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Security Trumps Freedom of Religion for Hutterite Drivers

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Cases Considered:

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

The Supreme Court of Canada's long awaited decision on whether Hutterites can be forced to have their photographs taken to obtain a driver's licence was released on July 24, 2009. Reversing the judgments of the Alberta Court of Queen's Bench and the Alberta Court of Appeal, a majority of the Supreme Court finds that the violation of freedom of religion caused by the photo requirement is justifiable under section 1 of the *Canadian Charter of Rights and Freedoms*. This comment will argue that the majority's decision, especially its failure to find a duty to accommodate on the part of the government, sets the protection of *Charter* rights back several years.

Facts

Since 1974 all drivers of motor vehicles in Alberta have been required to hold valid licences bearing their photograph. Until May 2003, the Registrar of Motor Vehicles could grant exemptions from this requirement by issuing licences without photos (Condition Code G licences) to persons who objected to having their photograph taken on religious grounds. In 2003 this exemption was removed via the *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 137/2003, made under the *Traffic Safety Act*, R.S.A. 2000, c.T-6. According to the government, the universal photo requirement was adopted to minimize identity theft arising from the use of driver's licences. To carry out this objective, all photos taken for driver's licences were placed in a facial recognition bank.

Hutterites, including the members of the Wilson Colony in southern Alberta, believe that it is contrary to the Second Commandment to have their photo willingly taken. The Second Commandment states "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, cited at para. 29). Prior to 2003, some members of the Wilson Colony held Condition Code G licences. Following 2003, they proposed that they be issued licences without photos, marked "Not to be used for identification purposes." The government did not accept this proposal, and suggested two alternatives: (1) licences would display a photo but be carried in a sealed envelope indicating they were the property of Alberta, or (2) licences would be photo-less, but digital photos of Hutterite drivers would be placed in the facial recognition bank. The government's proposals were said to be aimed at "minimiz[ing] 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" (at para. 12), but members of the Wilson Colony rejected the proposals on the basis that the act of taking the photos was itself a violation of the Second Commandment.

Lower Court decisions

In light of this impasse, the Wilson Colony challenged the photo requirement as contrary to the guarantee of freedom of religion under section 2(a) of the *Charter*. At trial, Justice Sal LoVecchio found in the Colony's favour, holding that the government had not adequately accommodated their religious beliefs. In his view, the Hutterites' proposal would sufficiently meet the government's objective of preventing identity theft, as anyone seeking to impersonate the licence holder would be "significantly limited" in their use of the licence if it were marked "Not to be used for identification purposes" (2006 ABQB 338 at para. 28).

A majority of the Alberta Court of Appeal (per Justices Carole Conrad and Clifton O'Brien) agreed with Justice LoVecchio that there had not been reasonable accommodation and that the claimants' rights were not minimally impaired (2007 ABCA 160). Justice Frans Slatter disagreed, finding in dissent that any accommodation beyond what the government had proposed would amount to undue hardship on the government.

Analysis

In my view, one of the most significant and troubling aspects of the Supreme Court decision is the Court's treatment of reasonable accommodation. For a majority of the Court, Chief Justice Beverley McLachlin holds that when a legislative act of government is at issue, there is no duty to accommodate minority rights and freedoms. The dissenting justices (Abella, LeBel and Fish, J.J.) do not explicitly challenge this aspect of the majority's ruling, which runs counter to the lower courts' focus on reasonable accommodation and previous case law of the Supreme Court. Before turning to this issue, I will examine the Court's reasons under section 2(a) of the *Charter* and its overall approach under section 1 of the *Charter*.

Section 2(a) Freedom of Religion

In order to establish a violation of freedom of religion under section 2(a) of the *Charter*, a claimant must prove a sincere belief in a particular tenet or practice connected to religion, and that the law or government action in question interferes with this belief or practice in a way that is more than trivial or insubstantial (at para. 32, citing *Syndicat Northcrest v. Amselem*, 2004 SCC 47). In this case, the government of Alberta conceded that the members of the Wilson Colony sincerely hold the belief that the photo requirement violates the Second Commandment (at para. 33). The second requirement, which the majority explains is meant to exclude "interference that does not threaten actual religious beliefs or conduct" from the ambit of section 2(a) (at para. 32), was not conceded by the government. However, "the courts below seem to have proceeded on the assumption that this requirement was met" (at para. 34), and so the majority assumes a violation of section 2(a) of the *Charter*.

As a result of this assumption, there is very little discussion in the majority's reasons under section 2(a) about the nature of the religious beliefs at issue and the seriousness of their violation. Some of this discussion comes later, but I was left thinking that the majority's limited analysis of freedom of religion caused its section 1 analysis to occur in a vacuum. The Court has been critical of this tendency in other cases (see for example *Schacter v. Canada*, [1992] 2 S.C.R. 679). A more robust analysis of section 2(a) may well have made a difference under section 1, as it seems to do for the dissenting justices.

Section 1 Justification

Once a claimant has proved (or a government has conceded) a violation of a *Charter* right or freedom, the burden shifts to the government to establish that the violation is "a reasonable limit" that can be "demonstrably justified in a free and democratic society" under section 1 of the

Charter. This analysis takes place via the *Oakes* test, which requires that the government prove a pressing and substantial objective, and the proportionality of the means through which the objective is achieved (*R. v. Oakes*, [1986] 1 S.C.R. 103). At the same time, it must be recalled that *Oakes* stands for more than this test. In a less-cited but still crucial aspect of *Oakes*, the Supreme Court set out some of the values and principles underlying a free and democratic society: "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society" (at para. 64). These values and principles are both the source of the rights and freedoms protected under 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" (ibid.).

However, rather than beginning with these core values, the majority commences its section 1 analysis with a statement of deference: "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*" (at para. 35). This is a very broad statement of the situations in which deference to government might be appropriate. In previous cases, deference was said to be owed in situations where, for example, the government was protecting vulnerable groups (e.g. with limits on pornography (*R. v. Butler*, [1992] 1 S.C.R. 452)), or mediating between the competing interests of different groups (e.g. those owed pay equity and others needing educational and health services in a time of fiscal crisis (*Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66)). Now, however, we are told that deference is owed for "public programs that regulate social and commercial interactions." But doesn't this include virtually everything that a government does? In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, McLachlin J. (as she then was) warned of the dangers of overly attenuating the government's burden of proof under section 1, but that now seems a distant memory (except in the reasons of Justice Abella, where she quotes liberally from McLachlin's reasons in *RJR-MacDonald* and does not once use the word deference).

Another general comment about the majority's approach under section 1 is its explicit reliance on utilitarian, cost / benefit reasoning. For example the spectre of the floodgates is raised as follows:

> 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 (at para. 36).

Chief Justice McLachlin thus indicates early on that this case is all about majority interests trumping minority rights. There is more utilitarian reasoning at para. 69, where the majority states that under section 1, "the court's ultimate perspective is societal". And at para. 77, the majority explicitly talks in terms of costs and benefits.

While societal interests have always been a key consideration under section 1 of the *Charter*, such interests were to be weighed against the rights and freedoms in question in the overall context of the values underlying a free and democratic society. There is no reference to the *Oakes* values in the majority reasons. Instead, the universality of regulatory programs seems to have become an overarching value that outweighs the practice of fundamental religious beliefs.

One final general point of interest under section 1 is made by the majority of the Supreme Court at para. 40. At the Alberta Court of Appeal, Justice Conrad "expressed concern" about the lack of democratic debate surrounding Alberta's discontinuance of the religious-based exemption from the photo requirement, which was effected by a regulation. However, the Supreme Court notes that regulations are clearly prescribed by law, and thus stand to be defended by the government under section 1. The Court does not consider whether the level of democratic debate around a particular measure should be a factor going to whether the government is entitled to some deference under section 1. Arguably, this would be an important addition to the other contextual factors enumerated by the Court in cases such as *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at paras. 90 to 91 (those factors include the vulnerability of the group the government is protecting, the group's "own subjective fears and apprehension of harm", the difficulty of scientifically measuring a particular harm, the effectiveness of a remedy, and the nature of the activity in question). If a government can show that a particular measure was the subject of wide and meaningful public consultation, perhaps courts should show the government some deference in defending that measure under the *Charter*. But the corollary would also be true, such that if a government failed to engage in democratic debate over a measure that adversely impacts upon a disadvantaged group, then the government would not be entitled to deference under the *Charter*.

The *Oakes* test

As noted earlier, the first part of the *Oakes* test requires that the government prove the measure which infringes a *Charter* right or freedom was enacted for a pressing and substantial reason. In this case, the majority articulates the objective in very broad terms when it finds that the government's photo requirement is aimed at "maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft" (at para. 42). Cast in such terms, the majority then has little difficulty finding the objective to be a pressing and substantial one. The government's other goal, "harmonization of international and interprovincial standards for photo identification" is seen as "a factor relevant to" the overall goal even though "other provinces have not yet moved to this requirement" (at para. 43). Moreover, the fact that the photo requirement was enacted pursuant to legislation that focuses on traffic safety is not seen as problematic. The majority agrees with Slatter J.A. that "[t]he 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" (at para. 45).

Overall, then, the prevention of identity theft – essentially an objective related to security – is found to be pressing and substantial. The dissent does not disagree with this conclusion (see Abella J. at para. 140).

The second part of the *Oakes* test requires that the means be proportional to the objective, and involves three considerations: rational connection, minimal impairment, and overall proportionality of effects.

The rational connection step is explained by the majority as requiring "a causal connection between the infringement and the benefit sought on the basis of reason or logic" (at para. 48, citing *RJR- MacDonald* at para. 153). Justice Abella contends that this step is "the seemingly easiest hurdle in the *Oakes* analysis" (at para. 141), and both the majority and dissent find that the requirement is met here. The majority holds that the government put forward sufficient evidence to show that the universal photo requirement is "more effective in preventing identity

theft than a system that grants exemptions to people who object to photos being taken on religious grounds" (at para. 49; see also the dissent at para. 142). The language used here is interesting and supports the characterization of the objective as security related. More specifically, the government's concerns about allowing exemptions are framed in terms of "fraudulent criminals", "wrongdoers" and "risk." This language calls to mind Wendy Brown's argument that tolerance for religious minorities (and other "others") – even though it is an insufficient response to difference -- easily turns to intolerance in the context of risk and security (see *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press, 2006).

The minimal impairment step of *Oakes* has been the stage where governments have failed most often in past cases. In the *Hutterian Brethren* case, however, the majority sets out some principles for this step that will make it easier for governments to cross this hurdle, particularly where legislative measures are being defended.

Under the minimal impairment step, the majority reiterates the need for deference in respect of "complex social issues" (at para. 53), but states that "deference is not blind or absolute" (at para. 55). It notes that "[t]he 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", and that "[t]he test … is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner" (at para. 55).

Applying these principles to the case at hand, the majority finds that the regulation imposing the universal photo requirement is part of a "complex regulatory scheme … aimed at an emerging and challenging problem" (at para. 56). However, there is no explanation of what makes this a "complex" regulatory scheme or a "challenging" problem. All government action could be called complex and challenging at some level, and the majority's failure to explain – or to make the government explain – is problematic.

The majority holds that the claimants' alternative of a photo-less licence that would not be used for identification purposes "would *significantly* compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage" (at para. 60, emphasis in original). The fact that 700,000 Albertans do not hold licences and pose an even greater risk for identity theft than drivers with photo-less licences – an argument accepted by the dissenting justices -- is said to be irrelevant, as this is seen to frame the objective of the regulation too broadly (i.e. to eliminate all identity theft) rather than looking at the true objective (to maintain the integrity of the driver's licensing system so as to minimize identity theft *associated with that system*" (at para. 63, emphasis in original)). But is the requirement for photos in relation to approximately 250 Hutterite drivers really something that will achieve that objective "in a real and substantial manner" (see Justice Abella at para. 158)?

The majority seems to acknowledge the challenges for freedom of religion presented by universal rules such as the photo requirement (at para. 61), but says that the impact of such laws should be considered at the final proportionality stage. This is interesting, as the final stage has not been determinative in past cases (something that the majority recognizes at para. 75). And is it in keeping with previous jurisprudence? There are many past cases where the Supreme Court looked at the impact of a law as part of the minimal impairment analysis. For example in *Keegstra*, the criminal nature of the hate speech laws and the potential for imprisonment were seen to be relevant under the minimal impairment step (*R. v. Keegstra*, [1990] 3 S.C.R. 697). More recently, in *Multani* the impact of a school board's zero tolerance weapons policy on a

Sikh's freedom to wear a kirpan was analyzed under the minimal impairment stage as well, under the rubric of reasonable accommodation (*Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6).

However, in *Hutterian Brethren* the majority rules that this is not a case where reasonable accommodation should be considered. Its first reason for this conclusion is that reasonable accommodation is a concept taken from human rights law rather than the *Charter* (at para. 66). Second, although *Multani* was decided under the *Charter* and a reasonable accommodation analysis was done under the minimal impairment step in that case, the majority finds a reason to distinguish *Multani*. It draws a distinction between *laws* (i.e. legislation and regulations), which will be found of no force or effect under section 52 of the *Constitution Act, 1982* if they violate the *Charter*, and *government action or administrative practice*, which will be remedied under section 24 of the *Charter* if they are found unconstitutional (at para. 67, emphasis added). Reasonable accommodation, which "envisions a dynamic process whereby the parties … adjust the terms of their relationship" (at para. 68), is said to apply to the latter type of case (of which *Multani* is an example) and not to the former. In respect of the former, the majority says the following:

> 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.* (at para. 69, emphasis added).

This reasoning is very disconcerting. In previous cases the Court has said that human rights legislation and the *Charter* should be interpreted consistently (see e.g. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 48 ("*Meiorin"*)), so it is unclear why the Court is taking a different approach here. Furthermore, the distinction between legislation and government / administrative action has the potential to be exploited by governments. One of the Court's strongest statements on reasonable accommodation occurred in *Meiorin*, where a government policy setting out minimum physical fitness requirements for forest firefighters was challenged by a woman who was fired after she could not meet one of the requirements. The Court (per McLachlin, J. as she then was) used this case as an opportunity to erase the distinction between direct discrimination (where discrimination is evident on the face of the law or policy) and adverse effects discrimination (where the law or policy is neutral but has a negative impact on a disadvantaged group). The government was found to be under a duty to justify the physical fitness requirement generally and to accommodate women in the position of Ms. Meiorin to the point of undue hardship. In a case released at the same time also involving the B.C. government, the Court used the same analysis in respect of a blanket refusal of drivers' licences for persons with a particular visual disability (see *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*")). While these were human rights cases, they could also have been brought under the *Charter* given that the government of B.C.'s actions were under challenge. According to the Court's reasoning in *Hutterian Brethren*, the cases would still have been subject to a reasonable accommodation analysis under the *Charter*, as they involved government actions other than legislation. But if the government had set out the physical fitness requirements or licence restrictions in regulations rather than policies, *Hutterian Brethren* now means that it could avoid its duty to accommodate in each case. Governments

wanting to escape a reasonable accommodation analysis under section 1 of the *Charter* could similarly choose to enact particular requirements or restrictions under legislation rather than policy.

The majority's reasoning also runs counter to lower court decisions which effectively use reasonable accommodation analysis in the context of legislation. For example, drug users have been exempted from universal criminal prohibitions against possession of drugs where they use marijuana for medical purposes (see e.g. *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.)) or where they use narcotics in a safe injection site (see e.g. *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661). Accommodation in relation to a mandatory firearm prohibition under the *Criminal Code*, which was found to have an adverse impact on an Aboriginal person who made his living as a trapper, has also been granted (see *R. v. Chief*, [1990] 1 W.W.R. 193 (Y.T.C.A.)). While accommodation in these cases was realized at the remedies stage via forms of constitutional exemption, nevertheless the cases can be seen as instances where governments are held to a duty to accommodate persons who are adversely impacted by their laws.

The majority insists that accommodation involves "individualized determinations" (at para. 69). This is often true, as in *Grismer* (where the blanket restriction on licences was struck down in favour of assessments for individual drivers with the disability in question.). However, there are other cases, such as *Hutterian Brethren*, where individuals are part of a recognized group that requires accommodation. The reasonable accommodation analysis should apply equally in these sorts of situations. Further, to state that legislatures "have no advance notice of a law's potential to infringe *Charter* rights" is to let governments off the hook in a major way. After more than 25 years of the *Charter* and a longer period in which they have been bound by human rights obligations, governments can no longer claim that they are unaware of the impact that laws might reasonably have on groups protected by these documents (for an argument to this effect that is now over 15 years old, see David Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993), 1 *Can. Lab. L.J.* 1 at pp. 8-9, cited in *Meiorin* at para. 29).

Perhaps the holding that reasonable accommodation is not part of the minimal impairment analysis for legislative breaches of the *Charter* is not as serious as I fear it may be. A court must consider whether there are *reasonable alternatives* that are less impairing of the claimant's rights and freedoms under section 1 in any event, and it could be said that the "reasonable alternatives" step fulfills largely the same function as the "reasonable accommodation" step. However, it seems perverse to suggest that legislatures have no duty to accommodate disadvantaged groups in this day and age, as well as contrary to trends in the case law.

It is interesting that the dissenting justices do not challenge the majority on this aspect of its ruling – in fact, they have nothing to say about reasonable accommodation, although they do find that the government did not meet the minimal impairment step. According to Justice Abella,

> 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 (at para. 147, emphasis in original).

This test the dissent found the government could not meet. Justice Abella notes that

> 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 (at para. 148).

Moving to the final proportionality stage, the majority claims that this is the only step to focus on the effects rather than the purpose of the law (at para. 76). As I argue above, I think this is analytically wrong, as the minimal impairment step has previously considered the effects of the law as well. Both Justices Abella and LeBel, writing in dissent, also disagree with the majority's "watertight compartments" approach under section 1 (at para. 134 per Abella J.; see also LeBel at para. 191).

There is much talk of risk in this part of the majority's judgment. For example, "[t]hough 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." According to the majority, this differs from previous freedom of religion cases, "where this Court … found that the potential risk was too speculative" (at para. 81). All a government enacting social legislation must show is that "reason and the evidence suggest [its measures will] be beneficial." There is no requirement "to show that the law will in fact produce the forecast benefits" (at para. 85). Once again, we see significant deference to the government in the majority's finding that the photo requirement has sufficient salutary effects. Justice Abella, in contrast, sees the advantages as speculative (at para. 154) and not up to the "rigorous" demands of section 1 (at para. 173).

The salutary effects must then be weighed against the deleterious effects of the photo requirement on freedom of religion. Freedom of religion is constructed by the majority as an aspect of liberty – i.e. it is seen to protect "the right of choice on matters of religion" (at para. 88). It is thus cast as essentially individualistic, in spite of the majority's attempts to link freedom of religion to culture and community (at para. 89).

Consistent with its reasons on reasonable accommodation, the majority draws a distinction between direct state compulsion in relation to religious beliefs and practices, and compulsion that is indirect. In the words of the majority:

> 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 (at para. 93).

The overall effect of the majority's reasons is to re-create the distinction between direct and adverse effects discrimination that it erased in *Meiorin*. It is striking that Justice McLachlin is the author of both judgments. The import of the distinction in *Hutterian Brethren* seems to be that cases of direct compulsion will generally be seen as serious (at para. 91-3), while cases of "incidental effects" may not be. The question in the latter type of case is whether the cost on freedom of religion "in terms of money, tradition or inconvenience" still leaves "the adherent with a meaningful choice concerning the religious practice at issue" (at para. 95).

Applying that question to the case at hand, the majority holds that "the cost of not being able to drive on the highway … 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" (at para. 96). Shockingly, the claimants are told that they should "[arrange] alternative means of highway transport … [so as not to] end the Colony's rural way of life" (at para. 97). Only costs that are "prohibitive" seem to matter (at para. 97), and the relevant costs here are seen to be merely those of "money and inconvenience" (at para. 102). Further, driving is said by the majority to be "not a right, but a privilege" (at para. 98). The Hutterites' reasons for needing to drive are given no attention whatsoever by the majority.

This can be contrasted with Abella J.'s reasons, where she notes that the Wilson and other colonies "attempt to be self-sufficient, and members of the community operate motor vehicles in order to fulfill their responsibilities to the community." More specifically, they drive motor vehicles in order "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" (at para. 118). Their reasons for driving are not just monetary and convenience-based, but are "religious and democratic" (at para. 175). Moreover, Justice Abella disagrees with the majority's reliance on licenses as "privileges", noting that benefits must be equally scrutinized under *Charter* (at para. 171; see also LeBel J. at para. 201).

In conclusion, the majority believes the law has "an important social goal… that should [not] lightly be sacrificed" (at para. 101). Weighed against effects which are seen to be only monetary matters of convenience, the law's violation of freedom of religion can easily be justified under section 1 of the *Charter* (at paras. 102-3).

Section 15

In light of its finding that there was a justifiable violation of section 2(a) of the *Charter*, the majority goes on to consider the claimants' alternative argument, that the photo requirement is contrary to equality rights as guaranteed under section 15 of the *Charter*. The majority reiterates the test from *R. v. Kapp*, 2008 SCC 41, whereby discrimination is to be assessed in terms of whether it amounts to a disadvantage perpetuated by prejudice or stereotyping (at para. 106). The regulation here is found to create a distinction on the enumerated ground of religion, however this distinction is seen to arise not from any demeaning stereotype, but from a "neutral and rationally defensible policy choice" (at para. 108). In its very brief reasons finding no discrimination, then, the majority seems to be importing section 1 considerations into section 15 of the *Charter* all over again. This is something that its reasons in *Kapp* said were to be avoided.

Conclusion

The majority decision in this case is a major disappointment and arguably sets *Charter* jurisprudence back many years. In particular, the majority's easing of the burden on governments in the case of their legislative actions is a major setback for disadvantaged groups under the *Charter*. The dissenting reasons are much truer to the spirit of the *Charter* and to previous case law, some of it decided by Justice McLachlin before she was Chief Justice. The one positive note here is that Justice Abella finally seems to be finding her voice on *Charter* issues as a member of the Supreme Court.