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Motion for Re-hearing of Hutterian Brethren Case Dismissed by Supreme Court of Canada

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Cases Considered:

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

On October 15, 2009 the Supreme Court of Canada denied a motion to re-hear the case of *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37. In that case, a majority of the Supreme Court denied the Hutterian Brethren's claim that its members should be exempted from provincial photo requirements for driver's licences based on freedom of religion. The Supreme Court did not provide any reasons for its decision, stating only as follows in a news release:

> The motion for an order returning the case to court of first instance, a stay of execution and re-hearing of the appeal is dismissed without costs.

While the Supreme Court did not give any details about the re-hearing application, Gregory Senda, counsel for the Hutterian Brethren of Wilson Colony and the Hutterian Brethren Church of Wilson Colony, kindly provided me with all of the documents filed in support of his motion under Rule 76 of the *Rules of the Supreme Court of Canada*, SOR/2002-156. This comment will review the arguments made in support of the application for a re-hearing, and those made in response.

Rule 76 provides as follows:

> **76.** (1) At any time before judgment is rendered or within 30 days after the judgment, a party may make a motion to the Court for a re-hearing of an appeal.
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> (2) Notwithstanding the time referred to in subrule 54(1), the other parties may respond to the motion for a re-hearing within 15 days after service of the motion.
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> (3) Within 15 days after service of the response to the motion for a re-hearing, the applicant may reply by serving on all other parties and filing with the Registrar the original and 14 copies of the reply.

> (4) Notwithstanding subrule 54(4), there shall be no oral argument on a motion for a re-hearing unless the Court otherwise orders.
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> (5) If the Court orders a re-hearing, the Court may make any order as to the conduct of the hearing as it considers appropriate.

The Hutterian Brethren put forward five grounds for a re-hearing:

> (1) The majority of the SCC replaced the trial judge's finding of fact that "it is essential to their continued existence as a community that some members operate motor vehicles" (see 2006 ABQB 338 at para. 2) with the finding that the evidence did not support this conclusion.
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> (2) The majority of the SCC excluded from the record evidence that the Hutterian Brethren would have accepted an alternative means of proving their identities, namely fingerprints.
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> (3) The majority of the SCC effectively placed the onus on the Hutterian Brethren to prove that alternatives to the photograph requirement were viable, such that the Hutterian Brethren should be able to adduce further evidence to meet this burden.
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> (4) The majority of the SCC effectively placed the onus on the Hutterian Brethren to anticipate what the Court might consider to amount a meaningful choice of how to follow their religious beliefs and practices (e.g. hiring other drivers), such that the Hutterian Brethren should be able to adduce further evidence to meet this burden.
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> (5) New evidence that could not have been adduced at the time of the hearing, showing that the U.S. Department of Homeland Security now allows Old Order Amish and Old Order Mennonites to enter that country without a photograph, should be admitted, as this "provides a different perspective on the issue of security analysed in the case at bar." (Motion for Order and Re-Hearing of the Hutterian Brethren of Wilson Colony and the Hutterian Brethren Church of Wilson Colony, para. 5).

Based on these grounds, the Hutterian Brethren argued that the case should be remanded to the court of first instance for further fact finding, that an order should be granted permitting the members of the Brethren to drive without photographs on their licenses in the meantime, and that execution of the Supreme Court's judgment should be stayed.

Both the Attorney General of Alberta (the appellant at the SCC) and the Attorney General of Canada (an intervener) filed responses to the re-hearing application. None of the other interveners – The Attorneys General of B.C., Ontario and Quebec, the Canadian Civil Liberties Association, the Ontario Human Rights Commission, and the Evangelical Fellowship of Canada and Christian Legal Fellowship – filed arguments in response, although the Evangelical

Fellowship of Canada and Christian Legal Fellowship asked that their earlier submissions at the initial SCC hearing be considered if a re-hearing was granted.

The A.G. Canada took issue only with the fifth ground for re-hearing, which was accompanied by an argument that the A.G. Canada should be added as a party in order to produce evidence as to what reciprocal measures Canada had taken in relation to the new policy of the U.S. Department of Homeland Security. The A.G. Canada argued that this ground for re-hearing did not meet the test for the introduction of fresh evidence from *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44. That case set out the requirements of "due diligence, relevance, credibility and decisiveness" for the admission of fresh evidence (at para. 10). According to the A.G. Canada, issues relating to the practices of the U.S. Department of Homeland Security were irrelevant to the appeal. Further, the A.G. Canada argued that it was outside its role as an intervener to adduce any such evidence.

Similarly, the A.G. Alberta argued that the fifth ground for re-hearing was "only tangentially relevant" and that the Supreme Court had not dealt with the use of driver's licences for travel to the United States in its reasons; thus it did not provide any response to that ground.

With respect to the remaining grounds, the A.G. Alberta made several arguments. First, it argued that the trial judge's finding that "it is essential to their continued existence as a community that some members operate motor vehicles" *was* drawn to the attention of the Supreme Court, and was referred to specifically in the reasons of Justice Abella in dissent (2009 SCC 37 at para. 164). The A.G. Alberta argued that the majority "did not attach to [these] words the categorical significance that the Respondents now claim for them" (Responding Motion Record of the Appellant Her Majesty the Queen in Right of the Province of Alberta, para. 7). Further, it contended that the Hutterian Brethren had not supported this "conclusory" statement with any evidence.

A similar argument was made with respect to the Hutterian Brethren's contention that it should be permitted to adduce evidence that it could not afford to hire drivers. The A.G. Alberta argued that the Supreme Court majority "did not introduce a "new case" to be met by the respondents", rather the A.G. Alberta itself "explicitly drew attention to the insufficiency" of the Respondent's evidence on this point in its factum (Responding Motion Record of Alberta, para. 22).

The A.G. Alberta also took issue with the contention that the Supreme Court ignored evidence that the Hutterian Brethren would have accepted fingerprinting as an alternative means of proving their identities. On this point, the A.G. Alberta argued that "in the course of this litigation, the Respondents raised, did not pursue, and expressly disclaimed fingerprint identification as a way to avoid potential conflict with their beliefs" (Responding Motion Record of Alberta, para. 9). It pointed to the fact that the Hutterian Brethren had not referred to fingerprinting in its written arguments to the Alberta Court of Queen's Bench, Court of Appeal or the Supreme Court of Canada. It also noted an exchange in the Court of Appeal where Justice Slatter had asked counsel for the Hutterian Brethren whether they were proposing fingerprinting as an alternative to photographing. According to an affidavit filed by the A.G. Alberta, counsel

for the Hutterian Brethren conferred with his clients and then advised the Court of Appeal that fingerprinting was not an acceptable alternative (Responding Motion Record of Alberta, para. 16). In light of its position earlier in the litigation, the A.G. Alberta argued that the Hutterian Brethren should not be permitted to adduce new evidence relating to any recent changes in its beliefs around fingerprinting or changes in its understanding of whether fingerprinting is consistent with those beliefs. Rather than argue what would amount to a new case, the A.G. Alberta submitted that the Hutterian Brethren's "proper course is to ask Alberta's Minister of Service Alberta to consider and respond to the changes in their beliefs and the opportunities that this change creates in light of this Court's decision" (Responding Motion Record of Alberta, para. 31).

In its Reply, the Hutterian Brethren stated that it had a "different recollection" of the oral proceedings before the Court of Appeal, and argued that the A.G. Alberta's argument on this point was an "attempt … to introduce hearsay evidence which would require calling the three presiding justices and all individuals present at the hearing." This, it said, would be "improper" and thus would not be addressed by the Respondents (Reply of the Hutterian Brethren of Wilson Colony and Hutterian Brethren Church of Wilson, para. 1). The Hutterian Brethren also noted that the A.G. Alberta had referred to fingerprinting in its factum at the Supreme Court, and that the Respondent had addressed the matter in oral argument at the SCC. On the role of the A.G. Canada, the Hutterian Brethren replied that "[g]overnment entities should not be allowed to decide which of the potentially relevant evidence uniquely within its control should be divulged to the Court" (Reply of the Hutterian Brethren of Wilson Colony and Hutterian Brethren Church of Wilson, para. 5). It maintained its position that the Supreme Court had created a reverse onus on the Hutterian Brethren "to prove the reasonableness of the alternative" under section 1, and argued that if this approach was taken "a flood of constitutional litigation will ensue" (Reply of the Hutterian Brethren of Wilson Colony and Hutterian Brethren Church of Wilson, para. 3).

What are the standards by which these arguments would have been considered by the Supreme Court? With respect to arguments that the Supreme Court should re-hear the case because it failed to consider particular findings made at trial, *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 2 S.C.R. 167 is instructive (this case was cited by the Hutterian Brethren in its Motion for Order and Re-Hearing). In that case, in response to the argument that the Court must have overlooked particular material, the Supreme Court stated as follows:

> That is an argument that any unsuccessful party could make seeking a rehearing. There is nothing here before us supportive of the fact that the Court misled itself or was misled as regards what was the record before it, the nature of the issues, or the questions to be addressed (at para. 3).

Seemingly, then, on the re-hearing application in the *Hutterian Brethren* case the Supreme Court found that there was insufficient support for the argument that it had been misled or had misled itself as to the record before it.

Also relevant is the case of *H.(D.) v. M.(H.)*, [1999] 1 S.C.R. 761, cited by the A.G. Alberta in its Responding Motion Record. In this case, the Supreme Court stated that it would "consider the grant of a rehearing if this were one of those truly exceptional cases where the applicant could show a potential failure of justice at the original hearing" (at para. 7). We must again draw an inference in light of the Supreme Court's lack of reasons in *Hutterian Brethren*, but it appears that it found that the Respondent's grounds in support of a re-hearing did not meet this test.

What alternatives remain for the Hutterian Brethren short of re-establishing their community elsewhere or remaining in their community and hiring drivers? It appears that the Alberta government may be open to considering the argument that fingerprinting could be used as an alternative means of establishing the identity of Hutterite drivers who believe that having their photograph taken is a violation of the Second Commandment. It is encouraging that the Alberta government still sees itself as obligated to accommodate the Hutterian Brethren of Wilson Colony in spite of the Supreme Court majority's seeming retreat from the duty to accommodate in this case (see my previous post Security Trumps Freedom of Religion for Hutterite Drivers on this point). Even if we think of the government's obligations in terms of "minimally impairing alternatives" rather than "accommodation", this is clearly the way to go.