Drivers Needed: Tough Choices from *Alberta v. Wilson Colony of Hutterian Brethren*

Janet Epp Buckingham*

Introduction

The recent Supreme Court of Canada decision in *Alberta v. Wilson Colony of Hutterian Brethren*[1] has broken new ground in important areas of *Charter* interpretation. While the Court has previously interpreted section 2(a) of the *Canadian Charter of Rights and Freedoms*[2] as an individual right, in this judgment it gave the communal aspects of religion some constitutional recognition. The Wilson Colony of Hutterites sought an exemption from the mandatory photo ID requirement for drivers' licences in Alberta. This requirement violates the Hutterite religious prohibition on having one's photograph taken, which is based on their very strict interpretation of the biblical Second Commandment not to have a "graven image." The Hutterites lost their case, raising a significant issue: what factors should now be taken into account in determining whether the state must accommodate a particular religious practice protected by section 2(a) of the *Charter*? There seems to be some confusion as to whether human rights concepts of reasonable accommodation have any place in interpreting the ambit of religious freedom. The Court was divided, four judges to three, with three separate judgments. Such division is typical of Supreme Court of Canada cases that consider religious freedom. Chief Justice McLachlin, writing for the majority, and Justice Abella, in dissent, actually debate with one another in their judgments.

The case was decided on the last step of the second part of the *Oakes* test, proportionality between salutary and deleterious effects. The Court itself makes note of the importance of the judgment for that reason. For the first time, lawyers and lower courts have some guidance in exactly how to apply this test in *Charter* cases. As well, the Supreme Court signalled its interest in comparative law to assist it in determining the ambit and application of rights analysis under the *Charter*. Both Chief Justice McLachlin and Justice Abella referred to European Court of Human Rights cases in their judgments. Unfortunately, there was little reference to international law.

Divided Court

At a 2009 Canadian Bar Association conference on the first 10 years of the McLachlin Court, the Chief Justice received kudos for the remarkable degree of consensus developed by this Court. This does not mean that there are never dissents, far from it. But under Chief Justice McLachlin, the Court has been less prone to numerous judgments. The ruling in *Wilson Colony* came down shortly after that conference and is one example where the Court was significantly divided; in a ruling where only seven judges participated,[3] there were three judgments. Consensus was clearly not on the table.

At the outset of her dissent, Justice Abella indicated her disagreement with the majority judgment, written by the Chief Justice.[4] Her dissent goes on to cite passages from the 1995 judgment of Justice McLachlin (as she then was) in *RJR-MacDonald Inc. v. Canada (Attorney*

General).[5] These passages from *RJR-MacDonald* caution against overstating the "pressing and substantial" objective[6] of a right-infringing measure and emphasize the government's responsibility to prove that no less-intrusive alternative was available.[7] Justice Abella also points out that *RJR-MacDonald* rejected a complete ban on advertising as more than minimally impairing.[8] She appears to argue that Chief Justice McLachlin's own analysis from 1995 supports the reasoning of Justice Abella's dissent. Furthermore, Justice Abella refers to an article the Chief Justice published in 2004[9] to substantiate her concern that the majority's approach in this case risks "presumptively shrinking the plenitude of what is captured by freedom of religion in s. 2(*a*) of the *Charter*."[10]

The Chief Justice, writing for the majority, responded directly to Justice Abella's argument. Her judgment takes issue with Justice Abella's emphasis on the collective aspects of religion and how they should be considered in this case, saying explicitly that the community impact in this case does not lead to "group right"[11] for Wilson Colony. She then argues against Justice Abella's assertion that the 700,000 Albertans with no driver's licence pose a greater risk to the integrity of the system than the 250 Hutterites who ask that their religious objections be accommodated.[12] Finally, she downplays Justice Abella's assertion that the photo ID requirement represents a serious infringement of the Hutterites' religious freedom. She states that it is up to the courts to make this determination, and not for the claimant to simply assert it.

Religion, it appears, is a divisive issue, even for justices of the Supreme Court of Canada.

Communal Aspects of Religion

This case is unique in that Hutterian Brethren farm communally and hold their farm property as a collective, and this was a significant fact in the case. Communal living is an integral part of their religious beliefs. Alvin Esau describes this lifestyle as living "*in* a church"[13] as all property is owned by the church. In fact, to be a member of the colony, it is essential to be a church member in good standing.[14] The objects common to all Hutterian Brethren colonies are set out in Articles of Association and include that the members "achieve one entire spiritual unit in complete community of goods."[15] It is quite clear that any member who deviates significantly from the theology of the colony risks expulsion, thereby forfeiting all rights to communal property and any share in the community's livelihood. But it is not just communal ownership that is at risk; spiritual unity is also vital. If a member is living contrary to the tenets of the faith, that person will be outside the spiritual unity of the colony.

Unlike some other religious communities, Amish and Old Order Mennonite for example, Hutterian Brethren do not eschew modern equipment. They use modern farm equipment and drive modern vehicles like tractors, large trucks, and even semi-trailer transports for agricultural produce. Drivers' licences are therefore important for getting their products to market. Yet this is more than just a matter of commercial convenience; members of the community serve one another by taking on various tasks required to run the communal farm. Not being able to obtain non-photo drivers' licences will change the community as, after this decision, the Wilson Colony is faced with an unpleasant choice: violate its religious beliefs or hire out driving duties.

It is notable that Hutterian Brethren have some history of discriminatory treatment in Alberta, although it is not discussed in the case. From World War II until 1972, the Province of Alberta restricted the size and spacing of colonies,[16] effectively prohibiting their expansion.[17] The Hutterites lost a legal challenge to the discriminatory legislation in 1969.[18]

Relatively few religious freedom cases have required Canadian courts to consider the communal aspect of religion, although judges have commented in *obiter*.[19] The issue was first considered in *R. v. Edwards Books and Art*,[20] a case concerning exemptions from Sunday closing laws for those of different religions. Chief Justice Dickson stated in relation to section 2(a) of the *Charter*, "The Constitution shelters individuals and *groups* only to the extent that religious beliefs or conduct might reasonably or actually

be threatened"[21] (emphasis added). Yet that case did not turn on this point.

The community aspects of religious life were squarely at issue in a 2001 Quebec trial decision concerning the Chassidic Jewish community.[22] At issue was a small wire strung around a neighbourhood in the City of Outremont, a suburb of Montreal. The wire is called an *eruv* and allows the Jews to consider the entire neighbourhood their "home" for the purposes of movement on their Sabbath. While the wires were seemingly innocuous, city officials began removing them after complaints from non-Jewish neighbours.[23] In finding for the Orthodox Jews, the Quebec Superior Court specifically referred to the importance of being able to participate in the religious life of the community.[24] Without the *eruv*, they are essentially confined to their homes on the Sabbath and cannot participate in community worship. For this reason, the court held that removing the *eruv* violates the Jews' religious freedom under section 2(a). The court therefore granted an injunction to stop city officials from removing the *eruv*.

Outside of religious communities like Hutterian Brethren, the most significant communal aspect of religion is the gathering place of a religious community, usually a house of worship. This was at issue in *Congrégation des témoins de Jéhovah de St.-Jérôme-Lafontaine v. Lafontaine (Village)*[25] but the majority of the Supreme Court of Canada decided the case on administrative law principles. Justice LeBel addressed the issue in his dissent:

> Freedom of religion includes the right to have a place of worship. Generally speaking, the establishment of a place of worship is necessary to the practice of a religion. Such facilities allow individuals to declare their religious beliefs, to manifest them and, quite simply, to practise their religion by worship, as well as to teach or disseminate it. In short, the construction of a place of worship is an integral part of the freedom of religion protected by s. 2(a) of the *Charter*.[26]

While Justice LeBel's focus still seems to be the individual, much of what transpires at a house of worship is communal in nature.

In the case brought by the Wilson Colony, the Alberta Attorney General conceded that the photo ID requirement violates the Hutterites' religious freedom under section 2(a) of the *Charter*. Thus, at both the Alberta Court of Queen's Bench[27] and the Alberta Court of Appeal[28] the issue was whether the violation could be justified under section 1. Justice LoVecchio of the Court of Queen's Bench did not review in detail the nature of the Hutterite community, but he noted in the introduction to his judgment that "it is essential to their continued existence as a community that some members operate motor vehicles."[29] In the section 1 analysis, he held that the requirement did not meet the minimal impairment test because "there is a reasonable accommodation available,"[30] namely, non-photo drivers' licences which were available in the province prior to 2003. He did not make any reference to the communal aspects of the colony in his section 1 analysis.

At the Alberta Court of Appeal, the communal aspects of the Wilson Colony were much more influential in the decision. In setting out the facts of the case Justice Conrad reviewed the Hutterian arguments regarding their religious community:

> The evidence shows that although the colonies attempt to be self-sufficient, certain members must drive regularly on Alberta highways in order to, *inter alia*, facilitate the sale of agricultural products, purchase raw materials from suppliers, transport colony members (including children) to medical appointments, and conduct the community's financial affairs. The respondents say that if they are unable to drive it will be impossible for them to continue this communal way of life, and that they are therefore being forced to choose between two of their religious beliefs: adhere to not having their photo taken or adhere to living a communal life and performing their assigned duties within the colony.[31]

Having noted the Province of Alberta's admission that the photo ID requirement violates the Hutterites' religious freedom, Justice Conrad turned to the section 1 analysis. She found that the objective of the regulation, preventing identity theft and fraud, was pressing and substantial, but there was no pressing and substantial

need for it to be universal with no exemptions, particularly for religious objections. She went on to find that the regulation did not meet the minimal impairment test. Finally, she weighed the effects of the legislation, again commenting on the impact on the community of not granting the exemption: "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."[32]

At the Supreme Court of Canada, Justice Abella's dissent makes the strongest affirmation of the communal aspects of religion. In both the "Background" section and early paragraphs of the "Analysis" section of her judgment she notes the impact of the photo ID requirement on the community. She refers to the *Edwards Books* decision, which noted that freedom of religion has "both individual and collective aspects."[33] She further affirms Justice Wilson's statements in the same case (although Justice Wilson dissented in part):

> [I]t seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the *Charter* expressly precluded by s. 27, which requires the *Charter* to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[34]

This discussion takes place within the context of the infringement of section 2(a), rather than the section 1 analysis.

Justice LeBel, also in dissent, shares this concern for the community in relation to the interpretation of religious freedom in section 2(a):

> Religion is about religious beliefs, but also about religious relationships. The present appeal signals the importance of this aspect. It raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations. As Justice Abella points out, the regulatory measures have an impact not only on the respondents' belief system, but also on the life of the community.[35]

Justice Fish also dissented, agreeing with both Justice Abella and Justice LeBel.

The majority judgment notes Justice Abella's focus on the communal aspects of religion, but states that the impact of the decision on the Hutterian community is only relevant at the proportionality stage of the section 1 analysis. "Community impact does not … transform the essential claim — that of the individual claimants for photo free licences — into an assertion of a group right."[36] This conclusion denies exactly what the Hutterites were asking for: recognition of a group right to be exempted from the photo ID requirement. Hutterite colonies function as communities, with each member given certain responsibilities for the proper functioning of the community.[37] The Wilson Colony was not asking for individual exemptions to protect individual religious freedom. But the majority was quite clear that section 2(a) of the *Charter* protects individual religious freedom only. The impact on the communal aspects of religion, while important, is only a factor in considering whether the infringement on religious freedom is justified under section 1.

Protection and Accommodation of Religious Practices

The Supreme Court of Canada has affirmed time and time again its commitment to strong protection for religious freedom. *Big M Drug Mart*[38] is the seminal case on religious freedom under the *Charter*. Justice Dickson, as he then was, set out a broad definition of religious freedom and went further to discuss the absence of coercion as characterizing freedom. He concluded, "Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the funda-

mental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."[39]

In a recent case the Supreme Court affirmed, "The protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence."[40] While the pivotal case *O'Malley v. Simpsons-Sears*[41] in 1984 was not decided under the *Charter*, it established the principle of reasonable accommodation of employees' religious practices. This has included observance of holy days[42] and religious dress requirements.[43] The accommodation requirement has been applied beyond employment situations, including in *Charter* cases. Two recent Supreme Court decisions, *Multani*[44] and *Amselem*[45] would have led observers to expect the Court to rule for the Hutterian Brethren in the instant case.

The *Amselem* case pitted Orthodox Jewish condominium owners against their condominium corporation. The by-laws specifically prohibited the building of any structures on the balconies of the high-rise, luxury condominiums. The Orthodox Jews wished to build temporary structures, *succahs*, on their balconies during the Jewish festival of *Succot* in accordance with their interpretation of Scripture. The condominium corporation sought an injunction to prevent the owners from building these temporary structures. The owners argued that this violated their religious freedom under the Quebec *Charter of Human Rights and Freedoms*.[46] In interpreting the Quebec *Charter*, Justice Iacobucci, writing for the majority, used interpretations of the Canadian *Charter* as authoritative. He summarized the definition of religious freedom as follows:

> [F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith.[47]

Justice Iacobucci went on to weigh the impact on other condominium owners if the Jewish owners built *succahs* on their balconies for nine days. He was quite unsympathetic to their concerns about the aesthetic impact or the possible diminution of value of their condominiums. He said, "[M]utual tolerance is one of the cornerstones of all democratic societies. Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others."[48]

Similarly, in *Multani* Justice Charron, writing for the majority, stated, "Religious tolerance is a very important value of Canadian society."[49] She upheld the right of a Sikh student to wear a *kirpan*, a ceremonial dagger, to school contrary to the no-weapons policy of the school. She recognized that the no-weapons policy has a pressing and substantial objective. But when she reached the minimal impairment part of the proportionality test, she found that refusing to accommodate Multani did not meet the requirements of the minimal impairment test. The evidence did not show that Sikh boys used the *kirpan* for violence; on the contrary, the Sikh religion teaches that the *kirpan* is not to be used to harm others. This case was brought under section 2(a) of the *Charter* but Justice Charron specifically referenced reasonable accommodation: "[T]he analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar."[50]

In both of these cases, the Supreme Court of Canada made it clear that laws or rules of general application must allow exemptions to accommodate religious practices. There does not appear to be anything novel about *Wilson Colony* that would cause the Court to deviate from its previous position.

Until 2003, the Registrar of Motor Vehicles in Alberta had the discretion to grant exemptions from the general requirement to have a photograph on every driver's licence.[51] These licences were called Condition Code G licences and indicated that they were not to be used for identification purposes. In 2003, this discretion was eliminated.[52] The Alberta government claimed that mandatory photo ID is necessary to prevent identity theft as driver's licences are "breeder documents" used as foundational ID in order to obtain other identity documents.

The Hutterian Brethren held Condition Code G licences, so the elimination of this licence category became a direct infringement of their religious freedom.

The majority of the Supreme Court takes issue with the lower courts' application of Justice Charron's interpretation of the minimal impairment test in the *Multani* case. Justice Charron used a reasonable accommodation test as part of the minimal impairment test. But the majority states, "Minimal impairment and reasonable accommodation are conceptually distinct."[53] The majority focuses on the fact that the case was brought under section 52 of the *Constitution Act, 1982*; under this section, a finding that the provision did not minimally impair the rights of the applicants would result in the regulation being struck down. Yet the regulation was what set out the absolute requirement of photo ID. Presumably, if it was struck down, it would not invalidate all drivers' licences in Alberta but merely the absolute requirement for photo ID. The majority indicates that the outcome might have been different if the application had been brought under section 24(1) of the *Charter*; this section, unlike section 52, allows the court to fashion a remedy for an individual claimant rather than being forced into the all-or-nothing remedy of striking down a law. While no doubt the Court is sensitive to accusations of judicial activism, striking down one subsection of a regulation with a one-year suspension in enforcement, as proposed by Justice Abella, does not appear to be a drastic remedy.

The two dissenting judgments follow a different approach. While they find the objective of the regulation to be pressing and substantial, they do not find that it meets the minimal impairment requirement. Justice Abella states, "The requirement therefore completely extinguishes the right."[54] Justice LeBel views the issue more broadly: "The photo requirement was not a proportionate limitation of the religious rights at stake."[55] Neither is convinced that allowing a small group of religious objectors to have non-photo ID licences, marked with a notice that they are not to be used for identification purposes, would undermine the integrity of the Alberta driver's licence system. And clearly, if the applicants are denied accommodation, it has a drastic effect on their community. As Justice LeBel comments, "a small group of people is being made to carry a heavy burden."[56]

One is left wondering what is different about this case compared to *Amselem* or *Multani*. Is it that a provincial regulation was impugned, rather than a condominium agreement or school rule? Is it that a regulation would be struck down rather than an administrative decision? Does asking for a remedy under section 52 rather than section 24(1) really make such a difference that it requires "a small group of people … to carry a heavy burden"?[57]

Salutary and Deleterious Effects

The majority of the Supreme Court apparently took the view that *Wilson Colony* is the first case to be decided on the last step of the *Oakes* test.[58] The *Oakes* test has four steps. The first is to determine if there is a pressing and substantial objective that justifies the legislation or regulation. The second part requires proportional means to meet that objective. This second part is broken down into three steps: (a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the deleterious effects of the infringement and the salutary effects of the law (abbreviated as "salutary and deleterious effects").

Every other judgment in this case, including the trial judgment and the majority judgment in the Alberta Court of Appeal, turned on minimal impairment, step (b) of the proportionality part of the *Oakes* test. The majority judgment of the Supreme Court goes through each of the steps of the *Oakes* test, specifically giving guidance on the application of "salutary and deleterious effects." The Hutterites were not successful at this fourth and final step. From a review of the majority's reasoning, however, it is doubtful that any future case will see a rights violation that is upheld on every part of the *Oakes* test that could fail on salutary and deleterious effects.

The majority found that the Province of Al-

berta had a pressing and substantial objective in establishing a universal photo ID requirement for drivers' licences; namely, reducing the risk of identity theft.[59] It went on to find that the universal requirement is rationally connected to the goal of preserving the integrity of the driver's licence system.[60] When addressing minimal impairment, the majority indicates that the courts must "accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives."[61] However, this provision is a regulation, not legislation. It was never considered by the legislature.

In its analysis of minimal impairment, the majority focuses on the Hutterite proposal for an alternative that does not require a photograph. The majority characterizes this as an "'all or nothing' dilemma."[62] It contrasts this with the province's proposals, all of which require a photograph but allow the Hutterites not to show it to others. The whole point of the Hutterites' religious objection, however, is to having a photograph taken, not showing it to others. It appears that there was intransigence on the part of both the Wilson Colony and the government, but the majority of the Court only sees that of the Hutterites. The majority judgment indicates that the provincial requirement minimally impairs the Hutterites' religious freedom, as photo ID is essential to the integrity of the driver's licence system.[63]

After citing Peter Hogg's view that the fourth step of the *Oakes* test is "actually redundant,"[64] the majority revives this neglected branch of the test: "The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation."[65] The salutary effects of the law are clearly related to the integrity of the driver's licence system and the prevention of identity theft. In assessing the deleterious effects of the law, the majority attempts to determine the seriousness of the limit on religious practice.[66] It determines that the limit imposes "the cost of not being able to drive on the highway"[67] but does not deprive "the Hutterian claimants of a meaningful choice as to their religious practice."[68] Contradicting the trial judge's finding of fact,[69] the majority held that while it would necessitate some changes to the life of the Wilson Colony, "the evidence does not support the conclusion that arranging alternative means of highway transport would end the Colony's rural way of life."[70] Thus, it ruled that the deleterious effects "fall at the less serious end of the scale."[71]

With this analysis, Peter Hogg's criticism (as restated by Chief Justice McLachlin) is acute:

> If a law has an objective deemed sufficiently important to override a *Charter* right and has been found to do so in a way which is rationally connected to the objective and minimally impairing of the right … how can the law's effects nonetheless be disproportionate to its objective?[72]

Constitutional experts have disagreed with Hogg's categorical assessment, arguing that although the deleterious effects of a legislative enactment had not yet been found to outweigh its objective, this conclusion remained theoretically possible.[73] Both of the dissenting judgments in *Wilson Colony*, for example, found that the deleterious effects on the litigants outweighed the legislative objective. As well, at least one Supreme Court of Canada case has been decided on this point but there was little analysis of this fourth step that was applicable to other cases.[74]

Justice Abella approaches the salutary and deleterious effects test quite differently from the majority. She looks at the issue from the perspective of the effects of accommodating the Hutterian exemption from the mandatory photo ID system. She says, "Here, the constitutional right is significantly impaired; the 'costs' to the public only slightly so, if at all."[75] Similarly, Justice LeBel states:

> [A] small number of people carrying a driver's licence without a photo will not significantly compromise the safety of the residents of Alberta. On the other hand, under the impugned regulation, a small group of people is being made to carry a heavy burden.[76]

The majority's explanation of the value of the "salutary and deleterious effects" step of the *Oakes* proportionality test does not appear to

significantly revive this part of the test. Perhaps if the impact on the claimants is shown to be drastic, more drastic than the potential loss of their religious communities, the state would fail on this branch of the test. The dissenting judges believed that this was a real possibility while the majority remained unconvinced that taking away the self-sufficiency of the community threatened the community itself.

Comparative Law

In the early days of *Charter* interpretation, Canadian courts looked far and wide – mainly to American judgments – for guidance in interpretation. But after several years of developing its own jurisprudence, this fell out of fashion and Canadian lawyers ceased to include much comparable jurisprudence from other jurisdictions. When faced with novel issues, however, the Court is showing interest in comparative and international law for guidance. In *Bruker v. Marcovitz*,[77] the judgments referred to European, Israeli and South African authorities. In the instant case, while American cases were argued, they were not referenced in the judgment. On the other hand, European jurisprudence referenced in the judgments was not argued before the Court.

As noted above, the Supreme Court of Canada has not addressed the communal aspects of religion as a central issue in a *Charter* case, although it has made reference to them. When coming to a novel issue, it is appropriate to consider how other courts, especially those with particular expertise, have addressed the issue. Justice Abella quotes with approval from three European Court of Human Rights judgments on this aspect of the case: *Kokkinakis v. Greece*,[78] *Şahin v. Turkey*,[79] and *Metropolitan Church of Bessarabia and Others v. Moldova*.[80] (The majority also refers to one of the European cases, *Kokkinakis v. Greece*.[81]) The quotations point to the importance of the communal aspect of religion but do not indicate how the Court applied the principles in the cases.

The Supreme Court of Canada has signalled its interest in hearing international authorities, particularly when interpreting the rights guaranteed by the *Charter*.[82] There is room for counsel to bring a broader and deeper range of authorities when arguing appeals before the Supreme Court of Canada. In this case, there were several interveners, which often bring that broader perspective.

Conclusions

The *Wilson Colony* decision is a significant step in the growing religious freedom jurisprudence. One wonders, however, if it is a step forward or backward for the protection of religious freedom in Canada. The Court was faced with novel issues and was far from unanimous in how to address them. The majority judgment side-stepped the issue of group rights for religious adherents. Although the majority indicated that the communal aspects of religion can be raised at the fourth branch of the *Oakes* test, the outcome in this case was the trampling of the acknowledged religious beliefs of a Canadian religious minority. This precedent leaves religious freedom solely as an individual right.

The Court has signalled its willingness to look to foreign judgments, particularly when considering novel issues. This will be helpful to counsel who can now bring to the Court helpful jurisprudence from other jurisdictions. Counsel will be well advised to argue these cases directly.

Given that *Wilson Colony* is a split decision by a less than full panel of the Supreme Court of Canada, it is not likely the final word on the place of the communal aspects of religion; it is the opening salvo. Religious communities can take some encouragement for future protection of religious beliefs and practices from the judgments of Justices Abella and LeBel. The results of *Wilson Colony* are, however, cold comfort to the members of the Hutterian Brethren who will now have one more community duty to assign: find truck drivers or decide who among them will have to break the Second Commandment and get an Alberta driver's licence ... or opt for civil disobedience.[83]

Notes

* LL.B., LL.D., Director, Laurentian Leadership Centre, Associate Professor, Trinity Western University.

1 2009 SCC 37, [2009] 2 S.C.R. 567 (CanLII) [*Wilson Colony].*

2 *Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982*, c. 11.

3 The Court was short one judge so the case was not heard by the full panel of nine.

4 *Wilson Colony, supra* note 1 at para. 112.

5 1995 CanLII 64 (S.C.C.), [1995] S.C.R. 199 [*RJR-MacDonald*].

6 *Wilson Colony, supra* note 1 at para. 137, citing *RJR-MacDonald, ibid.* at para. 144.

7 *Wilson Colony, ibid.* at para. 144, citing *RJR-MacDonald*, *ibid*. at para. 160.

8 *Wilson Colony, ibid.* at para. 148.

9 "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen's University Press, 2004) at 12, quoted in *ibid.* at para. 173.

10 *Wilson Colony, supra* note 1 at para. 173.

11 *Ibid.* at para. 31.

12 *Ibid.* at paras. 63-64.

13 Alvin J. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: University of British Columbia Press, 2004) at 4.

14 See *Lakeside Colony of Hutterian Brethren v. Hofer*, 1992 CanLII 37 (S.C.C.), [1992] 3 S.C.R. 165.

15 *Ibid.* at para. 15.

16 *Land Sales Prohibition Act,* S.A. 1942, c. 16. *Repealed* S.A. 1972, c. 103.

17 William Janzen, *Limits on Liberty: The Experience of Mennonite, Hutterite, and Doukhobor Communities in Canada* (Toronto: University of Toronto Press, 1990) at 67-75.

18 *Walter et al. v. Attorney General of Alberta, et al., 1969 CanLII 64 (S.C.C.),* [1969] S.C.R. 383.

19 See Janet Epp Buckingham, "The Fundamentals of Religious Freedom: the Case for Recognizing Collective Aspects of Religion" (2007) 36 Supreme Court Law Review (2d) 251.

20 1986 CanLII 12 (S.C.C.), [1986] 2 S.C.R. 713 [*Edwards Books*].

21 *Ibid.* at para. 9, quoted in *Wilson Colony, supra* note 1 at para. 32.

22 *Rosenberg v. Outremont (City),* [2001] R.J.Q. 1556, 84 C.R.R. (2d) 331 (Que. S.C.) [*Rosenberg*].

23 Shauna Van Praagh describes the larger cultural context of this case in "View from the *Succah*: Religion and Neighbourly Relations" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008) at 21.

24 *Rosenberg, supra* note 22 at paras. 33-36.

25 2004 SCC 48, [2004] 2 S.C.R. 650 (CanLII).

26 *Ibid.* at para. 73.

27 2006 ACQB 338, (2006) 398 A.R. 5 (CanLII) [*Wilson Colony, QB*].

28 2007 ABCA 160, (2007) 417 A.R. 68 (CanLII) [*Wilson Colony, CA*].

29 *Wilson Colony, QB, supra* note 27 at para. 2.

30 *Ibid.* at para. 29.

31 *Wilson Colony, CA, supra* note 28 at para. 6.

32 *Ibid*. at para. 55.

33 *Wilson Colony, supra* note 1 at para. 130, quoting *Edwards Books, supra* note 20 at para. 145.

34 *Edwards Books, ibid*. at para. 191.

35 *Wilson Colony*, *supra* note 1 at para. 182.

36 *Ibid.* at para. 31.

37 *Ibid*. at para. 8.

38 *R. v. Big M Drug Mart Ltd*, 1985 CanLII 69 (S.C.C.), [1985] 1 S.C.R. 295.

39 *Ibid*. at para. 95.

40 *Reference re Same-Sex* Marriage, 2004 SCC 79, [2004] 3 S.C.R. 689 (CanLII) at para. 53.

41 1985 CanLII 18 (S.C.C.), [1985] 2 S.C.R. 536.

42 *Central Okanagan School District No. 23 v. Renaud,* 1992 CanLII 81 (S.C.C.), [1992] 2 S.C.R. 970; *Commission scolaire régionale de Chambly v. Bergevin,* 1994 CanLII 102 (S.C.C.), [1994] 2 S.C.R. 525.

43 See *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* 1990 CanLII 76 (S.C.C.), [1990] 2 S.C.R. 489. While this case concerned holy days, it overruled *Bhinder v. CN,* 1985 CanLII 19 (S.C.C.), [1985] 2 S.C.R. 561 in which a Sikh man had lost when he claimed the right to wear a turban rather than a hard hat. See also *Multani v. Commission Scolaire Marguerite-Bourgeoys,* 2006 SCC 6, [2006] 1 S.C.R. 256 (CanLII) [*Multani*].

44 *Multani, ibid*.

45 *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (CanLII) [*Amselem*].

46 R.S.Q., c. C-12.

47 *Amselem, supra* note 45 at para. 46.

48 *Ibid*. at para. 87.

49 *Multani, supra* note 43 at para. 76.

50 *Ibid.* at para. 53.

51 *Operator Licensing and Vehicle Control Regulation,* Alta. Reg. 320/02, s. 14(1)(b).

52 *Operator Licensing and Vehicle Control Amendment Regulation,* Alta. Reg. 137/03, s. 3.

53 *Wilson Colony, supra* note 1 at para. 68.
54 *Ibid*. at para. 148.
55 *Iibid* at para. 201.
56 *Ibid*.
57 *Ibid*.
58 *Ibid*. at paras. 75-78, citing *R. v. Oakes*, 1986 CanLII 46 (S.C.C.), [1986] 1 S.C.R. 103.
59 *Ibid*. at para. 47.
60 *Ibid*. at para. 52.
61 *Ibid*. at para. 53.
62 *Ibid*. at para. 61.
63 *Ibid*. at para. 62.
64 *Ibid*. at para. 75. See Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at s. 38.12.
65 *Wilson Colony, ibid*. at para. 77.
66 *Ibid*. at para. 95.
67 *Ibid*. at para. 96.
68 *Ibid*.
69 *Wilson Colony, QB, supra* note 27. Note that the Wilson Colony applied for a rehearing on this point, which was denied.
70 *Wilson Colony, supra* note 1 at para. 97.
71 *Ibid*. at para. 102.
72 *Ibid*. at para. 75.
73 Leon E. Trakman, William Cole-Hamilton and Sean Gatien, "R. v. Oakes 1986-1997: Back to the Drawing Board" (1998), 36 Osgoode Hall Law Journal 83 at 103.
74 *New Brunswick (Minister of Health and Community Services) v. G. (J.)* 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46 at para. 98.
75 *Wilson Colony, supra* note 1 at para. 175.
76 *Ibid*. at para. 201.
77 2007 SCC 54, [2007] 3 S.C.R. 607 (CanLII).
78 No. 14307/88, [1993] 17 E.C.H.R. 397. Series A no. 260-A, quoted at *Wilson Colony, supra* note 1 at para. 128.
79 [GC], No. 44774/98, E.C.H.R. 2005-XI, quoted in *Wilson Colony, ibid*. at para. 129.
80 No. 45701/99, E.C.H.R. 2001-XII, quoted in *Wilson Colony, ibid*. at para. 131.
81 *Wilson Colony, ibid*. at para. 90.
82 See *Baker v. Canada (Citizenship and Immigration),* 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817 at para. 70.
83 Jamie Komarnicki, "Hutterites may defy driving law," Calgary Herald, February 28, 2010.