75] Despite the importance Dickson C.J. accorded to this stage of the justification analysis, it has not often been used. Indeed, Peter W. Hogg argues that the fourth branch of *Oakes* is actually redundant: *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.12. He finds confirmation of this view in the fact that he is unable to locate any case in which this stage of the analysis has been decisive to the outcome. In his opinion, this is because it essentially duplicates the analysis undertaken at the first stage, pressing and substantial objective. If a law has an objective deemed sufficiently important to override a *Charter* right and has been found to do so in a way

which is rationally connected to the objective and minimally impairing of the right, Hogg asks rhetorically, how can the law's effects nonetheless be disproportionate to its objective? In his view, a finding that a law's objective is "pressing and substantial" at the first stage of *Oakes* will *always* produce a conclusion that its effects are proportionate. The real balancing must be done under the heading of minimal impairment and, to a much more limited extent, rational connection.

[76] It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis — pressing goal, rational connection, and minimum impairment — could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups". As President Barak explains:

> Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right. . . . It requires placing colliding values and interests side by side and balancing them according to their weight. [p. 374]

In my view, the distinction drawn by Barak is a salutary one, though it has not always been strictly followed by Canadian courts. Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them. 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. Rather than reading down the

government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.

[77] The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation. In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, Bastarache J. explained:

> The third stage of the proportionality analysis performs a fundamentally distinct role. . . . The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [Emphasis in original; para. 125.]

[78] In my view, this is a case where the decisive analysis falls to be done at the final stage of *Oakes*. The first two elements of the proportionality test — rational connection and minimum impairment — are satisfied, and the matter stands to be resolved on whether the "deleterious effects of a measure on individuals or groups" outweigh the public benefit that may be gained from the measure. In cases such as this, where the demand is that the right be fully respected without compromise, the justification of the law imposing the limit will often turn on whether the deleterious effects are out of proportion to the public good achieved by the infringing measure.

1. *Salutary Effects*

[79] The first inquiry is into the benefits, or "salutary effects" associated with the legislative goal. Three salutary effects of the universal photo requirement were raised on the evidence: (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.

[80] The most important of these benefits and the one upon which Alberta principally relies is the enhancement of the security or integrity of the driver's licensing scheme. The photo requirement ensures both a "one-to-one" and "one-to-many" correspondence among licence holders. This makes it possible, through the use of computer software, to ensure that no person holds more than one licence. It is clear on the evidence that the universal photo requirement enhances the security of the licensing system and thus of Albertans. Mandatory photos represent a significant gain to the integrity and usefulness of the computer comparison system. In short, requiring that *all* licence holders are represented by a digital photo in the data bank will accomplish these security-related objectives more effectively than would an exemption for an as yet undetermined number of religious objectors. Any exemptions would undermine the certainty with which the government is able to say that a given licence corresponds to an identified individual and that no individual holds more than one licence. This evidence stands effectively uncontradicted.

[81] Though it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, it is clear that the internal integrity of the system would be compromised. In this respect, the present case may be contrasted with previous religious freedom cases where this Court has found that the potential risk was too speculative.

[82] In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, a risk was held to be overly speculative because there was insufficient evidence that potentially discriminatory beliefs were actually resulting in discriminatory conduct. In the present case, by contrast, it is clear that the photo exemption would have a tangible impact on the integrity of the licensing system because it would undermine one-to-one and one-to-many photo comparisons to verify identity.

[83] Similarly, in *Amselem*, the "security concern" posed by the construction of personal succahs was purely speculative because there was no evidence that emergency exits were actually being blocked. The appellants had offered to set up their succahs "in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way" (para. 89). The Court noted that "security concerns, if soundly established, would require appropriate recognition in ascertaining any limit on the exercise of the appellants' religious freedom" (para. 88). Here, by contrast, it is established that exempting people from the photo registry creates a real risk to security because it undermines the integrity of the system.

[84] The requirement of a photo on a driver's licence serves the additional purpose of assisting police officers in reliably identifying drivers at the roadside. Alberta concedes that this benefit, given the relatively small number of persons who would seek religious exemptions, would not in itself justify limiting freedom of religion. Yet another salutary benefit may flow from eventual harmonization with other licensing systems. This benefit, however, remains to be realized. While these effects may not be determinative, they support the overall salutary effect of the

universal photo requirement.

[85] In summary, the salutary effects of the universal photo requirement for driver's licences are sufficient, subject to final weighing against the negative impact on the right, to support some restriction of the right. As discussed earlier, a government enacting social legislation is not required to show that the law will in fact produce the forecast benefits. Legislatures can only be asked to impose measures that reason and the evidence suggest will be beneficial. If legislation designed to further the public good were required to await proof positive that the benefits would in fact be realized, few laws would be passed and the public interest would suffer.

2. *Deleterious Effects*

[86] This brings us to the deleterious effects of the limit on Colony members' exercise of their s. 2(*a*) right. At this point, the seriousness of the effects of the limit on Colony members' freedom of religion falls to be addressed. Several points call for discussion.

[87] A preliminary observation is that 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" (*Oakes*, at pp. 139-40).

[88] 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: *Thomson Newspapers*, at para. 125; see also *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391. 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.

[89] 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.

[90] 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. As recognized by the European Court of Human Rights in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A, cited by my colleague Abella J., this pluralistic context also includes "atheists, agnostics, sceptics and the unconcerned" (para. 31). Their interests are equally protected by s. 2(*a*): *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 347. 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, multi-religious 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.

[91] The seriousness of a particular limit must be judged on a case-by-case basis. However, guidance can be found in the jurisprudence. Limits that amount to state compulsion on matters of belief are always very serious. As the U.S. Supreme Court has stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State": *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at p. 851.

[92] Canadian law reflects the fundamental proposition that the state cannot by law directly compel religious belief or practice. Thus, this Court has held that if the purpose of a law is to interfere with religious practices, the law cannot be upheld: see *Big M Drug Mart*, *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (C.A.), and *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.). To compel religious practice by force of law deprives the individual of the fundamental right to choose his or her mode of religious experience, or lack thereof. Such laws will fail at the first stage of *Oakes* and

proportionality will not need to be considered.

[93] Cases of direct compulsion are straightforward. However, it may be more difficult to measure the seriousness of a limit on freedom of religion where the limit arises not from a direct assault on the right to choose, but as the result of incidental and unintended effects of the law. In many such cases, the limit does not preclude choice as to religious belief or practice, but it does make it more costly.

[94] 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.

[95] 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. Many religious practices entail costs which society reasonably expects the adherents to bear. The inability to access conditional benefits or privileges conferred by law may be among such costs. A limit on the right that exacts a cost but nevertheless leaves the adherent with

a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice.

[96] This returns us to the task at hand — assessing the seriousness of the limit on religious practice imposed in this case by the regulation's universal photo requirement for driver's licences. 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.

[97] The Hutterian claimants argue that the limit presents them with an invidious choice: the choice between some of its members violating the Second Commandment on the one hand, or accepting the end of their rural communal life on the other hand. However, 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.

[98] 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.

[99] 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.

3. *Weighing the Salutary and Deleterious Effects*

[100] Having considered the seriousness of the limit in terms of its impact on the claimants' freedom of religion, we must balance these deleterious effects against the salutary effects of the law, in order to determine whether the overall impact of the law is proportionate.

[101] The law has an important social goal — to maintain an effective driver's licence scheme that minimizes the risk of fraud to citizens as a whole. This is not a goal that should lightly be sacrificed. The evidence supports the conclusion that the universal photo requirement addresses a pressing problem and will reduce the risk of identity-related fraud, when compared to a photo requirement that permits exceptions.

[102] Against this important public benefit must be weighed the impact of the limit on the claimants' religious rights. While the limit imposes costs in terms of money and inconvenience as the price of maintaining the religious practice of not submitting to photos, it does not deprive members of their ability to live in accordance with their beliefs. Its deleterious effects, while not trivial, fall at the less serious end of the scale.

[103] Balancing the salutary and deleterious effects of the law, I conclude that the impact of the limit on religious practice associated with the universal photo requirement for obtaining a driver's licence, is proportionate.

(d) *Conclusion on Justification*

[104] I conclude that the limit on the Colony members' freedom of religion imposed by the universal photo requirement for holders of driver's licences has been shown to be justified under s. 1 of the *Charter*. The goal of minimizing the risk of fraud associated with driver's licences is pressing and substantial. The limit is rationally connected to the goal. The limit impairs the right

as little as reasonably possible in order to achieve the goal; the only alternative proposed would significantly compromise the goal of minimizing the risk. Finally, the measure is proportionate in terms of effects: the positive effects associated with the limit are significant, while the impact on the claimants, while not trivial, does not deprive them of the ability to follow their religious convictions.

B. *The Claim Under Section 15*

[105] The s. 15 claim was not considered at any length by the courts below and addressed only summarily by the parties in this Court. In my view, it is weaker than the s. 2(*a*) claim and can easily be dispensed with. To the extent that the s. 15(1) argument has any merit, many of my reasons for dismissing the s. 2(*a*) claim apply to it as well.

[106] Briefly, s. 15(1) is "aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds": *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 16. Religion is a ground enumerated in s. 15. As recently restated by this Court in *Kapp*, at para. 17, the test for discrimination under s. 15(1) is as follows:

(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[107] The respondents claim that "[r]efusing to issue licences to the Wilson Members who otherwise qualify for such licences simply because they refuse to abandon their religious belief in the Second Commandment, but issuing licences to the comparator group simply because they do not share such religious belief, clearly demeans and infringes upon the human dignity of the Wilson Members" (Factum, at para. 39). However, photo licences are not issued to other drivers "simply because they do not share such religious belief", but rather because they meet the statutory requirements for issuance of a licence — which include having a photo taken.

[108] Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(*a*). There is no breach of s. 15(1).

VI. Conclusion

[109] The impugned regulation is a reasonable limit on religious freedom, demonstrably justified in a free and democratic society. I would therefore allow the appeal. The constitutional questions stated in my order of January 16, 2008 should be answered as follows:

1. Does s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, as amended by Alta. Reg. 137/2003, infringe s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*?

   Answer: Yes.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

   Answer: Yes.

3. Does s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, as amended by Alta. Reg. 137/2003, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

   Answer: No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

   Answer: It is not necessary to answer this question.

The following are the reasons delivered by

[110] ABELLA J. (dissenting) — Freedom of religion is a core, constitutionally protected democratic value. To justify its impairment, therefore, the government must demonstrate that the

benefits of the infringement outweigh the harm it imposes. This was enunciated by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103, where he developed the test under s. 1 for justifying limits to constitutional rights:

> Even if an objective is of sufficient importance, . . . it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The 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. [p. 140]

And in *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (2008), Martha C. Nussbaum similarly observed that:

> Some such burdens to religion may have to be borne, if the peace and safety of the state are really at stake, or if there is some other extremely strong state interest. But it seems deeply wrong for the state to put citizens in such a tragic position needlessly, or in matters of less weight. And often matters lying behind laws of general applicability are not so weighty. [p. 117]

[111] It may be, however, that the nature of the particular religious duty brings it into serious conflict with countervailing and compelling social values and imperatives. As Dickson J. stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, religious freedoms are subject to such limitations

> as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others . . . .
>
> . . .
>
> . . . 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 . . . 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. [pp. 337 and 346]

[112] The issue in this case, therefore, is whether in balancing the benefits of the infringing measure against the harm to the right, the infringement is justified. With respect, unlike the Chief Justice, in my view it is not.

[113] The government of Alberta has imposed a mandatory photo requirement for a driver's licence. The stated objective of the measure is to help reduce identity theft through the use of a facial recognition database. The province acknowledges that roadside safety and security are not at issue. Since the introduction of a photo requirement 29 years earlier, there had been, without incident, an exemption for those like the Hutterites whose religion prohibits them from being photographed.

[114] 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.

[115] Unlike the severity of its impact on the Hutterites, the benefits to the province of requiring them to be photographed are, at best, marginal. Over 700,000 Albertans do not have a driver's license and are therefore not in the province's facial recognition database. There is no evidence that in the context of several hundred thousand unphotographed Albertans, the photos of approximately 250 Hutterites will have any discernable impact on the province's ability to reduce identity theft.

[116] This means that the serious harm caused by the infringing measure weighs far more heavily on the s. 1 scales than the benefits the province gains from its imposition on the Hutterites. The province has therefore not discharged its onus of justifying the imposition of a mandatory photo requirement on the members of the Wilson Colony.

Background

[117] In 1974, the Province of Alberta introduced photographs on driver's licences. Until 2003, the Registrar required photos as a general rule, but could issue a non-photo Condition Code G licence if a person had a sincere religious objection or a temporary medical condition which affected their appearance. The Alberta *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, under the *Traffic Safety Act*, R.S.A. 2000, c. T-6, governed these licences and gave the Registrar discretion to determine whether the exemption from a photograph requirement was justified.

[118] The Hutterites of Wilson Colony believe that the Second Commandment, which prohibits idolatry, prohibits them from being photographed. They also believe in communal property and live together in religious colonies. The colonies attempt to be self-sufficient, and members of the community operate motor vehicles in order to fulfill their responsibilities to the community. Specifically, the Wilson Colony members use motor vehicles to obtain medical services each week for the 48 children and 8 diabetics on the Colony, for community firefighting by volunteer firefighters, and in commercial activity to sustain their community.

[119] In May 2003, Alberta amended the regulations to make a photograph mandatory for *all* driver's licences (*Operator Licensing and Vehicle Control Amendment Regulation*, Alta. Reg. 137/2003). At the time, there were 453 Condition Code G licences in Alberta. Of those, 56 percent, or about 250, were held by Hutterites (2007 ABCA 160, 77 Alta. L.R. (4th) 281, *per* Conrad J.A., at para. 5).

[120] The purpose of the mandatory photograph was primarily to reduce identity theft. Section 3(b) of the amended regulations allows the Registrar to use facial recognition software to verify the identity of all licence applicants. The photograph that is taken at the time of issuance of the licence is incorporated into the province's database. Facial recognition software compares this photograph to all the other photographs in the system, to help ensure that no one has more than one licence in his or her name.

[121] As noted earlier, more than 700,000 Albertans do not have a driver's licence and are therefore not in the province's facial recognition database.

[122] The Wilson Colony members objected to being photographed. Alberta then proposed two alternatives: first, that they have their photograph taken and printed on their licences. Each licence would then be placed in a special package which the licensee would never be required to open, preventing the licensee from ever coming into physical contact with the printed photo. The photographs would be stored in digital form in the database. The second proposal was that a photograph would be taken but not actually printed on their licences. Only the digital images would

be stored in the facial recognition database.

[123] The Wilson Colony members rejected these alternatives since they both required them to contravene the religious prohibition against having their photograph taken. Their proposal was that there be a photoless licence with a stamp indicating that the licence could not be used for identification purposes.

[124] The failure to reach an agreement resulted in a constitutional challenge by the members of the Wilson Colony to the mandatory photo requirement. They were successful before the Alberta Court of Queen's Bench (2006 ABQB 338, 57 Alta. L.R. (4th) 300) and the Court of Appeal.

Analysis

[125] Alberta conceded that the photo requirement impairs the Wilson Colony members' freedom of religion. Nor did it dispute that the requirement places a distinctive burden on the Colony members, as the chambers judge noted:

> Nor does the Attorney General dispute that the requirement that people who wish to obtain or renew an operator's licence is a distinctive burden for those who hold those beliefs.
>
> In short, the Attorney General does not take issue with the proposition that the burden imposed upon the Applicants by Section 14(1)(b) of AR 137/2003 is a breach of the *Charter* Rights of the Applicants under both Section 2(a) and Section 15(1) of the *Charter*. Accordingly, there is no need to engage in an assessment of whether Section 14(1)(b) of AR 320/2002, as amended, violates the guaranteed *Charter* rights of the Applicants. [paras. 6-7]

[126] The constitutional guarantee of freedom of conscience and religion is found in s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, which states:

> **2.** Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion;

[127] In both *Big M Drug Mart* and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Dickson C.J. explained the significance of the right, one that rests on the values of autonomy and dignity. In *Edwards Books*, he characterized freedom of religion as "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" (p. 759). In *Big M Drug Mart*, he wrote that

> [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.
>
> . . .
>
> . . . an emphasis on individual conscience and individual judgment . . . lies at the heart of our democratic political tradition. [pp. 336 and 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]

[128] The European Court of Human Rights espoused a similarly liberal conception of freedom of religion in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A:

> . . . freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies . . . freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> . . . freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private" . . . . [para. 31]

[129] In *Şahin v. Turkey* [GC], No. 44774/98, ECHR 2005-XI, the European Court of Human Rights compellingly wrote:

> Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. [para. 108]

(See also Jeremy Webber "The Irreducibly Religious Content of Freedom of Religion", in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (2006), 178, at p. 184; Charles Taylor, *Philosophical Arguments* (1995), at pp. 225 *et seq*.)

[130] Moreover, it is important to recognize that freedom of religion has "both individual and collective aspects" (*Edwards Books*, at p. 781, *per* Dickson C.J.). Wilson J., in her partial dissent in *Edwards Books*, confirmed this dual nature of freedom of religion when she said:

> In his commentary on the *Canadian Charter of Rights and Freedoms* Professor Tarnopolsky . . . points out that the *Charter* protects group rights as well as individual rights. He distinguishes between individual and group rights on the basis that the assertion of an individual right emphasises the proposition that everyone is to be treated the same regardless of his or her membership in a particular identifiable group whereas the assertion of a group right is based on the claim of an individual or group of individuals because of membership in a particular identifiable group: see "The Equality Rights", in *The Canadian Charter of Rights and Freedoms: Commentary* (1982), at p. 437.
>
> . . . it seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the *Charter* expressly precluded by s. 27 which requires the *Charter* to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". [Emphasis in original; pp. 808-9.]

Both the individual and group aspects are engaged in this case.

[131] The group, or "community", aspect of religious freedom was discussed by 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]

[132] This does not mean that the right to freedom of religion cannot yield to a state objective whose benefits outweigh the harm to the right. The assertion of a sincere religious belief or duty does not end the inquiry. As the European Court of Human Rights said in *Şahin*:

> [Freedom of religion] does not protect every act motivated or inspired by a religion or belief . . . .
>
> In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected . . . .
>
> . . .
>
> . . . Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society . . . . [paras. 105, 106 and 108]

The nature of the religious right asserted will also be of relevance in balancing benefits and harms.

Section 1

[133] 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.

[134] It is against the scope of the particular constitutional right that the government has the onus of demonstrating that a limit is justified under s. 1 in accordance with the *Oakes* test. The purpose of the *Oakes* analysis is to balance the benefits of the objective with the harmful effects of the infringement. The stages of the *Oakes* test are not watertight compartments: the principle of proportionality guides the analysis at each step. This ensures that at every stage, the importance of the objective and the harm to the right are weighed.

[135] Dickson C.J. stressed in *Oakes* that the evidence necessary to prove the constituent elements of the s. 1 inquiry "should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit" (p. 138).

[136] Where, as here, the benefit to the state of the infringing measure is of limited value and the infringement is a deeply harmful one, the overall requirement of proportionality is not met.

Pressing and Substantial Objective

[137] At the first stage of the analysis, the government must demonstrate that it has a "pressing and substantial" objective that justifies the infringement of the right. In *RJR- MacDonald Inc. v.*

Canada (Attorney General), [1995] 3 S.C.R. 199, McLachlin J. cautioned that "[c]are must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure . . . . If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised" (para. 144 (emphasis in original)).

[138] Alberta acknowledged that it is not attempting to justify the photo requirement on the basis that it allows for quick and efficient driver identification at the side of the road. The exemption to the photograph requirement was in place for 29 years without any demonstrably negative effects on roadside enforcement.

[139] Instead, Alberta stated that the purpose of the mandatory photo requirement was to ensure that every individual who has applied for a licence is represented in the Province's facial recognition database. This database helps prevent an individual from applying for a licence in another person's name. Driver's licences are a widely accepted form of identification. False licences can be used to gain other fraudulent documentation. The objective, therefore, is to protect the integrity of the licensing system and its consequential benefit is the minimization of the risk of identity theft.

[140] I agree with the majority that this objective is an important one.

Rational Connection

[141] At the "rational connection" step in the proportionality analysis, the seemingly easiest

hurdle in the *Oakes* analysis, the Government must demonstrate that the infringing measure is rationally connected to the legislative goal. The connection must be established on a balance of probabilities (*RJR-MacDonald*, at para. 153; see also Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (1996), at p. 27).

[142] I agree with the majority that the Government has satisfied the rational connection aspect of the s. 1 analysis. As the chambers judge said (at para. 11): "The requirement of a photograph, coupled with facial recognition software, facilitates the government's objective of ensuring that no individual will hold multiple licences under different names." The regulations help prevent an applicant from fraudulently obtaining a licence in the name of another person whose photograph is already in the database.

Minimal Impairment

[143] Where I start to part company with the majority, with respect, is at the minimal impairment stage of the analysis. This aspect of the s. 1 analysis has attracted judicial approaches of some elasticity, reflecting an understandable desire both to be respectful of the complexity of developing public policy, while at the same time ensuring that the infringing measure meets its policy objectives no more intrusively than necessary.

[144] As McLachlin J. wrote in *RJR-MacDonald*, at para. 160, if the option chosen by the government "falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to

infringement". However, "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail".

[145] 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" (*RJR-MacDonald*, at para. 160).

[146] In assessing whether Alberta's regulation satisfies the minimal impairment stage, the majority rejects the Colony's alternative proposal of a photoless licence stamped with an indication that it not be used for identification purposes, on the grounds that "[t]he only way to reduce that risk [of misusing driver's licences for identity theft] as much as possible is through a universal photo requirement" and "the alternative proposed by the claimants would *significantly* compromise the government's objective" (paras. 59-60 (emphasis in original)). But as discussed later in these reasons, there is no cogent or persuasive evidence of any such dramatic interference with the government's objective.

[147] 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. And there is no doubt that the wider the use of the photographs, the greater the minimization of the risk. But at the minimal impairment stage, we do not assess whether the infringing measure fulfills the government's objective more perfectly than any other, but whether the means chosen impair the right no more than necessary to achieve the objective.

[148] In *RJR-MacDonald*, McLachlin J. rejected a complete ban on advertising on the grounds that a full prohibition will only be constitutionally acceptable at the minimal impairment stage of the analysis if the government can show that only a full prohibition will enable it to achieve its goal. 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.

[149] The minimal impairment stage should not, however, be seen to routinely end the s. 1 analysis. It is possible, for example, to have a law, which is not minimally impairing but may, on balance, given the importance of the government objective, be proportional. In my view, most of the heavy conceptual lifting and balancing ought to be done at the final step — proportionality. Proportionality is, after all, what s. 1 is about.

Proportionality

[150] It seems to me, with respect, that where the majority's s. 1 analysis fully flounders is in the final stage, where the negative effects of the infringement are balanced against the actual benefits derived from the legislative measure. This is the stage which "provides an opportunity to assess . . . whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*" (*Thomson Newspapers Co. v. Canada (Attorney*

General), [1998] 1 S.C.R. 877, at para. 125). The salutary effects that "actually result" from the implementation of the underlying objective must, therefore, be "proportional" to the harmful effects of the limitation on a constitutionally protected right (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 887-88; see also Jamie Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 *Osgoode Hall L.J.* 1, at p. 66, cited by Bastarache J. in *Thomson Newspapers*, at para. 125).

[151] In *Edwards Books*, Dickson C.J. articulated the proportionality requirement as follows: the "effects [of the infringing measure] must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights" (p. 768). (See also Aharon Barak, "Proportional Effect: The Israeli Experience" (2007), 57 *U.T.L.J.* 369, at p. 375.)

[152] At this proportionality stage, the "comparison is . . . between the loss for the fundamental right, on the one hand, and the gain for the good protected by the law, on the other" (Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007), 57 *U.T.L.J.* 383, at p. 393). It engages the following questions:

- How deeply is the right infringed?

- What is the degree to which the impugned limitation will advance its underlying objective?

[153] Justice Bastarache wrote in *Thomson Newspapers* that the deleterious effects of the measure need to be assessed in light of the "values underlying the *Charter*" (para. 125). This was the approach, in fact, first enunciated by Dickson C.J. in *Oakes*:

> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added; p. 136.]

[154] Turning to the salutary effects in this case, in my view, 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 (Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), 34 *S.C.L.R.* (2d) 501, at pp. 503-4).

[155] The positive impact of the mandatory photo requirement and the use of facial recognition technology is that it is a way to help ensure that individuals will not be able to commit identity theft. But the facial recognition technology is hardly fool-proof. Joseph Mark Pendleton, Director of the Special Investigations Unit of the Alberta Ministry of Government Services, acknowledged in his affidavit on behalf of the Government of Alberta, that "facial recognition software is not so advanced that it can make a definitive determination of whether two photographs are of the same person". The software merely narrows down potentially similar faces to a manageable number. A human investigator must still "eyeball" the pictures to determine if they are the same person.

[156] There is, in fact, no evidence from the government to suggest that the Condition Code G licences in place for 29 years as an exemption to the photo requirement, caused any harm at all to the integrity of the licensing system. As a result, there is no basis for determining why the exemption is no longer feasible, or so dramatically obstructs the government's objective that it cannot be re-instated.

[157] In his affidavit, Mr. Pendleton noted that "[t]o date, we have been successful in making arrangements to accommodate the concerns of others who have religious reservations regarding a driver's licence photograph" (para. 42). The only example he provided of a problem involving a Condition Code G licence, was a "Caucasian man" who sought a Condition Code G licence, based upon his commitment to native spirituality. He was refused because he was not a member of any recognized organization or denomination that shared his beliefs. This singular example does not seem to me to represent "cogent and persuasive" evidence of the necessity of a mandatory photograph. (See also *Bothwell v. Ontario (Minister of Transportation)* (2005), 24 Admin. L.R. (4th) 288 (Ont. Div. Ct.).)

[158] Seven hundred thousand Albertans are without a driver's licence. That means that 700,000 Albertans have no photograph in the system that can be checked by facial recognition technology. While adding approximately 250 licence holders to the database will reduce some opportunity for identity theft, it is hard to see how it will make a significant impact on preventing it when there are already several hundred thousand unlicenced and therefore unphotographed Albertans. Since there are so many others who are not in the database, the benefit of adding the photographs of the few Hutterites who wish to drive, would be marginal.

[159] It is worth noting too that in Alberta, numerous documents are used for identity purposes, including birth certificates, social insurance cards and health cards — not all of which include a photograph. Nor has Alberta thought it necessary to introduce, for example, a universal identity card to prevent identity theft. This suggests that the risk is not sufficiently compelling to justify universality.

[160] The fact that Alberta is seemingly unengaged by the impact on identity theft of over 700,000 Albertans being without a driver's licence, makes it difficult to understand why it feels that the system cannot tolerate 250 or so more exemptions.

[161] The majority mentions two ancillary benefits of the mandatory photo requirement: the eventual harmonization of Alberta's licensing scheme with those of other jurisdictions, and assistance in roadside safety and identification. There is no reason to anticipate that any such harmonized scheme would eliminate, rather than protect, religious exemptions. And as for the benefits to roadside identification and safety, Alberta conceded that this was not the purpose of the photo requirement and that any such benefits were minimal, as evidenced by the fact that this exemption has existed for the last 29 years without incident.

[162] 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.

[163] 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.

[164] The chambers judge found that the mandatory photo requirement threatened the autonomous ability of the respondents to maintain their communal way of life, concluding that "it is essential to [the respondents'] continued existence as a community that some members operate motor vehicles" (para. 2). Conrad J.A. of the Alberta Court of Appeal similarly wrote that the "evidence shows that although the colonies attempt to be self-sufficient, certain members must drive regularly on Alberta highways in order to . . . facilitate the sale of agricultural products, purchase raw materials from suppliers, transport colony members (including children) to medical appointments, and conduct the community's financial affairs" (para. 6).

[165] This self-sufficiency was explained in *Hofer v. Hofer*, [1970] S.C.R. 958, where Ritchie J. wrote that "the Hutterite religious faith and doctrine permeates the whole existence of the members of any Hutterite Colony" (p. 968). Quoting the trial judge, he observed: "To a Hutterian the whole life is the Church. . . . The tangible evidence of this spiritual community is the secondary or material community around them. They are not farming just to be farming — it is the type of livelihood that allows the greatest assurance of independence from the surrounding world" (p. 968). Justice Ritchie further noted that to the colonies, "the activities of the community were evidence of the living church" (p. 969).

[166] Historians too have described the intensely self-sufficient and deeply religious nature of the Hutterian community:

> The Hutterites live an austere, religiously motivated existence. Divorce, birth control, and . . . smoking and drinking are strictly forbidden. The Hutterite faithful do not bear arms, and they abstain from both voting and from holding public office. . . . But if they stand apart from the mainstream of Canadian society, by the same token they make very few demands upon it. Hutterites never become public charges: all colonies take care of their old and infirm, and most will not even accept family allowance cheques from the government. Hutterites apparently commit no serious crimes.
>
> . . .
>
> . . . The Hutterites maintain a private school within each colony, and comply with the minimum standards designated by the province . . . [and pay] income tax, corporate tax, and public school tax . . . .
>
> . . .
>
> By presenting so low a profile to the outside world, the Hutterites reduce the attention they attract. Their isolationism, however, makes them easy targets for local fears and apprehensions. . . .
>
> Their separatism and their peculiarities have made the Hutterites handy scapegoats.
>
> (Morris Davis and Joseph F. Krauter, *The Other Canadians: Profiles of Six Minorities* (1971), at pp. 89, 96, 98 and 99)

[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.

[168] In *Edwards Books*, Dickson C.J. held that indirect but non-trivial burdens on religious

practice are prohibited by the constitutional guarantee of freedom of religion (pp. 758-59). And in *Big M Drug Mart*, as previously noted, he highlighted "the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation" (p. 346). He also noted that

> [c]oercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. [pp. 336-37]

[169] Jeremy Webber argues that the first strand of freedom of religion is freedom from coercion, including

> both freedom from coerced religious observance and freedom from interference with religious observance. This was the original ground on which freedom of religion was won. It remains the heartland of the freedom.
>
> ("Understanding the Religion in Freedom of Religion", in P. Cane, C. Evans and Z. Robinson, eds., *Law and Religion in Theoretical and Historical Context* (2008), 26, at p. 29)

[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.

[171] I also have some discomfort with the majority's approach to assessing the seriousness of a religious infringement. It appears to suggest that there is a difference between the constitutional

scrutiny of a government program that is "compulsory", and one that is "conditional" or a "privilege". This approach, with great respect, is troubling. It is both novel and inconsistent with the principle enunciated in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner" (para. 73).

[172] The question, it seems to me, is whether the government has acted constitutionally. This should not depend on whether it does so through a law, a regulation, or a licence. Moreover, I have difficulty understanding what is meant by a "privilege" in the context of the provision of government services. As long ago as *Roncarelli v. Duplessis*, [1959] S.C.R. 121, this Court recognized the profound significance a licence may have on an individual's life or livelihood and that the government is required to exercise its power in administering the licensing system in a fair and constitutional manner.

[173] The burden under s. 1 is squarely on the government. That is where it should rigorously remain throughout the *Oakes* analysis, without diminution for any reason. The majority's approach — making the right dependent on a formalistic distinction and characterization of the nature of the law — creates, even if inadvertently, a legal hierarchy attracting diminishing levels of scrutiny. This not only imperils and contradicts human rights jurisprudence, it risks presumptively shrinking the plenitude of what is captured by freedom of religion in s. 2(*a*) of the *Charter* by tethering its scope to an artificial stratum of government action. (See McLachlin C.J., "Freedom of Religion and the Rule of Law: A Canadian Perspective", in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (2004), 12.)

[174] The harm to the Hutterites' *Charter* right is substantial and easily ascertainable, but, as previously noted, the benefit of requiring the Hutterites to be photographed for the purposes of reducing identity theft, is not. Hundreds of thousands of Albertans have no driver's licence and their photographs, therefore, are not available in the facial recognition database, to help minimize identity theft. It is not clear to me how having approximately 250 additional Hutterites' photographs in the database will be of any significance in enhancing the government's objective, compared to the seriousness of the intrusion into the Hutterites' religious autonomy.

[175] What we are left with is the desire to protect Albertans from the risks and costs associated with identity theft through a mandatory photo requirement, versus the cost to the Hutterites, religious and democratic, of not having their constitutional rights respected. Here, the constitutional right is significantly impaired; the "costs" to the public only slightly so, if at all.

[176] Given the disproportion in this case between the harmful effects of the mandatory photo requirement on religious freedom, compared to the minimal salutary effects of requiring photographs from the Hutterites, the government has not discharged its burden of demonstrating that the infringement is justified under s. 1. This makes the mandatory photograph requirement for driver's licences, in the absence of the availability of an exemption on religious grounds, inconsistent with s. 2(*a*) of the *Charter*.

[177] I would therefore dismiss the appeal, but would suspend a declaration of invalidity for one year to give Alberta an opportunity to fashion a responsive amendment.

The following are the reasons delivered by

LEBEL J. (dissenting) —

I. Introduction

[178] I have read the reasons of the Chief Justice and of my colleague Justice Abella. With respect for the other view, I agree with the comments of Justice Abella on the nature of the guarantee of freedom of religion under s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. I share her opinion that the impugned regulation that limits freedom of religion has not been properly justified by the appellant under s. 1 of the *Charter*. As a result, as she proposes, I would dismiss the appeal and uphold the declaration of invalidity of the regulation that requires the members of the Hutterite Colony to have their photos taken as a condition for the renewal or issuance of a driver's licence.

[179] After a few short comments on freedom of religion, I will focus my analysis on the interpretation and application of s. 1 of the *Charter*. I have some concerns as to how the reasons of the Chief Justice structure and apply the method of justification of s. 1, in other words, the *Oakes* test, as it is now known.

A. *Freedom of Religion*

[180] The constitutional guarantee of freedom of religion has triggered a substantial amount

of litigation since the coming into force of the *Charter*. The present appeal illustrates enduring difficulties in respect of its interpretation and application. 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.

[181] 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.

[182] 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. The reasons of the majority understate the nature and importance of this aspect of the guarantee of freedom of religion. This may perhaps explain the rather cursory treatment of

the rights claimed by the respondents in the course of the s. 1 analysis. I will now turn to this aspect of the case.

B. *Section 1: The Oakes Test*

[183] As set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, the *Oakes* test has stood at the core of Canadian constitutional law since the early days of the *Charter*. It has been the central issue of much *Charter* litigation. The outcome of complex cases has frequently turned on whether a limitation of a right was justified under s. 1. In *Oakes*, our Court sought to give meaning and structure to the broad and bald affirmation, in s. 1 of the *Charter*, that constitutional rights could be limited, provided that the limitation could be justified in a manner consistent with the democratic values of Canada. Although courts have struggled in applying or interpreting it, the *Oakes* test has stood the test of time and remains a critical component of the constitutional ordering of basic rights in Canada.

[184] In the context of the values of the democratic society of Canada, courts were assigned the responsibility of final adjudication in the case of conflicts between public authorities and citizens, subject to the derogation or notwithstanding clause in s. 33 of the *Charter* (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 496-97). In its own way, the *Oakes* test is yet another attempt to determine why and how a law could be found to be just and whether it should be enforced. Many centuries ago, St. Thomas Aquinas put his mind to the same question. For him, a just law was one with a legitimate purpose which relied on reasonable or proportionate means to achieve it. Proportionate burdens should be imposed on citizens (see Thomas Aquinas, *Treatise on Law* (1991), at p. 96). In more modern times, the same idea informed the drafting of the *European*

Convention of Human Rights. It inspired the approach of international law in domains like the laws of war (see D. M. Weinstock, "Philosophical Reflections on the *Oakes* Test", in L. B. Tremblay and G. C. N. Webber, eds., *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (2009), 115, at pp. 115-16; also T. Hurka, "Proportionality in the Morality of War" (2005), 33 *Phil. & Pub. Aff.* 34; G. Van der Schyff, *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (2005), at pp. 23-27; M.-A. Eissen, "The Principle of Proportionality in the Case-Law of the European Court of Human Rights", in R. St. J. Macdonald, F. Matscher and H. Petzold, eds., *The European System for the Protection of Human Rights* (1993), 125). The principle of proportionality can even be found in Canadian criminal law. Self-defence, in s. 34 of the *Criminal Code*, R.S.C. 1985, c. C-46, for example, is predicated on the legitimacy of the purpose and the proportionality of the means used to further that purpose.

[185] The *Oakes* test belongs to this legal and philosophical tradition. In essence, it is about purpose and means: the legitimacy of the purpose and the proportionality of the means. The use of proportionate means in order to achieve legitimate purposes will justify a limitation of rights under s. 1.

[186] As is well known, the *Oakes* test imposes on the state the burden of demonstrating a pressing and substantial objective. This is the purpose part of the test. Then, the state must meet the proportionality requirements. The first requirement of the proportionality test is that there be a rational connection between the purpose and the means. This part of the test is really about the necessity or usefulness of the means in connection with the objective. A law that does not somehow contribute to advancing the stated purpose will not pass constitutional muster. The courts must then

review the means themselves by asking whether the means are minimally impairing of the right in question (the "minimal impairment" test). Finally, the court will engage in a balancing of the measure's salutary and deleterious effects (see P.W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.8; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 975-76). The reasons of the Chief Justice focus on the last part of this test in seeking to justify the impugned regulations under s. 1.

[187] It has also been said, at times, that context should be considered at the outset of the analysis in order to determine the scope of the deference of courts to government when applying the *Oakes* test (*Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877). 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, although I will not attempt, within the limited scope of these reasons, to delve any further into the vexed question of what is sufficient evidence or demonstration of justification. The justification process also reflects the democratic life of a state like Canada, which operates under the rule of law, in the tradition of a parliamentary government, within the framework of a federal form of government. Section 1 and the *Oakes* test are designed to reach a proper equilibrium between the rule of law, the roles of courts, Parliament or legislatures, and executives, and the democratic life of our country. In the end, when conflict does arise and cannot be resolved, courts must try to strike a proper balance between competing demands, always mindful of their place within the constitutional and political sphere.

[188] In general, courts have only rarely questioned the purpose of a law or regulation in the course of a s. 1 analysis. The threshold of justification remains quite low and laws have almost never been struck down on the basis of an improper purpose (Hogg, at section 38.9(b)). The pressing and compelling purpose test amounts to a *prima facie* review of the legitimacy of the law's objective. Its flexibility reflects the need to avoid too close questioning of the policy reasons underlying a law. Such a review would be better left to the political and parliamentary process. The flexibility of the analysis at this stage results also from the abstract nature of the purpose, which can be expressed by the courts at "various levels of generality" (Hogg, at section 38.9(a); *Thomson Newspapers*, at para. 125, *per* Bastarache J.). Since this objective is often not expressed with much clarity in the law or regulation, its identification and definition at this stage of the analysis often amount to a judicial construct based on such evidence as is available. The nature of this part of the *Oakes* test should caution courts against treating the purpose with undue emphasis on its sanctity throughout the proportionality analysis, when its nature and effects will have to be more closely questioned.

[189] The first part of the *Oakes* test is closely connected to the proportionality analysis. The rational connection analysis requires the courts to determine, for a start, whether the means chosen will somehow advance the stated purpose of the law. At this stage too, courts have rarely found statutes and regulations wanting (Hogg, at section 38.10(a)).

[190] This acknowledgment of the realities of constitutional adjudication does not mean that courts will or should never intervene at these earlier stages. However, this situation confirms that, after almost a quarter century of s. 1 jurisprudence, the crux of the matter lies in what may be called

the core of the proportionality analysis, the minimal impairment test and the balancing of effects. It is at these stages that the means are questioned and their relationship to the law's purpose is challenged and reviewed. It is also where the purpose itself must be reassessed with regard to the means chosen by Parliament or the legislature.

[191] A constitutional scholar, Peter Hogg, has observed that s. 1 litigation really revolves around minimal impairment (at sections 38.11(a) and 38.12). There is more than a kernel of truth to this statement. It may reflect what is really happening in the course of constitutional litigation about s. 1 and the conduct of a proportionality analysis. Indeed, I believe that the proportionality analysis depends on a close connection between the final two stages of the *Oakes* test. The court's goal is essentially the same at both stages: to strike a proper balance between state action, the preservation of *Charter* rights and the protection of rights or interests that may not be guaranteed by the Constitution, but that may nevertheless be of high social value or importance (see *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, at paras. 65 and 72).

[192] It may be tempting to draw sharp analytical distinctions between the minimal impairment and balancing of effects parts of the *Oakes* test. But determining whether a measure limiting a right successfully meets the justification test should lead to some questioning of the purpose in the course of the proportionality analysis, to determine not only whether an alternative solution could reach the goal, but also to what extent the goal itself ought to be realized. This part of the analysis may confirm the validity of alternative, less intrusive measures.

[193] The pull toward a sharp distinction between the two steps of the proportionality analysis, minimal impairment and balancing of effects, is perhaps intensified by semantic difficulties with the minimal impairment test. Courts still use the word "minimal" to characterize the acceptable level of rights impairment, in keeping with the original language used in *Oakes*. This is a strong word that seemed to suggest that, in the justification process, the state would have to show that the measure taken was really the least intrusive possible. It would have to demonstrate that no less drastic measure could be adopted that would achieve the stated legislative purpose. A literal application of such a test might lead, in essence, to courts adopting a libertarian perspective that the state should be constrained and its powers narrowly defined and limited. This understanding of the Constitution might have put Parliament and the legislature in a straitjacket and would have crystallized constitutional arrangements essentially made up of negative rights.

[194] In practical terms, the jurisprudence of this Court confirms that minimal does not really mean minimal in the ordinary sense of the word. The *Oakes* test was quickly reinterpreted, so that the question, in the minimal impairment analysis, became whether the right was infringed "as little as is reasonably possible", within a range of reasonable options (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772, *per* Dickson C.J.). The analysis leaves a reasonable margin of action to the state (p. 795, *per* La Forest J.). This is where we now stand, using words that, sometimes, no longer reflect the legal nature of a test.

[195] In order to determine whether the measure falls within a range of reasonable options, courts must weigh the purpose against the extent of the infringement. They must look at the range of options that are available within the bounds of a democratic Constitution. A deeper analysis of

the purpose is in order at this stage of the proportionality analysis. The stated objective is not an absolute and should not be treated as a given. Moreover, alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective. An alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity. At this stage of the proportionality analysis, the overall objective of the s. 1 analysis remains constant: 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. In this sense, courts must execute a holistic proportionality analysis with different legal and analytical components, which remain tightly woven.

[196] The proportionality analysis reflects the need to leave some flexibility to government in respect of the choice of means. But the review of those means must also leave the courts with a degree of flexibility in the assessment of the range of alternatives that could realize the goal, and also in determining how far the goal ought to be attained in order to achieve the proper balance between the objective of the state and the rights at stake.

[197] For all practical purposes, the reasons of the Chief Justice treat the law's objective as if it were unassailable once the courts engage in the proportionality analysis. No means that would not allow the objective to be realized to its fullest extent could be considered as a reasonable alternative. In this respect, the reasons appear inconsistent. First, para. 54 states: "*Less drastic means which do not actually achieve the government's objective are not considered at this stage*", i.e. the minimal impairment stage. Such an approach would severely restrict the ambit of court review of government action and would reduce it to an analysis of the alignment of means with purposes. At

other times, however, I note that the reasons seem more alive to this problem. Thus, one may find in the reasons suggestions that "*achieving the objective*" might actually mean looking into whether there exists an alternative means of reaching the objective "*in a real and substantial manner*" (para. 55). What that would actually mean in practical terms may not be as clear as one could wish. Nevertheless, these words appear to signal that, even at the minimal impairment stage, the objective might have to be redefined and circumscribed.

[198] Indeed, one wonders how an objective could be satisfied in a real and substantial manner without being read down somewhat. A different approach to the interpretation and application of the *Oakes* test would seem hard to reconcile with previous pronouncements of our Court. Our recent judgment in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, offers a fine example of a different understanding of the nature of the proportionality analysis.

[199] In *Charkaoui*, our Court struck down in part, on s. 7 grounds, the security certificate regime set up under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. It accepted that the security of Canada and the protection of intelligence sources were pressing and compelling objectives. Nevertheless, the Court found that alternative measures might give sufficient protection to confidential information. Important as they were, the objectives of the law were not treated as absolute goals, which had to be realized in their perfect integrity. The objectives were recast, in fact, at a lower level than the state might have wished. The Court assessed the objectives, the impugned means and the alternative means together, as necessary components of a seamless proportionality analysis (paras. 85-87).

II. Conclusion

[200] As to the outcome of this case, I agree with the reasons of Justice Abella and with the substance of her views on the lack of justification for the regulation under s. 1. 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.

[201] 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. Absolute safety is probably impossible in a democratic society. A limited restriction on the Province's objective of minimizing identity theft would not unduly compromise this aspect of the security of Alberta residents and might lie within the range of reasonable and constitutional alternatives. Indeed, the Province's stated purpose is not set in stone and does not need to be achieved at all costs. The infringing measure was implemented in order to reach a hypothetical

objective of minimizing identity theft, by requiring driver's licences with photos. But a small number of people carrying a driver's licence without a photo will not significantly compromise the safety of the residents of Alberta. On the other hand, under the impugned regulation, a small group of people is being made to carry a heavy burden. The photo requirement was not a proportionate limitation of the religious rights at stake.

[202] For these reasons and those of my colleague, Justice Abella, I would dismiss the appeal with costs.

The following are the reasons delivered by

[203] FISH J. (dissenting) — Like Justice LeBel, and for the reasons he has given, I agree with Justice Abella and would dispose of the appeal as they both suggest.

Appeal allowed, LEBEL, FISH *and* ABELLA JJ. *dissenting.*

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