

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)**

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

Appellant
(Appellant)

- and -

**HUTTERIAN BRETHREN OF WILSON COLONY and
HUTTERIAN BRETHREN CHURCH OF WILSON COLONY**

Respondents
(Respondents)

**FACTUM OF THE APPELLANT,
(Her Majesty the Queen in Right of the Province of Alberta)
Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada***

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PART I - FACTS

A. Introduction and Outline

1. In 2003 Alberta amended regulations under the *Traffic Safety Act* to require a photograph of everyone who obtains or renews an Operator's (driver's) Licence.
2. This is an appeal of a May 17, 2007 decision of the Alberta Court of Appeal, which held by a majority that our photo requirement is an unjustified infringement of the Respondents' freedom of religion.¹ The Court of Appeal upheld a declaration by the Honourable Mr. Justice LoVecchio² that amendments creating Alberta's photo requirement were invalid. Mr. Justice Slatter dissented, holding that the photo requirement is justified.³
3. The Respondents, the Hutterian Brethren of Wilson Colony and Hutterian Brethren Church of Wilson Colony, understand⁴ 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") to prohibit them from allowing their photographs to be taken willingly.
4. Alberta accepts that the licence photo requirement impairs the Respondents' freedom of religion, as protected by Section 2(a) of the *Canadian Charter of Rights and Freedoms*. The parties disagree only about whether this restriction of religious freedom is justified under Section 1 of the *Charter*.⁵
5. Driver's licence photographs were introduced in Alberta in 1974. For many years Hutterites were not required to have photographs on their driver's licences, out of consideration of their

¹ Reasons for Judgment of the Honourable Madam Justice Conrad, concurred in by the Honourable Mr. Justice O'Brien, **Appellant's Record Volume I, Pages 19-32**.

² Reasons for Judgment of the Honourable Mr. Justice LoVecchio of the Alberta Court of Queen's Bench, **Appellant's Record Volume I, Pages 6-15**.

³ Dissenting Reasons for Judgment of the Honourable Mr. Justice Slatter, **Appellant's Record Volume I, Pages 33-55**.

⁴ For ease of expression, we do not distinguish between the named Respondents and their members, e.g., "The Respondents believe that ..."

⁵ The Attorney General has not contested that the photo requirement impairs the Respondents' equality rights. The Respondents' Notice of Application in our Court of Queen's Bench referred to Section 2(a) of the *Charter* but did not mention Section 15(1) as grounds for finding a *Charter* infringement, although the Section 15(1) was argued in the (then) Applicants' Brief. We did not separately deal with Section 15(1) in our argument in Queen's Bench, our position being that Section 1 analysis of the admitted Section 2(a) infringement should follow "reasonable accommodation" reasoning familiar from anti-discrimination law. Our view of the form Section 1 analysis should take was vindicated by this Court's decision in *Multani*, which was released on the morning this case was heard in Queen's Bench. Since *Multani* there has been no apparent need to distinguish our responses to the Respondents' Section 2(a) and 15(1) claims.

religious beliefs. Until May 2003 photo-free “Condition Code G” licences were available to members of religious groups that objected to the photo requirement. In May 2003 there were 453 Condition Code G licences in Alberta.

6. On May 20, 2003 driver’s licence photographs became mandatory. Section 14(1)(b) of Alberta’s Operator Licensing and Vehicle Control Regulation⁶ was amended to require a facial photograph of every person applying for or renewing an Alberta Operator’s Licence for incorporation in the licence. Previously, the Registrar of Motor Vehicles had discretion to require a photo of any licensee and did not demand a photo of people who qualified for Condition Code G licence. The amendment removed that discretion.
7. The amending regulation, Alberta Regulation 137/2003, also enabled the Registrar of Motor Vehicles to use facial recognition software (which measures unique invariable characteristics of a person’s face) to identify someone who applies for an operator’s licence. Section 14, as amended, provides:
 - 14(1) Before issuing or renewing an operator’s licence or issuing a duplicate operator’s licence, the Registrar
 - (a) must be satisfied that the applicant is the person named in the application, and
 - (b) must **[previously “may”]** require an image of the applicant’s face, for incorporation in the licence, be taken by equipment provided by the Registrar.
 - (2) An image incorporated into the operator’s licence must be an image taken under subsection (1).
 - (3) **[new]** The Registrar may, without limiting the use of other means of identity verification, use 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.
8. Section 14 was amended by the Minister of Transportation under authority of the *Traffic Safety Act*.⁷
9. A photo-bearing licence readily identifies a driver to a peace officer as the holder of a licence. For nearly 30 years between 1974 and 2003 Alberta tolerated the difficulties the Condition Code G licence posed for highway traffic enforcement. Our justification of the

⁶ Alberta Regulation 320/2002 [**Appellant’s Authorities, Tab 12**], as amended by AR 137/2003 [**Appellant’s Authorities, Tab 13**]. Henceforth, for brevity, “Section 14(1)(b)”.

⁷ *Traffic Safety Act*, RSA 2000, Chap. T-6, Section 64 (1)(a)(i) and (ii) [**Appellant’s Authorities, Tab 11**]

licence photo requirement has not focused upon these difficulties. Rather, *two recent developments justify our new insistence on a licence photograph. There are, first, threats to the public that did not exist in 1974, which, second, we may now reduce with facial recognition technology and digital photos of licensees.*

10. The purpose of a driver's licence photo is to enable a peace officer to easily determine that a driver who produces an Operator's Licence is truly the holder of the licence. The usefulness of the Operator's Licence for its statutory purpose has made it the generally-accepted identity document in our society. "It is, *de facto*, our national identity card."⁸ The driver's licence's currency as identification makes a false driver's licence invaluable to someone who would impersonate another or who would create a false identity. It is a "breeder document", which enables a wrongdoer to obtain other false evidence of identity.
11. Identity theft is now "by far the most prevalent and fastest growing form of fraud".
12. Moreover, we face threats to public safety that were unforeseen in 1974, which are reduced if the driver's licence cannot be used to create a false identity.
13. Facial recognition analysis ("FR") interferes with attempts at impersonation and the creation of false identities by those who would abuse the currency of driver's licence as identification. FR allows us to be sure that a person renewing or replacing an Operator's Licence is the person to whom the licence was issued. FR analysis also tells us whether a licensee holds a second Alberta Operator's Licence under a different name. Moreover, FR analysis prevents collusion between a wrongdoer and a person working in a registry office. There is no good alternative to the photo requirement, which achieves these purposes.
14. In the course of this litigation the Minister of Government Services made two proposals in an effort to accommodate the Respondents' beliefs. These proposals protect the security of the Operator's Licence, because each requires a digital photo to be taken for purposes of facial recognition analysis. The proposals seek to reduce or eliminate Appellants' contact with an image. The first proposal also preserves the primary advantage of a photo licence, the ready identification of a driver as a licensee:

⁸ Affidavit of Joseph Mark Pendleton sworn July 28, 2005, Para. 25, **Appellant's Record Volume II, Pages 91-104.**

- a. Alberta will require a digital photo of every licensee, but will issue to Hutterites who claim a religious objection an Operator’s Licence in a wallet, envelope or folder marked to indicate that it is the property of the Province of Alberta and that it is given to the licensee to be kept in the licensee’s possession when operating a motor vehicle and offered to a peace officer as necessary. Arrangements will be made to ensure that the Operator’s License is replaced in its enclosure when returned to the licensee. The digital photograph will be placed in our facial recognition database to ensure that someone does not impersonate the licensee by seeking an Operator’s Licence in the licensee’s name. FR will also ensure that the licensee holds only one Operator’s Licence.
 - b. Alberta will require a digital photo of every licensee, but will issue a licence that bears no photograph to Hutterites who claim a religious objection. The digital photo will be placed in our facial recognition database to ensure that no one impersonates the licensee and obtains an Operator’s Licence in the licensee’s name. FR will also ensure that the licensee holds only one Operator’s License.
15. Neither proposal is acceptable to the Respondents, because both require a photograph to be taken for facial recognition analysis.

B. The Decisions Below

a. Queen’s Bench

16. Mr. Justice LoVecchio identified “whether or not the new requirement of a digital photograph for every licensee is justified under Section 1 of the Charter” as “[t]he sole issue in dispute”.⁹
17. His Lordship accepted that “the prevention of identity theft and the broad range of harm that arises out of identity theft is a sufficiently pressing and substantial objective to meet the first stage of the *Oakes* test”. He noted, however, that our claimed objective, “of ensuring that the system of issuing operator’s licences is safeguarded from fraud” does not address the problem of identity theft generally, as “it does not protect the identities of those not qualified to drive.” He warned that our “more limited understanding of the objective of the impugned

⁹ Reasons for Judgment, Para. 8. **Appellant’s Record Volume I, Page 9.**

legislation must be borne in mind when considering the factors under the second stage of the *Oakes* analysis.”¹⁰

18. Mr. Justice LoVecchio held that the photo requirement is rationally connected to preventing identity theft:

16 Operator's licences are clearly an important form of identification. There is no question that they may be used to obtain other forms of identification. So 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 matter the larger objective of limiting identity theft.

19. Mr. Justice LoVecchio went on to hold that there is an alternative way to achieve the objectives of the photo requirement, which does not require the Respondents to be photographed:

27 The Applicants have proposed an alternative to the scheme imposed by the regulation. That alternative would be to issue, to the Wilson Colony members who qualify to drive, non-photograph driver's licences that are specially marked "not to be used for identification purposes". This would not impair the Applicants' guaranteed *Charter* rights.

28 In my view, this accommodation would also meet the government's objectives. The non-photographic driver's licences would bear a warning to all who might rely upon them as identity documentation not to do so. Even in the unlikely event that an individual sought to obtain a non-photographic driver's licence by impersonating a person who claimed a religious objection to the capture of their image, that individual would be significantly limited in the extent to which he or she could use the licence.

29 Because there is a reasonable accommodation available, which would provide adequate safeguards against identity theft, while at the same time not requiring individuals with bona fide religious objections to violate their religious beliefs, I find that the government has failed to demonstrate that the mandatory requirement of a photograph constitutes minimal impairment of the guaranteed right.¹¹

20. Mr. Justice LoVecchio also compared the photo requirements' benefits to its impact on the Respondents:

30 Because I have concluded that the impugned regulation does not constitute a minimal impairment, it is not strictly necessary to weigh its deleterious and salutary effects. It is worth noting, however, that the effects of the measure should be carefully considered in the context of its limited objectives.

31 Operators' licences containing digital photographs, 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. These licences do

¹⁰ Reasons for Judgment, Para. 14. **Appellant's Record Volume I, Page 10.**

¹¹ **Appellant's Record Volume I, Page 12**

not, however, safeguard the identity of the thousands of other individuals to whom operators' licences are never issued because they do not qualify to drive.

32 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.¹²

21. In the result, His Lordship declared that “Section 3 of AR 137/2003 is inconsistent with the Constitution of Canada and is of no force or effect.”

b. The Majority in the Court of Appeal (Conrad and O’Brien JJ.)

i. Alberta Cannot Rely on Prevention of Fraud and Protection of Public Safety to Justify the Photo Requirement.

22. A majority of the Court of Appeal described the claimed purposes of the photo requirement and accepted that they were “in principle” sufficient to warrant a restriction of *Charter* rights and freedoms:

[21] The Province submits that the mandatory photo requirement being challenged in this case is necessary to prevent identity theft, facilitate harmonization with other provinces and countries, and reduce terrorism. In support of this argument, it notes that drivers' licences have become a widely accepted form of identification and that false licences are therefore not only dangerous in and of themselves, but can also be used to gain other fraudulent documentation. As a result, drivers' licences are "breeder documents" which can be used to steal another person's identity and impersonate that individual for criminal or terrorist purposes. Further, using a digital photograph to minimize the security threats posed by fraudulent licences is consistent with many of the inter-jurisdictional harmonization agreements Alberta is seeking to enter.

[22] The Province argues that requiring photos for its facial recognition database will reduce the security risks associated with licences in two ways:

1. it will not be possible to fraudulently claim the identity of an individual already in the system; and
2. it will not be possible for an individual already in the system to apply for a second licence using a false name.

[23] It is self-evident that increasing security, preventing identity theft and minimizing terrorism are pressing and substantial goals sufficient to warrant, in principle, a breach of an individual's *Charter* rights. Thus, where the Province passes laws aimed squarely at these purposes, the first portion of the section 1 analysis will almost always be met.¹³

¹² Appellant’s Record Volume I, Page 12

¹³ Appellant’s Record Volume I, Pages 24-5

23. The majority did not, however, accept that Alberta has passed laws “aimed squarely at these purposes”. The majority holds that although the Lieutenant Governor in Council may properly limit abuse of the driver’s licence’s currency as identification when it enacts regulations that set a photo requirement, Alberta cannot rely on prevention of fraud and protection of public safety to justify the photo requirement’s effect on the Respondents’ freedom of religion. Prevention of “peripheral harm”, outside the primary purposes of the legislation under which Section 14(1)(b) is enacted, cannot justify the photo requirement. The majority nonetheless held that the purposes of the photo requirement, so far as they relate only to highway safety, were capable of justifying a restriction of a right or freedom protected by the *Charter*:

[26] During oral submissions, the Province recognized that the purpose of the *TSA* is highway safety, not security. It argues, however, that the Province has a responsibility to minimize the harm caused by its legislation and that this forms a valid objective of regulations passed under the *Act*. It says that part of that responsibility is to minimize the risks caused by the status of drivers’ licences as breeder documents.

[27] While *the Province is entitled to consider the peripheral harm which may result from its regulations under the TSA or, indeed, under any act, this risk minimization does not constitute a discrete objective of the Act sufficient to warrant overriding a right guaranteed by the Charter. A secondary objective of minimizing harm is incapable of saving a regulation which is not, on its own, justifiable in a free and democratic society.* When the *TSA* was passed, the Legislature determined that highway safety was a pressing and substantial objective which warranted action by the state. To help reach that objective, it enabled the Minister or the Lieutenant Governor-in-Council to pass specific kinds of regulations. These powers are enumerated in nine distinct provisions of the *TSA*, with each section authorizing a series of regulations relating to a specific subject matter: *TSA* sections 18, 64, 81, 100, 105, 116, 129, 156, 191. While the topical nature of the contemplated regulations varies, their common element is that they all relate directly to highway safety. Thus, subject to any future amendment to the *TSA*, the broad objective of highway safety must underlie all regulations passed under that *Act*.

[28] This does not, of course, preclude the introduction of new legislation aimed specifically at preventing terrorism or identity theft. Nor does it prevent the Legislature from amending the *TSA* to include broader goals surrounding licence security or other forms of potential harm. *What it does do is ensure that the means taken to achieve these important objectives are discussed and debated by our elected representatives. The possible infringement of rights which might result from any government action in this regard would also form part of this discussion. If measures introduced pursuant to such a debate are challenged on Charter grounds, the Province will be able to legitimately frame the objective as increasing security.* In this case, however, security, anti-terrorism and prevention of fraud are not the goals the Legislature has authorized the Minister to pursue, and the inquiry should therefore be limited to whether the impugned regulation serves an objective related to the permissible goal of highway safety.

...

[30] In my view, the true goal of the impugned regulation is to ensure that every individual who has applied for a licence is represented in the Province's facial recognition database. Thus, at best, the highway traffic related aims of the photo requirement are (a) *to prevent an individual from applying for a licence in another person's name*, and (b) to prevent a single individual from obtaining two licences. These two objectives are aimed at ensuring the integrity of the TSA's licensing regime, as they protect the Province's ability to ensure that only qualified motorists are driving vehicles, that demerits and suspensions are properly allocated, and that other details of an individual's driving record are accurate. These are important facets of our system for protecting highway safety and constitute valid goals under the Act. I find that they are also both pressing and substantial objectives sufficient to warrant, in principle, an infringement of a *Charter* right.¹⁴ (Emphasis added.)

24. We note that the majority does not merely truncate Alberta's Section 1 argument, refusing to consider goals other than traffic safety. The majority also expands the first purpose we claim for the photo requirement, from that of making it "impossible to fraudulently claim the identity of an individual already in the system" to a broader goal, italicized in the last quoted paragraph above, of preventing "an individual from applying for a licence in another person's name" regardless of whether that person has a driver's licence.

25. The majority's subsequent criticism of the photo requirement's connection to its purpose turns on its failure to prevent fraudulent impersonation *of* people who are not already in the system *by* people who are not in the system, a virtue that we do not claim for the photo requirement and happily admit that it does not have.

ii. The Majority's Reasoning on Proportionality

26. The majority is best read as comparing the photo requirement's benefits to its effect on the Respondents' freedom of religion throughout its discussion of proportionality. Its section on "Minimal Impairment" (paras. 43-53) is really an evaluation of the photo requirement's benefits.

27. Careful attention to the majority's reasoning shows that it holds that nothing significant is accomplished by applying the photo requirement to the Respondents. That is, the majority holds that:

- a. the photo requirement's ability to detect attempts at impersonation of people who have driver's licences is insignificant because many possible victims of impersonation do not have driver's licences,¹⁵ and

¹⁴ Appellant's Record Volume I, Page 25-6

¹⁵ Paras. 40-42, 46. Appellant's Record, Volume I, Pages 28-30.

- b. the photo requirement's ability to detect attempts by licence holders to obtain a second licence is insignificant because
 - i. comparatively few people claimed exemptions from the photo requirement on religious grounds when exemptions were available, and there is no historical evidence of a problem of people whose real licence has no photo obtaining second licences,¹⁶ and
 - ii. a holder of a no-photo licence who seeks a second licence can be detected well enough when he misrepresents his religious beliefs.¹⁷

28. This reasoning a) leads the majority to conclude, first, that the photo requirement is not rationally connected to the (expanded) goal of ensuring that wrongdoers do not obtain licences in others' names. Second, characterizing our proposed accommodations of the Respondents' beliefs as "absolute" restrictions of the Respondents' rights because both proposals require them to be photographed, and concluding that the mandatory photo requirement accomplishes nothing significant, the majority finds b) that the photo requirement does not minimally impair the Respondents' rights.

29. Thus, the majority decision turns on the practical unimportance of applying the photo requirement to the Respondents.¹⁸ It does not turn on the rationality of the photo requirement's connection to its goals or on the existence of an alternative way to achieve those goals, which does not impair the Respondents rights. (For analytical clarity our Section 1 argument will consider whether the goals of a mandatory photo requirement, which, requires a photo of those who might properly claim that a photograph infringes his or her freedom of religion, are pressing and substantial, and then turn to whether a mandatory photo requirement achieves its goals and whether less-intrusive alternatives exist.)

30. Having concluded that the photo requirement either lacks a rational connection to its (expanded) goals or fails to minimally impair the Respondents' rights, the majority compares the photo requirement's impact on the Respondents' way of life with the risk associated with allowing exceptions to the photo requirement:

¹⁶ Paras. 47, 48. **Appellant's Record, Volume I, Page 30.**

¹⁷ Paras. 49-52. **Appellant's Record, Volume I, Pages 30-31.**

¹⁸ To help fix ideas, we believe that the structure of majority's reasoning can be illustrated by analogy to the facts of *Multani, infra*: the majority embeds a finding that a kirpan is not dangerous in its discussion of proportionality.

[55] Although the Hutterian Brethren may be able to hire drivers to help with some routine tasks, it is difficult in today's world to imagine an entire rural community functioning effectively when none of its members are able to operate a motor vehicle on Alberta's highways. This reality is reflected in the finding of the chambers judge that the very existence of these communities is dependent on some members being able to drive. Thus, the effects of the law on the respondents are overwhelming and significant, and stand in stark contrast with the minute risks associated with allowing some exceptions to the mandatory photo requirement.¹⁹

C. Our Section 1 Evidence

2. The core of our Section 1 argument appears in the Affidavit of Joseph Pendleton sworn July 28, 2005.²⁰ Mr. Pendleton's central testimony is as follows:

- Facial recognition software allows us to rapidly compare a digital photograph of a person seeking an operator's licence not only with previous photographs of the licensee named in the licence (a one:one comparison) but also with photographs of other licence holders that are in our database (a one:many comparison). (Our database will be complete by May 2009.)
- A combination of FR technology and human review detects attempts at impersonation and creation of false identities that were previously undetectable.²¹ Human beings review and if necessary investigate licence applications and renewals that FR identifies as worthy of concern. Before the introduction of FR there was no way to tell if a licensee held a second licence under a different name.
- Moreover, we issue a photo-bearing license from a central production facility only after our facial recognition software and personnel have approved the licence. Central issue of Operator's Licences after FR analysis ensures that registry agents or their employees, who deal directly with people renewing licences, cannot collude with a person who seeks a licence in another licensee's name or who seeks a second licence under a false name.

¹⁹ **Appellant's Record Volume I, Page 32.**

²⁰ Affidavit of Joseph Mark Pendleton sworn July 28, 2005, Para. 25, **Appellant's Record Volume II, Pages 91-104.**

²¹ We note that before the introduction of FR, there was no way to tell if any particular licensee held a second licence under another name. The majority in the Court of Appeal makes much of the fact that we adduced no evidence to show that holders of Condition Code G licences obtained second licences in the past.

At paragraph 32 of his first affidavit²² Mr. Pendleton describes an actual circumstance that would now be prevented by the internal control that FR makes possible:

32. Consumer fraud does not exhaust the criminal purposes of an impersonation. One Alberta woman, S., renewed her driver's licence in 2002, and found that another woman had renewed the licence and obtained a licence with her own photo on it. The unknown impersonator had used S.'s name and presented the false driver's licence to Las Vegas police, where she had been charged and convicted of prostitution under S.'s name. We believe, but could not prove, that this impersonation had been facilitated by a dishonest registry agent, paid by Las Vegas pimps to supply false identification for a number of women going Las Vegas from Alberta. This impersonation would have been detected immediately by a one:one comparison if it had been attempted after we introduced FR. If S. had been a Hutterite woman holding a Code G licence, a one:one comparison would detect nothing.

- Between May 2004, when facial recognition software was introduced, and the date of Mr. Pendleton's affidavit in July 2005, twenty-five criminal investigations resulted from the use of FR, a majority of which resulted in criminal charges and many of which were continuing at the latter date.
- In 1974 the major motivation for an altered or false driver's licence was minors' attempts misrepresent their ages and obtain access to alcohol. In recent years criminals have taken advantage of the opportunities that misrepresentation of identity creates for fraud. "Identity theft" is the collection and use of another's personal information without his or her knowledge to impersonate that person for criminal purposes. Identity theft is now by far the most prevalent and fastest-growing form of fraud.
- In the case of a Hutterite, who lacks existing sources of credit that may be "hijacked" by someone who impersonates him or her, the risk is instead that a person may fraudulently obtain credit or goods and services from new sources using the Hutterite's name. *The primary victims of identity theft are those who are persuaded to extend credit or furnish goods and services to someone who is not who they claim to be.*
- *A driver's licence is a "breeder document" because it is readily accepted as proof of identity in our society and can be used to create other evidence of false identity.* A false

²² Affidavit of Joseph Mark Pendleton sworn July 28, 2005, Para. 32. **Appellant's Record Volume II, Pages 91-104.**

Operator's Licence provides the means for a person to fraudulently incur debts and obligations in another's name. If a fraud artist obtains enough personal information about a Hutterite who holds a licence for which no photo exists in our database the wrongdoer may persuasively seek to renew the licence or to replace the licence, claiming it to be lost. The licence itself might be lost or stolen and fall into the wrong hands and renewed with another person's photo on it. Or, a wrongdoer may collude with a registry agent or employee in obtaining a licence in the Hutterite's name. With a false photo-bearing licence a wrongdoer has better evidence that he is the person he impersonates than his Hutterian victim does, and the Hutterian way of life leaves nothing negative on the victim's credit record. Our facial recognition security measures would not detect the impersonation unless the fraud artist's photo was already in our database.

- Mr. Pendleton also testifies, at Paragraph 33 of his July 28, 2005 affidavit:

33. After the terrorist attacks in New York City on September 11, 2001 Cabinet decided to completely revamp Alberta's driver's licence program, to ensure that Alberta issues the most secure licence possible. Although the purpose of the licence is to ensure traffic safety in this province, its widespread acceptance as proof of identity and its status as breeder document both here and elsewhere makes the security of the driver's licence a public safety issue. This concern is real, not hypothetical. Although I am unable to discuss the circumstance in any detail because I received information from the RCMP subject to security classifications that do not permit it, in 1999 a false Alberta driver's licence was issued to an individual who several years later was arrested in the United States while attempting to carry out a terrorist attack. Although the Alberta document was not implicated in the attempted attack, our security measures, which now make Alberta's licence the most secure in North America, respond to the real possibility that defects in security will be exploited by those who wish us ill. Our photo requirement and facial recognition analysis are an essential part of this improved security.²³

- The Hutterian Brethren are not the only group whose beliefs may be appropriated by those who seek to hold two Operator's Licences, whether to drive while suspended or to create a false identity. Nor are they the only group whose members can plausibly claim an exemption from the photo requirement and thus become candidates for impersonation. Mr. Pendleton describes an application for a Code G License by a Caucasian man

²³Affidavit of Joseph Mark Pendleton sworn July 28, 2005, Para. 33, **Appellant's Record, Volume II, Page 101.**

committed to “native spirituality” who believed, with his immediate circle and with undoubted conviction, that a photograph would “steal his soul”. (Litigation in other jurisdictions, while of limited assistance to our legal analysis, shows similar claims regarding licence photos have been made on behalf of other religious groups.²⁴)

31. The majority in the Court of Appeal suggests at Paragraph 44 of its reasons that we have “not proposed any accommodation which will alleviate the need for the Hutterian Brethren to be photographed as a condition of licensing. There is, for example, no suggestion of collecting other unique identifying data in lieu of the photo.” Our evidence regarding alternatives to the digital photo did not figure prominently in our argument before the Court of Appeal because the Respondents did not press any argument that alternative “unique identifying data” might achieve the goals of the photo requirement. Nonetheless, Mr. Pendleton’s second affidavit²⁵ responds to the Respondent’s suggestion early in this litigation that a thumbprint might serve as a substitute for a digital photo, and speaks to this issue in detail:

- The advantage of the driver’s licence photo for its primary purpose is that it can be used by any peace officer, without special training, to identify a driver and determine his or her right to drive. While for many years we accepted the difficulties created by the Condition Code G licence for highway traffic enforcement, this does not undermine the necessity of having almost all drivers carry a photo-bearing license.
- The general currency of the driver’s licence as identification flows from its effectiveness for its primary purpose: *anyone* can tell if someone proffering a driver’s licence is the person described in the licence by comparing the licence photo with the person’s face.
- The alternative biometric indicator of identity suggested by the Respondents, a thumbprint, is not useful for the photo’s primary purpose. First, a *thumbprint* cannot be reliably compared with a person’s *thumb*, as a picture can be compared with a person’s face. Second, not only would every peace officer engaged in highway traffic

²⁴ See, e.g., *Freeman v. Dep’t of Highway Safety and Motor Vehicles*, 924 So. 2d 48 (Fla. App. 5 Dist., 2006) [**Appellant’s Authorities, Tab 2**] (Islamic woman refuses to remove veil for driver’s licence photo); *Valov v. Department of Motor Vehicles*, 132 Cal. App. 4th 1113 (Cal. App. 2 Dist., 2005) [**Appellant’s Authorities, Tab 9**] (Molokan man refuses to take a driver’s licence photo, considering it a graven image). These relatively-recent decisions describe the factual circumstances in earlier U.S. litigation.

²⁵ Affidavit of Joseph Mark Pendleton sworn February 1, 2006, Paras. 1-15, **Appellant’s Record, Volume III, Pages 307-313**.

enforcement require special training to make a comparison between a licence thumbprint and a *thumbprint* taken from a driver, the controlled conditions required to a) take a driver's thumbprint and b) compare the thumbprints do not exist at roadside.

- Like FR analysis, AFIS (the Automated Fingerprint Identification System) cannot conclusively identify matches between a fingerprint and fingerprints in a data base without human review. Unlike FR analysis, where facial photos can be quickly compared by attentive laymen, AFIS requires that trained experts review the fingerprints that the software identifies as worthy of concern. The sheer number of digital photos we analyze each year to ensure that no one holds more than one licence (about 800,000) implies a "huge" investment in review by fingerprint experts.
- Moreover, we could not ensure that an applicant for a driver's licence does not hold another licence under a different name by fingerprinting only people who object to being photographed for religious reasons. We would have to fingerprint *everyone*, so that we would have something to compare objectors' fingerprints *to*. Mr. Pendleton describes the logistics of the project:

6. ... [I]n order for a thumbprint to serve the purpose of comparison between holders of operator's licenses, it will be necessary to fingerprint *all* applicants for driver's licenses, and not merely those who wish not to be photographed. In 2005, we analyzed *nearly eight hundred thousand* (798,674) digital photos with our facial recognition software for driver's licence applications and renewals and for a relatively small number of government-issued identification cards that are available to people who do not drive. As Mr. Lounsbury points out, taking good fingerprint impressions in a controlled environment is a learnable skill. It is not, however, a trivial one. It is nowhere near as reliable as simply taking a digital photograph. *Taking a digital photo is idiot-proof and taking a good fingerprint impression isn't.* The capture of thumbprints for security purposes would require nearly eight hundred thousand thumbprints to be taken each year, in 224 registry agents' offices by over one thousand registry employees. Use of thumbprints would introduce an unnecessary source of error into the security system. (Emphases in original.)

- Alberta's decision in favour of digital photos has international support:

14. In my previous affidavit, I described the virtues of facial recognition technology as a security measure. Mr. Lounsbury's affidavit raises the issue of the relative merits of facial images over other biometric identifiers. Alberta Government Services considered using other

biometric identifiers before Cabinet's decision to make Alberta's operator's licence the most secure possible. After examining the alternative biometrics available (including fingerprinting) we decided that facial recognition was the preferred option. Notably, the International Civil Aviation Organization (ICAO), when considering the establishment of international standards for biometrics with respect to passports and travel documents, also concluded that facial recognition technology was the best choice. The ICAO is the United Nations agency concerned with co-operative international regulation of civil aviation. In its review of possible biometrics ICAO considered many of the same factors that Government Services considered. A prominent virtue of facial biometrics is that they are, and are perceived to be, less intrusive than alternatives – unlike an image of a fingerprint or a retinal scan, an image of one's face does not disclose information that one does not routinely disclose to others in daily life.

- Thus, digital photos also better respect the *privacy* of other licence holders than do other biometrics – a database of facial images does not require the state to store information about licence holders that they do not routinely disclose to others.

32. Thus, FR has overwhelming practical advantages over “unique identifying data” because it takes advantage of ordinary human beings' ability to recognize others by their faces.

D. Other Aspects of the Regulatory Scheme

i. Procedures on Enrollment.

33. Facial recognition analysis is not the only product of Alberta's efforts to make our Operator's licence “the most secure licence possible.” Mr. Pendleton testifies:

35. Since the decision was taken to make the Alberta's driver's licence the most secure possible, we have:

- Improved the requirements of identity verification for issuance of a new driver's licence;
- Increased the physical security characteristics of the card itself, with Alberta being the only jurisdiction to laser engrave its driver's licences to prevent counterfeiting;
- Introduced the use of facial recognition software, as I have described;
- Created the [Special Investigations Unit], to actively investigate breaches and possible breaches of security.

34. Our improved requirements for identity verification are described in extracts from *Alberta Government Services' Registry Agent Motor Vehicle Policy and Procedure Manual*.²⁶ Our identity verification process for people who seek to obtain, renew or replace a licence is set out in Sub Section 2.05.02 of the *Manual*.²⁷ We inquire into who a prospective licensee is (photo identification, preferably government-issued), what other supporting documents they have, and whether the prospective licensee is familiar with personal information that is already in our possession or which appears on the documents presented.
35. Unless and until our identity verification procedures can be made foolproof, the internal security provided by FR remains necessary. We refer the Court to our procedures to enable it to consider, in concrete terms, whether our claimed need for FR is an artifact of any defect in our efforts to verify the identity of those who obtain, renew or replace an Alberta Operator's Licence. We believe that we can make it difficult but not impossible for a wrongdoer to falsely obtain a licence in another licensee's name or in a false name, and that our efforts in this regard will satisfy the Court. Our photo requirement thus plays an essential role in the system's security.

ii. Identity Cards for Albertans without Operator's Licences

36. In his reasons, Mr. Justice LoVecchio indicates that he regards the purpose of the photo requirement – to prevent the Alberta Operator's Licence from being abused by those who would impersonate others or who would establish a false identity – to be of diminished importance because Alberta has not created a scheme of identity documents to generally combat identity theft and the creation of false identities.
37. Although Alberta has no scheme of mandatory identity papers, there *is* a voluntary government-issued identity card, which is available to those who do not have an Operator's Licence²⁸ and who wish to carry government-issued photo identification.²⁹ FR is used to ensure the joint security of Identification Cards and Operator's Licences.³⁰

iii. Reciprocal and International Standards

²⁶ **Appellant's Record , Volume IV, Pages 556 through 587.**

²⁷ **Appellant's Record , Volume IV, pages 556 through 563.**

²⁸ Alberta Regulation 221/2003 (Identification Card Regulation), Section 2(a), 6. [**Appellant's Authorities, Tab 14**]

²⁹ *Government Organization Act*, R.S.A. 2000, Chap. G-10, Schedule 12 (Registries Administration), Part 2 (Voluntary Identification Cards). [**Appellant's Authorities, Tab 10**]

³⁰ Alberta Regulation 221/2003 (Identification Card Regulation), Section 7. [**Appellant's Authorities, Tab 14**]

38. The Alberta driver's licence is accepted as authorization for driving out-of-province pursuant to reciprocal agreements reached with other provinces and territories, with U.S. states and with other countries (the United States, Japan, Germany, Austria, Republic of Korea, Switzerland, Belgium and the United Kingdom.) Mr. Pendleton testifies:

37. The Canadian Council of Motor Transport Administrators ("CCMTA"), of which Alberta is a member, is the official government organization in Canada for driver and vehicle licence administration, road safety standards and commercial vehicle management. The CCMTA is comprised of representatives of all provinces and territories and the federal government and reports to the Council of Ministers Responsible for Transportation and Highway Safety and the Council of Deputy Ministers Responsible for Transportation and Highway Safety. The CCMTA's responsibilities include establishment of national road safety policy and standards, including standards for driver qualifications and driver's licences. The CCMTA manages the Interprovincial Record Exchange system, which provides interprovincial exchange of information regarding licensed drivers and enables Alberta and other jurisdictions to check a driver's qualifications and driving record when issuing an driver's licence.

38. The CCMTA is completing a new Canadian Driver Licence Agreement, to be published in 2006, which will replace the 1990 Canadian Driver Licence Compact. At the direction of the Council of Ministers, the new CDLA will include new security initiatives, which include new driver's licence security requirements, including a mandatory photo requirement for all driver's licences issued in Canada.

39. The CCMTA's new security initiatives are being developed in conjunction with the American Association of Motor Vehicle Administrators ("AAMVA"), of which Alberta and other CCMTA members are members. AAMVA is an international organization representing state and provincial officials in the United States and Canada who administer and enforce motor vehicle laws. The CCMTA has endorsed AAMVA's Driver Licence Identification Security Framework and its International Card Design Specification under the new Canadian Driver Licence Agreement in order to harmonize driver's licence security measures and achieve the goal of a single licence and driving record for each driver in North America. A digital photograph will shortly become a mandatory part of the reciprocal agreements governing minimum standards of driver's licence security throughout Canada and the United States.

39. We understand that the mere existence of inter-jurisdictional agreements that will require a driver's licence photograph cannot, of themselves, justify a limitation of the Respondents' religious freedom. We do, however, say that the coming demand for a mandatory driver's licence photo indicates a North American consensus regarding minimum security standards

for driver's licences and pursues a shared goal of "a single licence and driving record for each driver in North America."

40. The majority in the Court of Appeal inferred from the fact that some Canadian and U.S. jurisdictions permit religious exemptions from the photo requirement, much as Alberta did before 2003, that "inter-jurisdictional agreements are not conditional on an absolute requirement that licences contain photographs."³¹ Mr. Pendleton's evidence is clear, we believe, that the new Canadian Driver Licence Agreement he describes is *prospective*, that it requires a photograph as a minimum security standard, and will, when it comes into force, require some jurisdictions to change their laws.³²

E. Why the Respondents Object to Being Photographed

41. The precise nature of the Respondents' objection to Section 14(1)(b) becomes important when we consider the extent to which our proposals accommodate the Respondents' beliefs and attempt to compare the photo requirement's benefits to its impact on those beliefs. The Respondents' affidavit evidence regarding their religious objection to being photographed evidence appears, in its entirety, at paragraph 8 of Samuel Wurz' affidavit affirmed August 10, 2005:

8. Aside from the doctrine of communal property, the Hutterian Brethren believe that Commandment No. 2 of The Ten Commandments prohibits the capture of one's image, and accordingly, do not submit to allowing their photograph to be taken willingly as to do so would be a sin. Commandment No. 2 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", which the Hutterian Brethren interpret to include photographs capturing their likeness, and attached hereto and marked as Exhibit "C" to this my Affidavit is The Ten Commandments.³³

42. On cross-examination Mr. Wurz allowed that his objection to photographs goes beyond participation in making images. Regardless of how an image is made, his religious convictions prevent him from "having images as part of your daily life."³⁴ Mr. Wurz further testified that possession and use of an image is offensive to him because of its connection to

³¹ Paras. 33, 34. **Appellant's Record, Volume I, Page 27.**

³² Assuming, of course, that the mandatory photo requirement is consistent with the ultimate decision of this Court.

³³ **Appellant's Record, Volume II, Page 192.**

³⁴ Transcript, Page 3, lines 15-27; Page 4, lines 7-13; Page 5, lines 1-10. **Appellant's Record, Volume V, Pages 668-70**

idolatry, which he was willing to characterize as “seeking salvation, comfort or help in some created thing rather than in God”.³⁵

43. Mr. Wurz was asked to consider why making an image not “for himself” but for another’s possession and use is contrary to God’s will. His testimony is as follows:

Q ... I’m taking it you’re familiar with Chapter 14 of the Wisdom of Solomon, are you?

A Yes.

Q And do you understand that to be an articulation of concerns related to images and idolatry that you would accept and adopt? You take it as Scripture and authoritative?

A Yes.

Q Now, what I’m trying to – just so you know where we’re going so you know, have some context for the question I’m going to be asking, what I’d like to talk about is someone who makes an image but not for himself but for another’s possession and use, does something contrary to God’s will.

A Yes.

Q You’d agree with that?

A Yes.

Q And looking at Chapter 14 of the Wisdom of Solomon I see in Verse 11 it refers to “[i]dols as being [c] stumbling blocks to the souls of man and a snare to the feet of the unwise” and what I take that to mean is that someone who makes an idol, who makes an image not for his own use or not to become part of his own daily life but for someone else, what’s wrong with that is the possibility of injury or the injury he creates for others; is that correct?

A Yes.

Q So would it be fair to say that the problem with your becoming involved with creation of image which is not for yourself, is that it may contribute to or does contribute to others turning away from God?

A Yes, and I’d like to clarify that. Scripture tells us that if I do something that aggravates my brother, now if my brother or somebody in the colony does not believe in the picture and I go and make a picture and it aggravates him, why I am – and offends him, then I have to account for that before God.³⁶

44. This discussion concludes:

Q ... So your participation in the making of an image for the use and purposes of Alberta Government Services would be – one reason why it’s wrong is that it’s a snare to the feet of the unwise?

A Yes.

³⁵ Transcript, Page 7, lines 16-26. **Appellant’s Record, Volume V, Page 672**

³⁶ Transcript, Page 21, line 3 to Page 22, line 15. **Appellant’s Record Volume V, Pages 686-7.**

- Q The risk it puts people in Government Services to; and the secondary or another concern that you have about that is that the knowledge that you put people at Government Service to this risk would be known in your community and would be an offence you'd have to answer for, offence to them that you'd have to answer for?
- A Yes. ...³⁷

45. Regarding the offence to members of his colony that would be caused if he permitted his photo to be taken for use by Alberta Government Services, Mr. Wurz went on to say that he must “look at the future” – if he were to allow his photo to be taken solely for other’s use, it would undermine the authority of other practices expected of younger people of his Colony.³⁸
46. We therefore say that the core of the Respondents’ concern regarding our second proposed accommodation – which would grant the Respondents driver’s licences that did not carry photos, but would require a digital photo for our database and facial recognition analyses – is the spiritual risk that the image creates for employees of Alberta Government Services.
47. The Respondents believe that God’s commandments may not be prioritized, believing that to violate one commandment is as to violate them all.³⁹ In the Respondents’ view, if a law impairs their ability to comply God’s will at all, it does so *completely*.

³⁷ Transcript, Page 23, line 20-Page 24, line 5. **Appellant’s Record Volume V, Pages 688-9.**

³⁸ Transcript, Page 24, lines 12-21. **Appellant’s Record Volume V, Page 689.**

³⁹ Transcript Pages 9-10. **Appellant’s Record Volume V, Pages 674-5**

PART II – ISSUES ON APPEAL

48. The Appellant says that the mandatory photo requirement created by Section 14(1)(b) of Alberta Regulation 320/2002, as amended by AR 137/2003, is justifiable under Section 1 of the *Charter*:

- a. The Appellant may rely on prevention of fraud and protection of public safety in justifying the photo requirement;
- b. The photo requirement is “prescribed by law”;
- c. The photo requirement serves pressing and substantial goals;
- d. The photo requirement’s benefits are proportional to its impact on the Respondents.

PART III – ARGUMENT

49. Section 1 of the Charter provides:

1. 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.

50. We take this Court’s majority decision in *Multani*⁴⁰ to provide our model for our justification of the photo requirement’s effect on the Respondents’ freedom of religion. The general structure of a Section 1 justification of a decision by a statutory decision-maker is well-known:

23 ... [W]here the legislation pursuant to which an administrative body has made a contested decision confers a discretion (in the instant case, the choice of means to keep schools safe) and does not confer, either expressly or by implication, the power to limit the rights and freedoms guaranteed by the *Canadian Charter*, the decision should, if there is an infringement, be subjected to the test set out in s. 1 of the *Canadian Charter* to ascertain whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. If it is not justified, the administrative body has exceeded its authority in making the contested decision.

...

43 The onus is on the respondents to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be

⁴⁰ *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256 [Appellant’s Authorities, Tab 3]

proportional to the objective in question: *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.).

A. Our justification of the photo requirement properly relies on prevention of fraud and protection of public safety.

51. Our justification of our photo requirement does not focus on the ways in which a driver's licence photo assists peace officers in enforcing traffic laws. We instead rely upon the ability of digital photos and facial recognition analysis to impede wrongdoers who would commit fraud or threaten public safety by abusing the driver's licences' currency as an identity document. The majority of the Court of Appeal refused to consider prevention of fraud and protection of public safety in its evaluation of the photo requirement.

i. There is no category of purposes authorized by statute, which are unavailable to justify the photo requirement.

52. Read carefully, the majority did *not* hold that regulations made under the *Traffic Safety Act* could only pursue purposes related to traffic safety. The majority held instead that regulations *could* properly seek to limit "peripheral harm" enabled by measures that directly pursue traffic safety, but that prevention of peripheral harm could not be used to justify the photo requirement. We say that the idea that a purpose may be fairly pursued under a statute's authority but yet be unavailable to justify its impact on a *Charter* right, apparently because a purpose that is implied by law has not been sufficiently debated in the Assembly, is manifestly wrong.

53. In *Slaight Communications Inc. v. Davidson* (the then-) Mr. Justice Lamer's description of how the *Charter* applies to the exercise of a statutory discretion attracted the support of the Court:

91 Section 61.5(9)(c) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. *There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the Charter*

or to allow a protected right or freedom to be limited when the language used by Parliament suggests this. (Emphasis added.)⁴¹

54. If the Minister of Transportation may take into account prevention of collateral harm when determining the scope of the Director's discretion regarding a driver's licence photo, then the Minister may take it into account where it leads to reasonable and justifiable limits on the Respondents' freedom of religion. There is no third category, of matters that may properly be considered in the exercise of a statutory discretion, but which are unavailable to justify limitations on *Charter* rights that may result.

ii. "Prescribed by Law"

55. As we have noted, the majority does not doubt that prevention of collateral harm that is enabled by our Operator's Licence falls within the intendment of the *Traffic Safety Act*. Mr. Justice Slatter precisely describes the connection between prevention of abuse of the driver's licence and the goals of the *Traffic Safety Act* when he writes:

[90] But, in addition to the direct objectives of the statute, in performing a s. 1 analysis it is also appropriate to look at the practical realities of the situation. The primary use of a driver's licence is obviously to identify licenced drivers, but the practical reality is that driver's licences have come to be used as a nearly universal and reliable form of identification. There is probably nothing the government could do to stop that collateral use, even if it wanted to. ... In deciding on the form of a driver's licence, and when and how one will be issued, the government is entitled to have regard to the actual uses that will be made of that document. *Specifically, where the document, in this case a driver's licence, can be misused for fraudulent or improper purposes, the government is well within its rights to try and design the document to minimize or prevent such uses. It 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.*⁴² (Emphasis added.)

56. It is important to be accurate about how our photo requirement relates to the general goal of the *Traffic Safety Act*, which everyone agrees is traffic safety. First, the reason why *any* driver's licence carries a licensee's photo is to enable a peace officer to determine that a particular driver is the holder of the licence he produces. When considering whether an exemption could continue to be offered to those who have religious objections to being photographed, the role the driver's licence has come to play as identification in our society

⁴¹ [1989] 1 S.C.R. 1038, at para. 91. [**Appellant's Authorities, Tab 7**] See, also, Para. 9 (per Dickson C.J.C.) and Para. 27 (per Beetz J.).

⁴² Dissenting Reasons for Judgment of the Honourable Mr. Justice Slatter, **Appellant's Record Volume I, Page 42**.

was a factor. That is, in choosing *the manner* in which the goal of traffic safety is pursued – i.e., the scope of a photo requirement, which itself serves the primary goal of the statute – prevention of abuse of the driver’s license’s currency as identification contributed to the decision. The May 2003 amendments reflects the Minister’s conclusion that a mandatory photo and facial recognition analysis serves to prevent that abuse.

57. We thus distinguish the primary goals of legislation (here, traffic safety) from the broader class of matters that must be considered by a statutory decision-maker who must decide in particular *how* the primary goals are to be pursued. We say: the “adverbial” factors that are properly considered in choosing *means* to achieve a statute’s primary goals are open-ended and vary with the particular context.

58. *This is the rule rather than the exception.* Trivially, decision-makers are presumably expected to take into account the *cost* of alternative ways of effecting statutory goals. We attribute to legislators a general expectation that those who make statutory decisions will do so *fairly*.⁴³ To further illustrate, we ask the Court to consider the situation prior to 2003, when Directors of Motor Vehicles had discretion to *not* require a photo of a licensee and permitted people who objected for religious reasons to not be photographed. Absolutely nothing was amiss when the Condition Code G licence was offered in the 1970s, notwithstanding that the exemption was motivated by considerations other than traffic safety. The Directors of the day pursued traffic safety in a way that accommodated Hutterian belief, properly considering matters other than traffic safety in deciding the scope of the photo requirement.

59. Here, the context in which traffic safety is pursued includes the driver’s licence emergent role as our society’s identity document. An insecure driver’s licence enables new forms of wrongdoing, and new technology impedes those who would abuse the role this government-issued document now plays. Setting the photo requirement so to avoid collateral harm is comfortably within the intendment of the *Traffic Safety Act*. As a consequence, this purpose is properly considered in justification of the photo requirement’s effect on the Respondents’ freedom of religion.

⁴³ See, e.g., *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, at para. 129, per Binnie J. [Appellant’s Authorities, Tab 4]

iii. The Assembly's Privilege of Freedom of Debate

60. Paragraph 28 of the majority's reasons (which we quoted at paragraph 23 above) suggests that only legislative objectives that are debated in the Assembly can justify a restriction of a *Charter* right, because only then will restriction of the right have been considered by the Assembly. This appeal to the fact that collateral purposes will not normally have been the subject of legislative debate is constitutionally doubtful. Once it has been established that prevention of wrongdoing that is enabled by the driver's licence is a proper matter for the Minister to consider when deciding the scope of our photo requirement, our courts have no licence to consider whether the issue has been sufficiently debated in the Legislative Assembly.
61. This Court considered the constitutional status of the Assembly's privileges in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*.⁴⁴ The Assembly's refusal to permit filming of proceedings of the House was alleged to be an infringement of freedom expression and contrary to the *Charter*. A majority of the Court held that Canadian legislative bodies have such privileges as are necessary for their proper functioning. Decisions on the manner in which legislation is to be debated fall within the exclusive jurisdiction of the legislative body:
- ... Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. *The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.*⁴⁵ (Emphasis added.)
62. A decision regarding whether or how a particular matter is to be debated falls squarely within the Assembly's privileges as a legislative body and is not a proper subject of consideration by a court.
63. We therefore say that prevention of fraud and the protection of public safety are properly raised by our Section 1 argument.

⁴⁴ [1993] 1 S.C.R. 319 [Appellant's Authorities, Tab 5]

⁴⁵ [1993] 1 S.C.R. 319, Para. 129 [Appellant's Authorities, Tab 5]

B. The Photo Requirement Serves Purposes Capable of Justifying a Restriction of Charter Rights and Freedoms

64. We do not believe that it can be seriously contested that our photo requirement serves “pressing and substantial” purposes, capable of justifying a restriction of a *Charter* right or freedom:

- The driver’s licence functions as our national identity card. It is, moreover, a breeder document, which enables a wrongdoer in possession of a false driver’s licence to obtain further evidence of false identity.
- Digital photos and facial recognition analysis of licence holders prevent wrongdoers from impersonating a licence holder and prevents all licence holders from obtaining a second licence (or an identity card) under a false name.
- These goals are not, of course, ends in themselves, but are means to prevent fraud and the use of false identities by those who pose threats to public safety.
- In particular, identity theft is the most prevalent and fastest growing form of fraud.
- Moreover, we have adduced an *actual example* of a person who obtained a false Alberta driver’s licence in 1999 and who was later arrested while attempting a terrorist attack in the United States: “[O]ur security measures, which now make Alberta’s licence the most secure in North America, respond to the real possibility that defects in security will be exploited by those who wish us ill. Our photo requirement and facial recognition analysis are an essential part of this improved security.”⁴⁶

i. The Character of an Exception

65. The more particular purpose to be examined is the purpose achieved by including the Respondents in the photo requirement. We note that our concern is not the granting of an exception to people who assert a religious objection to the photograph requirement *as such*. Our concern is instead the opportunities that an exception affords wrongdoers, that is, people who lie in order to take advantage of others’ acceptance of the driver’s licence as secure, government-issued proof of identity.

⁴⁶ *Supra*, Paragraph

66. Before turning to the consequences of an exception, we first consider the legal constraints on the form an exception can take. We first note that an exception offered to just the Respondents could not pass constitutional muster. Although early versions of the Condition Code G licence specifically exempted members of Hutterite colonies from the photo requirement,⁴⁷ Hutterites are no longer the only group in Alberta whose members might, with undeniable conviction, claim a religious exemption to the photo requirement. Since we cannot just “pick and choose” between religious groups, absent good reason to believe that the risk created by an exception offered to the Respondents differs from the risk created by an exception offered more generally, we say that the exception at issue must be offered more broadly.
67. Most recently, an applicant for a Condition Code G licence was required to demonstrate membership in a religious organization exempted by the Registrar from the photo requirement.⁴⁸ Since this Court’s decision in *Amselem*, we know that these demands for objective confirmation of an individual’s religious commitments are unresponsive to the right that the Respondents seek to vindicate.
68. In *Amselem*, this Court divided on the issue of whether a claim based on freedom of religion must demonstrate a connection to a religious community or body of belief, which required action that conflicts with a condominium rule.⁴⁹ The Appellants were Orthodox Jews who owned condominium⁵⁰ units in Montreal. The units’ balconies were common property dedicated to the exclusive use of the occupants of the unit. The “declaration of co-ownership” prohibited decorations, alterations and constructions on the balconies. The Appellants had in previous years erected “succahs” on their balconies annually for nine-day festival of Succot, to observe the biblical requirement of dwelling in small, enclosed huts during that period. The condominium sought a permanent injunction prohibiting erection of the temporary structures in future.

⁴⁷ Affidavit of Joseph Mark Pendleton sworn July 25, 2005, Exhibit B, **Appellant’s Record, Volume II, page 119.**

⁴⁸ Affidavit of Joseph Mark Pendleton sworn July 25, 2005, Exhibit A, **Appellant’s Record, Volume II, page 110.**

⁴⁹ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551. [**Appellant’s Authorities, Tab 8**]

⁵⁰ The word “condominium” appears nowhere in the case, but it is clear from discussion of the parties’ relationship under Quebec law that it may be usefully summarized by use of this term, which is familiar in the common law provinces.

69. The majority held that no such objective basis was required, based on its view of the character of freedom of religion. Freedom of religion protects *subjective spiritual commitments* – that is the point and purpose of the guarantee, both under the Quebec and Canadian *Charters*:⁵¹

- The “definition and content of an individual’s protected right to religious freedom ... revolves around the notion of personal choice and individual autonomy and freedom.”⁵² The guarantees of freedom of religion reflect “a personal or subjective conception of freedom of religion, one that is integrally linked with an individual’s self-definition and fulfillment and is a function of personal autonomy and choice, elements which undergird the right” “The emphasis then is on personal choice of religious beliefs.”⁵³ Freedom of religion concerns us only with whether a particular belief is religious and whether it is sincerely held.⁵⁴
- Thus, people invoking freedom of religion need not show that their beliefs or practices are objectively valid, i.e., recognized as valid by other adherents of their faith. Freedom of religion consists in freedom to harbour beliefs and undertake practices that are sincerely chosen “in order to connect with the divine or as a function of his or her spiritual faith”.⁵⁵
- Religious beliefs and practices that are shared by others are also protected by the guarantees of freedom of religion.⁵⁶ “Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. Inquiry into the mandatory nature of an alleged religious practice is ... inappropriate”.⁵⁷
- Rather, the only appropriate inquiry regarding a claimed religious belief or practice is whether it is religious in character and whether the belief is sincere. An inquiry into the

⁵¹ *Amselem*, Para. 37. [Appellant’s Authorities, Tab 8]

⁵² *Amselem*, Para. 40. [Appellant’s Authorities, Tab 8]

⁵³ *Amselem*, Paras. 42, 43. [Appellant’s Authorities, Tab 8]

⁵⁴ *Amselem*, Paras. 46, 47, 56. [Appellant’s Authorities, Tab 8]

⁵⁵ *Amselem*, Para. 46. [Appellant’s Authorities, Tab 8]

⁵⁶ *Amselem*, Para. 47. [Appellant’s Authorities, Tab 8]

⁵⁷ *Amselem*, Para. 47. [Appellant’s Authorities, Tab 8]

sincerity of a belief must be “minimal”. “The court’s role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings.”⁵⁸

- Thus, while expert testimony regarding the tenets of a claimant’s religion may help a claimant demonstrate the sincerity of his or her belief, it is not necessary.⁵⁹ Sincerity of belief may be assessed based on the credibility of a claimant’s testimony and the consistency of his or her *current* religious practices:

It is important to underscore ... that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. A person’s connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious obligation emanating from such a relationship, may well change and evolve over time. Because of the vacillating nature of religious belief, a court’s inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person’s belief at the time of the alleged interference with his or her religious freedom.⁶⁰

70. *Amselem* implies structural constraints on any religious exemption from the photo requirement. The issue in this case is not whether the Respondents, as specific claimants, may safely be granted an exemption from the photo requirement. Rather, the issue is whether the Respondents *and everyone else who is able to claim the benefit of religious freedom* as described in *Amselem* may safely be granted an exemption from the photo requirement. An exemption founded in freedom of religion must reflect the character of the right that it seeks to vindicate; it is not a dispensation arbitrarily awarded to a particular group.

71. We believe that the restrictions *Amselem* sets for courts that adjudicate claims of religious freedom apply as well to Alberta Government Services when it evaluates any claim for an exemption. The subjective character of this freedom implies that a person who claims a

⁵⁸ *Amselem*, Para. 52. [Appellant’s Authorities, Tab 8]

⁵⁹ *Amselem*, Para. 54. [Appellant’s Authorities, Tab 8]

⁶⁰ *Amselem*, Para. 53. [Appellant’s Authorities, Tab 8]

religious objection to the photo requirement with apparent conviction is presumptively entitled to an exemption. To rigorously inquire into the claimant's past practice, to insist that his current claim be consistent with his past practice,⁶¹ to demand that his beliefs be consistently conceived, or to be skeptical of the sincerity of beliefs that are not shared by a religious community, undermines the purpose of the freedom that founds the exemption. When the majority in the Court of Appeal suggests that inquiry into the sincerity of a claimed belief will sufficiently uncover false claims for religious exemptions,⁶² it fails to accept not only *Amselem*'s specific holding, but its underlying point.

72. We therefore say that an exemption that vindicates the right that the Respondents assert must be offered to those who, with apparent conviction, assert a religious objection to being photographed.

ii. The Consequences of an Exemption

73. The majority in the Court of Appeal characterizes the concern that a religious exemption opens the driver's licence to abuse by those who would falsely claim a no-photo licence as a "floodgates" argument.⁶³ With respect, our concern is not about numbers as such, or with the number of claims for exemption that might be made in good faith. Alberta increased the security of the Operator's License because wrongdoers *lie* to take advantage of its currency as identification. That is, the foundational characteristic of freedom of religion – its subjectivity – competes *directly* with the essential purpose of the photo requirement, which impedes those who would *falsely* obtain a driver's licence.

74. That is, 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 FR. The number of people who might truly claim an exemption from the photo requirement is significant primarily because it reflects the variety

⁶¹ The Respondents thought it necessary to address in their evidence the fact that two of their younger members had sought and received Operator's Licences *with* photos. (**Appellant's Record, Volume III, pages 302-305**) While we never understood the need for this evidence – the fact that some members might deviate from beliefs generally held by the Hutterian Brethren doesn't begin to imply that those beliefs are not generally and genuinely held by others – we ask whether it would be consistent with Court's decision in *Amselem* if the two who had been photographed had subsequently been refused no-photo licences, after deciding that they had erred? Genuine respect for freedom of religion, as this Court describes it in *Amselem*, demands deference to an individual's claim to an inconsistent religious commitment.

⁶² Para. 52. **Appellant's Record Volume I, Page 31**

⁶³ Para. 51. **Appellant's Record Volume I, Page 31**

of beliefs that might be appropriated by someone wishing to falsely claim a licence that does not require his photo to be included in our database. Wrongdoers might obtain a licence without being photographed either by appropriating religious convictions of groups that they are unconnected with, or might possibly claim a religious objection to the photo requirement by appeal to the more rigorous beliefs of their co-religionists.

75. We therefore say that the general purpose of the photo requirement, that of preventing wrongdoers from impersonating licensees or obtaining licences under false names (impossible for someone who is already “in the system”) applies fully to licencees who might plausibly claim a religious objection to being photographed. An exemption to the photo requirement for those who can persuasively claim it impairs a “pressing and substantial” purpose, capable of justifying a restriction on religious freedom.

C. Rational Connection

76. We do not believe that the connection between the photo requirement and its objective is disputable: The photo requirement prevents fraud and protects public safety by making it impossible for wrongdoers to renew or replace another person’s licence, by preventing people who hold driver’s licences (or identity cards) from obtaining a second licence in another name and thus creating a false identity and by preventing collusion between wrongdoers and people who work in registry offices. The photo requirement ensures the internal security of our society’s primary identity document.

D. Minimal Impairment and Reasonable Accommodation

77. For the Respondents the categories of “more” and “less” have no application to actions that are offensive to God. Nor is it clear how, following *Amselem*, any sense can be generally attached to the idea of a *lesser* impact on a religious belief or practice – the subjective character of religious freedom precludes us from even drawing distinctions between interference with strict religious obligations and “lesser” degrees of interference with an individual’s connection to the divine. A law that requires action that is inconsistent with the Respondents’ faith as a condition of holding a driver’s licence impairs religious freedom, and that is what there is to be said about it. The only way to affect the Respondents’ religious freedom *less* is to not affect it *at all*.

78. As a result, our inquiry into minimal impairment can only look to whether there is a way to achieve the goals of the photo requirement without any conflict with the Respondents' beliefs. The reason why a driver's licence photo serves its primary function in highway traffic enforcement is that "attentive laymen" can easily tell if a driver is the holder of a licence. This is what creates the driver's licence's usefulness as identification for the general public, and makes FR analysis the only practicable way to ensure the internal security of the driver's licence. Moreover, a digital photo is the biometric that best respects the privacy of driver's licence holders generally, who would all need to submit to, e.g., fingerprinting as well as a photograph, and have the results preserved by the state (if this alternative that could be practically superadded to a photo, which it could not).
79. The Respondents' proposed alternative found favour with Mr. Justice LoVecchio. However, giving those who persuasively claim a religious exemption licences without photos, stamped "Not to be used as identification" does not do what a digital photo in our facial recognition data base does. It does not prevent a wrongdoer from renewing another person's photo-free licence and obtaining a photo-bearing licence in the true holder's name, it does not prevent a holder of a no-photo licence from holding two licences (or a licence and an identity card) under different names, and it does not prevent collusion between wrongdoers and registry office employees. The photo requirement protects the internal security of the driver's licence in a way that impairs the Respondents' rights as little as possible.
80. Our proposed accommodations reduce or eliminate the Respondents' contact with an image, but both require a photo to be taken for inclusion in our facial recognition database. In the Respondents' view, as we have seen, neither proposal limits the impact of the photo requirement on their beliefs, because although our proposals reduce or eliminate the need for the Respondents to have images as part of their daily lives, both require those Respondents who would hold a driver's licence to participate in the making of an image, even if not "for yourself".
81. Despite the religious character of their concern, we say that the Respondents' specific objection to our proposals strays from purposes underlying our guarantee of freedom of religion. The majority in *Amselem* considered the possibility that some spiritual commitments may not be protected by the *Charter's* guarantee of religious freedom because

of their effects on others. These remarks help us assess the relationship between the Respondents' specific concerns about a photo taken for others' use and the purposes underlying this *Charter* guarantee:

- 61 ... [N]ot every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute. [Citations] This is so because we live in a society of individuals in which we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it" [Citation] In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another.
- 62 Freedom of religion as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec *Charter* and the Canadian *Charter* and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.⁶⁴

82. The impact of the photo requirement on the Respondents' subjective spiritual commitments diverges from its impact on the Respondents' *protected freedom of religion* in this particular case. Mr. Wurz' cross-examination, quoted above, shows that his concern about contributing a photograph for use by government employees engaged in facial recognition analysis is founded in the spiritual risk he would create for government employees.⁶⁵ The source of the Respondents' concern regarding a photograph taken only for others' use is the possibility that

⁶⁴ *Amselem*, Paras. 61-62. [Appellant's Authorities, Tab 8]

⁶⁵ While Mr. Wurz has other concerns about contributing a photo for facial recognition analysis, these concerns – his contravention of God's law would be an "offence" to his Brethren and a departure from accepted teachings might undermine the authority of his community's beliefs for its younger members – these other concerns depend upon his primary concern for other's spiritual well-being.

the photograph will be “a snare to the feet of the unwise” and the spiritual risk that exposure to an image *creates for others*. Despite the sincerity of their concern, this commitment to others’ spiritual well-being impedes how *others* may seek their own good in their own way. The Respondents’ commitments *regarding others’ spiritual wellbeing* becomes the standard by which we evaluate how others may serve a pressing and substantial public purpose.

83. Our proposed accommodations are genuine in that they conflict with the Respondents’ views regarding others’ choices. While our proposed accommodations may not lessen the impact of the photo requirement upon the Respondents’ beliefs from the Respondents’ perspective, our proposals affect *their protected freedom of religion* only because the Respondents make others’ choices their own concern. From the perspective of the purpose of this *Charter* guarantee, our proposed accommodations are genuine, even if they are of little apparent comfort to the Respondents. Our proposals give up everything that can be given up, while still achieving the purposes of the photo requirement.

E. Effects of the Photo Requirement

i. Measuring the Photo Requirement’s *Religious* Significance

84. In the last step of proportionality analysis, we balance the benefits the photo requirement against its impact on the Respondents’ spiritual commitments and against its other consequences.

85. The distinctive character of freedom of religion creates conceptual limitations on how the public benefits of a law of general application can be compared to its effect on individuals’ religious beliefs and practices. This appeal may be the first in which the Court considers how one compares genuine public benefits of a law to its impact *on religious freedom*, which the Court has defined wholly in subjective terms. In our view, no such comparison is possible, given the Court’s characterization of this unique freedom in *Amselem*. *The subjective character of freedom of religion implies that a law that affects spiritual commitments no more than is necessary to achieve a pressing and substantial goal cannot be balanced against the magnitude of those effects.*

86. The majority in *Amselem* comments on the possibility of comparing the significance of religious beliefs:

72 Furthermore, based on the above-discussed definition of freedom of religion, it appears that the trial judge applied the wrong test to the evidence adduced by the appellants in support of their belief. For if freedom of religion encompasses not only what adherents feel sincerely obliged to do, but also includes what an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to engender a connection with the divine or with the subject or object of his or her spiritual faith, then the proper test would be whether the appellants sincerely believe that dwelling in or setting up their own individual succah is of religious significance to them, irrespective of whether they subjectively believe that their religion requires them to build their own succah. *This is because it is hard to qualify the value of religious experience. Religious fulfilment is by its very nature subjective and personal.* To some, the religious and spiritual significance of building and eating in one's own succah could vastly outweigh the significance of a strict fulfilment of the biblical commandment of "dwelling" in a succah, and that, in and of itself, would suffice in grounding a claim of freedom of religion.⁶⁶ (Emphasis added.)

87. We wish to focus on Mr. Justice Iacobucci's somewhat unusual use of the word "qualify" in this passage. Most commonly, an attribution (here, of value to a religious experience) is said to be "qualified" when it is diminished or subjected to conditions. This common meaning of the phrase "hard to qualify" makes no sense in this context. Rather, "qualify" is used here in a more general, grammatical sense – religious experience resists *adjectives*. It resists modification, description, specification and *comparison*. The point Mr. Justice Iacobucci makes here is that religious significance is by its nature *incommensurable*.
88. The subjective character of the spiritual commitments protected by the *Charter* forestalls any attempt to assign relative weight or significance to those commitments. Once a religious objection to the requirements of a law of general application is found to be genuine, *there is nothing more that can be said about it*. It follows that no comparative judgment regarding the significance of a competing legislative purpose is possible, for we have nothing we can usefully compare the legislative purpose *to*. The result of our comparison must be all or nothing – either every protected religious commitment outweighs any pressing and substantial public purpose, or none does – and the photo requirement undoubtedly serves a purpose that is capable of justifying a limitation on freedom of religion.
89. We ask the Court to consider the significance of this characteristic of freedom of religion from the standpoint of our interpretation of the *Charter* as a whole. It is one thing, we say, to recognize that people's deepest normative commitments are worthy of accommodation

⁶⁶ *Amselem*, Para 72 [Appellant's Authorities, Tab 8]

notwithstanding that they are shared by few others or none. It is another thing to make an individual's subjective commitments the measure of the purposes of a law of general application that does not conflict unnecessarily with his spiritual commitments. The first of these recognizes the subjective character of a commitment we are bound to accommodate; the second, we say, denies the rule of law.

90. The distinctive implications of religious freedom for proportionality analysis correspond to the distinctive character of religious freedom. Freedom of religion differs from other fundamental freedoms in that it does not protect an objectively-defined domain of activity from state interference (as freedom of expression or freedom of association do, for example). Instead, this particular fundamental freedom is personal and subjective – actions that are encouraged or discouraged by a person's sincere spiritual commitments are protected from laws that conflict with those beliefs. Where a law of general application conflicts with religious freedom, the problem is not with a law as such, as it would be if a law interfered with an objectively-defined sphere of activity. Rather, a law impairs freedom of religion when it conflicts with religious beliefs that individuals *happen to hold*.

91. This Court recently considered whether an exemption to a minimum sentence could be offered as a constitutional remedy, discussing the implications of such a remedy for the rule of law.⁶⁷ We believe that the concern voiced by the Court in that context – that our law should mean what it appears to mean – supports the distinction we urge. That is, a statutory decision-maker who chooses *means* to achieve a statutory goal that accommodate individuals' conflicting religious commitments is comfortably within the intendment of the statute. An attempt to displace the *goals* of a statute in deference to the contingencies of individuals' subjective spiritual commitments is, we say, a categorically different matter. A considerate choice of means does not imply that believers stand apart from the pressing and substantial public goals of a democratic society. However, any attempt to balance the subjective spiritual implications of a law of general application against its pressing and substantial accomplishments does exactly that, and undermines the rule of law.

92. It is not inconsistent with the rule of law to insist that laws of general application accommodate individuals' deepest commitments where they can and only in the service of

⁶⁷R. v. *Ferguson*, 2008 SCC 6, at paras. 67-73. [Appellant's Authorities, Tab 6]

pressing and substantial goals. A demand for reasonable accommodation of religious belief constitutes an objective restriction on *how* we pursue the public purposes of a free and democratic society. It recognizes that the state must avoid unnecessary conflict with individuals' deepest commitments. It reflects a considerate regard that may be offered to all. Reasonable accommodation is an objective constraint upon the *manner* in which pressing and substantial public purposes may be pursued in a free and democratic society, but does not purport to compete with the purposes themselves.⁶⁸

ii. Secular Effects of the Photo Requirement.

93. The Respondents claim that they will have to give up their distinctive communal and agricultural way of life if a digital photo is required of all holders of Alberta Operator's Licences. The majority in the Court of Appeal attributes to Mr. Justice LoVecchio "a finding of fact that the mandatory photo requirement threatened the ability of the respondents to maintain their communal way of life."⁶⁹

94. Mr. Justice LoVecchio opened his reasons for judgment with these remarks:

1 Drivers' licences (sometimes referred to as "operators' licences") carrying photographs were introduced in Alberta in 1974, but until recently, individuals who objected to providing a photographic image could be issued a non-photo "Code G" licence.

2 The members of the Applicant Colony and Church sincerely believe that the Second Commandment of their religion prohibits them from having their photograph willingly taken. As it is essential to their continued existence as a community that some members operate motor vehicles, a number of the members of the community applied for and obtained Code G licences.⁷⁰

95. In his comparison of the photo requirement's benefits and burdens, Mr. Justice LoVecchio does not refer to any impact on the Respondents' way of life, referring instead to the "acknowledged incursion" on their religious beliefs:

(c) Effects of the Measure

30 Because I have concluded that the impugned regulation does not constitute a minimal impairment, it is not strictly necessary to weigh its deleterious and salutary

⁶⁸ Primary discussions of the significance of religious exemptions for the rule of law appear in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) [**Appellant's Authorities, Tab 1**]. We believe our *Charter's* more fine-grained tools in respect of justification enable the more nuanced position urged in our submissions.

⁶⁹ Para. 14. See, also, para. 55. **Appellant's Record Volume I, Page 23, 32.**

⁷⁰ **Appellant's Record Volume I, Page 7.**

effects. It is worth noting, however, that the effects of the measure should be carefully considered in the context of its limited objectives.

31 Operators' licences containing digital photographs, 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. These licences do not, however, safeguard the identity of the thousands of other individuals to whom operators' licences are never issued because they do not qualify to drive.

32 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.⁷¹

96. We believe that the majority over-reads Mr. Justice Lovecchio's reasons in ascribing to him the idea that Wilson Colony will close if the photo requirement is upheld, a conclusion that beggars credulity, particularly when this "finding of fact" plays no subsequent role in his deliberations. Mr. Justice Slatter more plausibly understands the consequences of the photo requirement: "Some Hutterite Colonies may have to hire drivers from time to time", or some of their number will, under practical compulsion, get their photos taken.⁷² We do not wish to diminish the effect of the photo requirement on the Respondents – "from time to time" understates the matter, we think – but attributing the end of the Respondents' communal way of life to the photo requirement is less than credible. The Respondents will respond in ways that are available to anyone else, by prioritizing their travel and by paying someone who does not share their beliefs to drive.

97. The burden of scheduling and arranging transportation is not itself an imposition on religious belief and practice. Against this, we say that we require a photo on the licences of almost all drivers to identify them to police, that the driver's licence has as a result become our national identity document and there is no way of avoiding this fact, that the opportunities that the driver's licence thus creates for wrongdoers are serious and may not be ignored, and that there is no alternative to a universal photo to provide for internal security of the system. While we do not discount the secular effects of the photo requirement on the Respondents, we say that these effects cannot be privileged over a pressing and substantial goal, capable of justifying a restriction of a *Charter* right.

PART IV – COSTS

⁷¹ Appellant's Record Volume I, Page 12.

⁷² Para. 126. Appellant's Record, Volume I, Page 54.

98. The Appellant does not seek costs.

PART V – ORDER SOUGHT

99. The Crown in Right of Alberta asks that this appeal be allowed and the Order of the Honourable Mr. Justice LoVecchio of the Alberta Court of Queen’s Bench be set aside.

Respectfully submitted, April 8, 2008

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