

Controlling Entry into the Marketplace in Order to Exercise of Freedom of Religion

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Cases Considered:

[*Alberta v. Hutterian Brethren of Wilson Colony*](#), 2009 SCC 37

In "Minority-Majority Relations and Economic Interdependence" (1960) 27(4) *Phylon* 367, Calvin Redekop and John A. Hostetler predicted that the Hutterian Brethren would survive because they controlled their entry into the marketplace. In this post I will briefly describe the nature of the religious beliefs of the Hutterian Brethren, but only to the extent necessary to understand the impact the Supreme Court of Canada decision in *Alberta v. Hutterian Brethren of Wilson Colony* might have. Next, I will set out the arguments of Redekop and Hostetler and then I will use their points to explain how the Supreme Court's decision takes away this control from the more conservative colonies within the Hutterian Brethren Church and thus jeopardizes the sect's survival.

Some Background on the Hutterian Brethren

It is necessary to explain in a general and brief fashion a few things about the Hutterian Brethren. For this section I have relied extensively on the following accounts with their focus on Canadian, Albertan, or legal events: Alvin J. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004); William Janzen, *Limits on Liberty: The Experience of Mennonite, Hutterite and Doukhobor Communities in Canada* (Toronto: University of Toronto Press, 1990); Robert Macdonald, "The Hutterites in Alberta," in *Peoples of Alberta: Portraits of Cultural Diversity*, eds. Howard Palmer and Tamara Palmer (Saskatoon, Saskatchewan: Western Producer Prairie Books, 1985) 348; Howard Palmer, *Land of the Second Chance: A History of Ethnic Groups in Southern Alberta* (Lethbridge: Lethbridge Herald, 1972); and Douglas Sanders, "The Hutterites: A Case Study in Minority Rights," (1964) 42 *Canadian Bar Review* 225. I have also used some of the text and information in a previous piece of mine: "Space for Religion: Regulation of Hutterite Expansion and the Superior Courts of Alberta," in *The Alberta Supreme Court at 100: History and Authority*, Jonathon Swainger, ed. (Osgoode Society for Canadian Legal History and University of Alberta Press, 2007), 159-192

One of the reasons the Supreme Court of Canada could find that the violation of the Wilson Colony's freedom of religion was justified under section 1 of the *Charter* was because the Court never considered the nature of their religious beliefs or the impact their violation might have on the colony's survival in any depth. A scant three paragraphs of the majority's judgment discuss these matters: see paras. 29, 30 and 97. As my colleague, Jennifer Koshan, notes in her post on this decision ([Security Trumps Freedom of Religion for Hutterite Drivers](#)), the majority's limited analysis of freedom of religion caused its section 1 analysis to occur in a vacuum. The

government of Alberta conceded, from the beginning, that the burden imposed upon the Hutterian Brethren of Wilson Colony by the province's universal photo requirement is a breach of the section 2(a) freedom of religion and the section 15(1) equality guarantees under the *Charter*: see [Hutterian Brethern of Wilson Colony v. Alberta](#), 2006 ABQB 338 at para. 7. As a result, the evidence of the impact on the Hutterian Brethren of Wilson Colony appears to have been confined to the Affidavit of S. Samuel Wurz, affirmed November 10, 2005. The vast secondary literature on the Hutterian Brethren appears to have been ignored for the most part. Only one such text — Morris Davis and Joseph F. Krauter's *The Other Canadians: Profiles of Six Minorities* (Toronto: Metheun, 1971), which discusses the Hutterites in 14 pages (pages 87-101) — is listed in the Supreme Court's "Authors Cited."

Like other Anabaptists such as the Mennonites and the Amish, the Hutterites' history can be traced back to Switzerland in 1525, when their ancestors attempted the restoration of the first first-century Christian church. Thus, they began an effort almost five centuries ago to separate from the institutions and values of the society in which they lived, and they continue these efforts today. From their very beginnings, the Hutterites' religious beliefs and practices have challenged the values and authority of the established state.

Few other minority groups in Canada hold values and beliefs that differ more from those of the larger surrounding society than do the Hutterites. Like all Anabaptists, these beliefs include adult baptism, the rigid separation of church and state, and the establishment of the church as a Christian community that follows Jesus in all areas of life. What distinguishes the Hutterian Brethren from other Anabaptist groups is the Hutterites' belief in communal property, based upon the description of the early Christian church in Acts 2:44: "And all that believed were together, and had all things in common." All property within a Hutterite colony is church property; there is no distinct church organization in a colony because the community is the congregation. The description of a colony by Professor Alvin J. Esau in his book, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004) at x, is especially evocative: from the Hutterite perspective, a colony "may be thought of as a communal ark of salvation that leads to eternal life in heaven, while the rest of the world is drowning in the flood of temporary selfish pride and pleasure leading to death."

The Hutterian Brethren have survived as a distinct religious and ethno-cultural group; of all Anabaptist groups, they have made the fewest adaptations to their host societies. (There are three different branches of the Hutterian Brethren in Canada — the Lehrerleut and Dariusleut (mainly in Alberta) and Schmiedeleut (mainly in Manitoba) — and they vary in how conservative they are and there is also a great deal of variation between individual colonies.)

The Hutterites' viability over almost five centuries has been attributed to their very distinctiveness and to their creation and maintenance of literal and figurative boundaries between their communities and the larger surrounding society. Those boundaries include their dress, their religious education, and their language, but one of the most important boundary mechanisms used by the Hutterites to preserve their way of life is the geographic and social isolation of their individual colonies. Geographically, each colony is established on a huge tract of land comprising thousands of acres, as isolated as possible from more highly populated centres. A certain level of economic independence also prevents too much interaction with the larger surrounding society. In addition, each Hutterite colony is virtually institutionally complete, with its own educational, political, economic, and legal institutions.

The fact that the Hutterites make their living almost wholly from agriculture has a bearing on their cohesion. As agriculturalists, it is possible for the Hutterites to have more of the isolation that is necessary for survival and to maintain a much greater degree of unified, autonomous self-sufficiency than would be possible otherwise. By working on farms, the Hutterites avoid contact with others in employment settings. It also gives them a very large degree of economic independence and they rely on the world for few things.

Changes in Hutterite society are largely limited to technological innovations. Farming equipment technology generally matches or exceeds that of non-Hutterite farmers. Change is based entirely on colony welfare. Religious precepts do not limit their use of technology so its use does not necessarily indicate change.

"Minority-Majority Relations and Economic Interdependence"

The article and argument I am relying mainly upon for an explanation of the probable consequences of the decision in *Alberta v. Hutterian Brethren of Wilson Colony* was written by two academics, Calvin Redekop and John A. Hostetler, who shared a wealth of knowledge about and experience with Anabaptist groups. Calvin Redekop (1925-), a Canadian professor of sociology until his retirement in 1990 and a Mennonite himself, taught at five Mennonite colleges and is a prolific writer on Mennonite life. John A. Hostetler (1918-2001), born to an Old Order Amish family, served as a leading interpreter of Amish and Hutterite communities throughout the last half of the twentieth century. He is the author of numerous articles, chapters, books and research reports on the Old Order Amish and Mennonites and one of the most authoritative accounts of Hutterite life: *Hutterite Society* (1974).

In their article, "Minority-Majority Relations and Economic Interdependence," (1966) 27(4) *Phylon* 367, Redekop and Hostetler focus on one type of minority-majority relationship, and that is the relationships between groups that want to retain their own identity (rather than assimilate) and the majority society. They look at three groups in the Anabaptist tradition whose goal is pluralism — the Amish, the Old Colony Mennonites, and the Hutterites — and conclude that the minority can retain its identity to the degree it can control the amount and intensity of its interaction with the majority in the marketplace. However, by definition, it is not the minority which gets to decide what their relationship with the majority will be like — as the Supreme Court of Canada made abundantly clear on July 24, 2009.

The "marketplace" that Redekop and Hostetler write about is the place where members of the Hutterian Brethren and members of the world meet. The marketplace is the interlacing of the economic institutions of both the larger, surrounding society and the Hutterites. It includes the entire process of the exchange of things and the norms, statuses, values and material elements that are present whenever people meet to exchange. The marketplace is a place of social and cultural exchange.

How does a minority group such as the Hutterites succeed in retaining their identity in the midst of Canadian society, given the majority's ability to dictate the terms of the relationship? According to Redekop and Hostetler, a significant central objective of the Hutterian Brethren is that of remaining "uncontaminated" by the "world." The form their avoidance of contamination has taken for centuries is separation from the world — physical, social and cultural separation. The Hutterites attempt to isolate themselves as much as possible from the larger society that surrounds them. As a result, relationships with the outside world are controlled as much as possible. For example, they restrict contact by settling in isolated areas of the province. Social

intercourse is avoided by discouraging interaction with "people of the world." They have also repelled the tendency for assimilation through increasing economic interdependency.

It is the aspect of economic interdependency that is the most relevant to the Supreme Court of Canada's decision. As Redekop and Hostetler note, if the Hutterites were completely independent economic societies, the economic aspects of separation from the world would be irrelevant. However, they are not completely economically independent of the larger economic structure of the world because they are not completely economically self-sufficient.

As Redekop and Hostetler explain it, for the Hutterites, the objective of marketplace exchanges is to make a profit in order to procure the things needed to promote their communal way of life. Making money is a God-sanctioned activity so long as the money is held in common, as is all other property of the Hutterian Brethren. The attitude of the Hutterites to the marketplace is ambivalent. They are afraid of the influences of the marketplace on the one hand. On the other hand they realize the necessity of the market place and they patronize it but they are wary of it.

Because the Hutterites live in compounds on isolated colonies, the activities of members are easy to control. They have developed a status role system which keeps contact with outside systems and people to a minimum. For example, the person in the role of minister is the one who negotiates for the big purchases, such as land purchases. The person who is the steward or house manager is the person whose job it is to go to town to make necessary purchases for the whole colony. The status roles of those allowed to meet and negotiate with people in the marketplace are very few.

The heart of Redekop and Hostetler's argument is that the amount and type of contact with the outside world through the marketplace is significant for group survival. They propose that the extent of the interdependency and the extent of assimilation has to a large degree been the consequence of the type of marketplace relationship which existed. When the market place relationship is controlled by the minority, the structural assimilation has been weaker.

Thus Redekop and Hostetler proposed that a minority can retain its identity to the degree it can control the amount and intensity of the interaction in the marketplace and that the degree to which the larger society can determine the nature of the contacts in the marketplace determines the degree to which the will of the majority is operative at all.

The Supreme Court of Canada's Determination of the Nature of Marketplace Contacts

Until the *Alberta v. Hutterian Brethren of Wilson Colony* case, the Hutterites exercised considerable control on their part of the relationships in the market place. The Supreme Court of Canada 4:3 majority decision takes away that control from the Hutterian Brethren and puts it in the hands of the larger, surrounding society.

The impossible position the Supreme Court of Canada has placed the Wilson Colony and other like-minded Hutterian Brethren in is easy to understand with a reiteration of some of the points developed earlier in this post. The Hutterites live isolated from the world in order to remain uncontaminated by the world. They live communally; all property within a Hutterite colony is church property. They are agriculturalists, but they are not entirely self-sufficient. In order to get their produce to the marketplace where it can be exchanged for the few things that the congregation needs from the world (such as money to buy land), they need to drive trucks. The Wilson Colony is not the only Hutterite colony to refuse to have their photographs taken based

on Exodus 20:3-17 — "You shall not make for yourself an idol, or any likeness of what is in heaven above or on earth beneath or in the water under the earth" — although it is in the small minority of colonies on this issue (based on the fact there were only 252 Code G non-photograph drivers' licences issued to Hutterites in 2003, when the rules change). The Supreme Court of Canada decision makes it impossible for those Hutterian Brethren who adhere to the same interpretation of Exodus 20:3-17 that the Wilson Colony does to drive trucks. As the Affidavit of S. Samuel Wurz, affirmed November 10, 2005, sets forth:

[Alberta] is in effect attempting to force the Hutterian Brethren to make a choice between two of our religious beliefs, adhere to the Second Commandment or adhere to our communal way of life. Without being able to drive, we cannot maintain our communal way of life as society is currently structured. However, in order to be able to drive, [Alberta] says we must contravene The Second Commandment. The position of [Alberta] is tearing apart the fabric of our existence.

Because their isolation is necessary for them to maintain their unified, autonomous self-sufficiency as a "communal ark of salvation," the Supreme Court majority's reasons for saying that the Alberta government's universal driver's licence photograph requirement does not deprive adherents of "a meaningful choice" (at para. 94) show a grave lack of understanding of the religious matters at stake.

When the majority of the Court measures the "deleterious effects of a measure on individuals or groups" as it does in the final stage of the *Oakes* test, there is no indication of any awareness of just what those effects will be. The majority talks (at para. 95) about "incidental effects" of laws passed for the general good that "may impose costs on the religious practitioner in terms of money, tradition, or inconvenience." It is difficult to think of more trivializing words than "incidental" and "inconvenience." The majority acknowledge that the relevant Alberta regulation "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 do the Wilson Colony members, from their perspective, really have a "choice" not to have their photos taken? Is the cost merely the cost of not being able to drive on the highway? Not according to Redekop and Hostetler's conclusions.

The majority states (at para. 97) that there is no evidence that "arranging alternative means of highway transport would end the colony's rural way of life." Put that way, of course there isn't that kind of evidence. The evidence was that it would end the Wilson Colony's existence. The Affidavit of S. Samuel Wurz may not explain "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," but the history of this group and all of the secondary literature and studies of this sect, including the article by Redekop and Hostetler summarized earlier in this post, make it obvious why that is not possible if the group wants to survive.

Even assuming it is possible to hire people with driver's licences to drive from isolated colonies to nearby towns and back, hiring such people or arranging for third party transport of produce and people brings "people of the world" to the colonies in great numbers. It is not the economic cost that is the problem, as the majority suggests (at para. 98). Hiring drivers to come to the Wilson Colony to get colony members or agricultural produce means that the Hutterites can no longer avoid contact with others in the employment setting. The Hutterite and non-Hutterite interaction in the marketplace has been taking place away from the colony. The Supreme Court decision changes the location of much of that social and cultural interaction to the colony itself.

The Hutterites had been controlling which members' role it was to participate in interactions in the marketplace. They had developed a status role system which kept contact with outside systems and people to a minimum. Now, with the Court's decision, there will be more opportunities for more interaction with more colony members by all those drivers attending at the colony and transporting colony members into town. I could go on listing the probable impacts of the Court's decision, but they are not that hard to predict when one takes account of the sect's beliefs and way of life.

The alternative to this gradual contamination by the world that the Supreme Court's majority decision leaves the Hutterite Brethren of Wilson Colony and other like-minded Hutterites is to sin. That is not an alternative. It is not even a "deleterious effect" that the majority considers, perhaps because the majority assumes the Hutterites will hire drivers. According to the majority (at para. 99), the requirement for driver's licence photographs will impose "some financial cost on the community and depart from their tradition of being self-sufficient in terms of transport." There is nothing about the effects of sin there, or about the effect on the group's chances of survival. Sin and survival do not seem to rate a line in the ledger of cost-benefit analysis that the majority engages in.

The Wilson Colony is not merely a group with a "rural communal life" as the majority puts it (at para. 97). The Wilson Colony of Hutterian Brethren is intentionally separate from the broader society, living out their interpretation of Acts, chapter 2, verses 42 to 47 so that their way of life is the practice of total Christianity. To say, as does the majority (at para. 2), that "[t]he Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities" is to impose the Court's understanding of the world on them. To say that the Wilson Colony drives to local centres to "do business" (at para. 30) is to suggest that they drive to local centres to do something that is not religious. It misses the all encompassing nature of a first century Christian redemptive congregation. And so does the majority's assertion that "religion touches so many facets of daily life" (at para. 90), in the face of a perspective that religion is all there is to daily life.

In the section on "Weighing the Salutary and Deleterious Effects," the majority summarizes those deleterious effects (at para. 102) by stating that the government's insistence on photographs "imposes a cost 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." But it arguably will do just that. If Redekop and Hostetler are correct — and the many other writers who attribute the Hutterites' survival to their physical, social and economic isolation — then the Supreme Court of Canada decision in *Alberta v. Hutterian Brethren of Wilson Colony* is extremely repressive.

Conclusion

The Hutterites' history of relations with their host nations has been one of broken promises, persecution, and flight. Persecution in Switzerland in the 1500s forced them to flee to Moravia, and broken promises and persecution followed them from Moravia to Hungary, Romania, and then Russia. Broken promises and persecution in Russia brought the few remaining Hutterites to South Dakota in the 1870s. There, the Hutterites' pacifism, their use of the German language, and their communal lifestyle made them objects of hostility during the Spanish–American War in the late nineteenth century, and again during World War I. Relying on Canadian government assurances that their communal land holding system, their culturally- and religiously-specific

educational system, and their pacifism would be accommodated, the Hutterites fled to Canada in 1918.

What awaited them in Canada, however, was the same pattern of broken promises and persecution. In 1919, in response to public and provincial government pressure, the federal government removed the Hutterites' exemption from military service and temporarily banned their immigration. While attitudes towards the Hutterites in Alberta were more favourable for a brief period of time in the 1930s, the outbreak of the Second World War saw the return of animosity, including a legislated ban on Hutterite land acquisitions in Alberta from 1942 to 1947. That total ban was followed by the establishment of the Communal Property Control Board, which controlled the Hutterites' acquisition of land until 1971. Some Hutterites left the province; the first colonies in Saskatchewan, for example, were established in 1952.

The latest threat — the Supreme Court decision in the *Hutterian Brethren of Wilson Colony* case — seems as serious. Not surprisingly, at least two Alberta Hutterite colonies are reported to be contemplating leaving the province in the wake of the decision: see the Globe and Mail article by Patrick White, "[In wake of court ruling, Hutterites contemplate leaving Alberta](#)" (July 28, 2009). In weighing the "deleterious effects" on the Hutterian Brethren against the "salutary effects" of the province's universal photo requirement, the Supreme Court appears to have drastically short-weighted the "deleterious effects" side of the scale.