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# Freedom of Religion at the Supreme Court in 2009: Multiculturalism at the Crossroads?

Nathalie Des Rosiers \*

## I. INTRODUCTION

Religious toleration has meaning only when it leads to the acceptance of decisions that one finds unpalatable or incomprehensible. Otherwise, when religious toleration only means respect for differences within a generally acceptable spectrum of options, it requires no constitutional protection. It is because a majority may feel compelled to act against a minority, may feel sufficiently irritated, repelled or dismissive of a minority, that constitutional protection is needed. Justice Binnie in his dissent in *C. (A.) v. Manitoba (Director of Child and Family Services)* puts it this way: “The *Charter*<sup>1</sup> is not just about the freedom to make what most members of society would regard as the wise and correct choice. If that were the case, the *Charter* would be superfluous.”<sup>2</sup>

If freedom of religion were analyzed in a way that most resembles the protection we afford speech,<sup>3</sup> the above would aptly describe the state of the law on freedom of religion in Canada, but it does not. In this paper, I attempt to explain why freedom of religion has more to do with an ambivalent commitment to multiculturalism than a devotion to freedom of conscience, and why as the commitment to multiculturalism is declining,

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

<sup>2</sup> [2009] S.C.J. No. 30, [2009] 2 S.C.R. 181, at para. 163 (S.C.C.) [hereinafter “*C. (A.)*”].

<sup>3</sup> There is no point in protecting speech one agrees with, one must be prepared to defend the right to speak of people with whom one disagrees vehemently. As described in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 968 (S.C.C.):

Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.

so is the protection for freedom of religion. In an article published in 1993, Jacques Zylberberg and Pauleen Côté suggested that “[t]olerance, more than freedom of conscience”<sup>4</sup> facilitated the establishment of non-Christian communities in the colonial origins of the Confederation. In my view, the linkage between ideas about multiculturalism, the will to live peacefully “with” the other, has continued to anchor the aspirations to recognize freedom of religion throughout Canadian history, despite the experience of discrimination for many communities. A discourse of tolerance has supported the judicial recognition of freedom of religion. When the commitment to tolerance is waning, the understanding of freedom of religion appears wanting.

This paper begins with a brief review of the judicial treatment of freedom of religion and its link to multiculturalism, tolerance and majority-minorities relationships. It then analyzes the Supreme Court of Canada pronouncements on freedom of religion in 2009 in light of this history and, in particular, discusses the decision in *Alberta v. Hutterian Brethren of Wilson Colony*.<sup>5</sup> A second case, *C. (A.) v. Manitoba (Director of Child and Family Services)*<sup>6</sup> dealt also with freedom of religion to a lesser extent; it will be referenced at times but deserves a longer assessment in the context of age discrimination and the treatment of children and mature minors.

The link between protection for individual or collective freedoms and diversity is not new. Freedom allows for a diversity of opinion and lifestyles, which is the enrichment that democracies count on. Because of the freedom to experiment with thought, innovation is fostered. Because of the freedom to be left alone, deeper reflection is enhanced. Because of the freedom to believe in different creeds, critical discussions and self-analysis can occur. In the two cases discussed here, one could say that the Jehovah’s Witnesses’ criticism of the medical profession and use of blood transfusions has enriched Canadian life by demanding the exploration of alternative medical treatments. Canadian society is also enriched by the Hutterian Brethren’s refusal to be photographed and their criticism of Western society’s vanity and obsession with looks. In addition, the Hutterian Brethren’s skepticism toward the necessity and efficiency of a

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<sup>4</sup> Jacques Zylberberg & Pauline Côté, « Les balises étatiques de la religion au Canada », (1993) 40 *Social Compass* 529, at 531 : « La tolérance, plus qu’a la liberté de conscience, facilitera l’établissement, dans la colonie puis dans les dominions, de différentes autres collectivités par exemple juives, baptistes et mormones... ».

<sup>5</sup> [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.), [hereinafter “*Hutterian Brethren*”].

<sup>6</sup> *Supra*, note 2.

digital photo bank also raises helpful debates. In a way, protecting freedom of religion fosters diversity and multiculturalism, and when less protection is offered, less diversity is to be expected.

After the brief review of Canadian history of freedom of religion and its link to ideas of multiculturalism (Part II), I analyze the 2009 judicial pronouncements in light of this history suggesting a pessimistic assessment of their impact on freedom of religion and multicultural tolerance (Part III) by commenting principally on three issues: (1) the acceptance of secondary purposes under section 1 of the Charter; (2) the rejection of the accommodation framework; and (3) the discounting of marginal beliefs. It is my hope that the decision in *Hutterian Brethren* will not signal a fundamental shift in the Canadian jurisprudence on freedom of religion; however, in my view, there is reason to be concerned.

## II. FREEDOM OF RELIGION AND MULTICULTURALISM

Freedom of religion decisions may be analyzed in multiple ways: they represent a form of freedom of expression since they protect the way one expresses one's spirituality. Freedom of religion is also a form of freedom of association as one defines one's belonging to an organized community with shared beliefs. One could also analyze religion as a collective right:<sup>7</sup> the way in which the institutions of religion are needed to provide the range of support for the experience of religious people and the way in which it provides the right for some groups to religious schooling (section 93 of the *Constitution Act, 1867*<sup>8</sup>). Finally, in Canada, freedom of religion has always had strong anti-discrimination and equality undertones, that is, the tension between majority religions and minority religions has always been at the core of the protection of freedom of religion. José Woehrling and Richard Moon have argued that this focus on equality creates confusion.<sup>9</sup> Nevertheless, the Canadian context presupposes a sensibility to equality in the context of the assessment of religious freedoms. Canada attempted to develop a model of religious toleration but lived and reproduced religious discrimination. The struggle

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<sup>7</sup> Janet Epp Buckingham, "Drivers Needed: Tough Choices from *Alberta v. Wilson Colony of Hutterian Brethren*" (2010) 18 Const. Forum 109 [hereinafter "Buckingham"].

<sup>8</sup> (U.K.) 30 & 31 Vict., c. 3.

<sup>9</sup> José Woehrling, "La place de la religion dans les écoles publiques du Québec" (2007) 41 R.J.T. 651, at 655; Richard Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 S.C.L.R. (2d) 201; Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms" (2003) 41 Brandeis L.J. 563.

to develop a way to live together “with” religious minorities explains Canadian history, which like other countries, has been marked by religious conflicts, albeit less bloody: the desire to convert “pagans” underpinned the disastrous assumptions about assimilation of Aboriginal people; the opposition between Catholics and Protestants motivated in part the deportation of the Acadians;<sup>10</sup> the *Quebec Act* could be analyzed as a first gesture of religious accommodation<sup>11</sup> where the King of England accepted that in Canada and only in Canada, Catholics would not have to take the Oath of Allegiance.<sup>12</sup> The framework for the arrangements in 1867 is strongly impregnated with an attempt to manage religious diversity. Despite the desire to have a constitution in the image of Great Britain, there was a pragmatic tolerance of the Catholic religion.

The beginning of the colony was marked by the alliance between Christian religions and governmental elites who worked together for many purposes, from the assimilation of indigenous people to the development of colonization and the integration of new immigrant groups. Over time, freedom of religion became understood as a way to extend the privileges granted to Christian groups to other religions. This link between cultural tolerance and freedom of religion seems evident in its first legal articulation: the presence and desire to live “with” a French Canadian minority strongly linked to the Catholic religion calls for an idea of religion as intimately linked to the idea of cultural tolerance and the desire to live together. Nevertheless, religious discrimination is also a well-known fact of our history: from Canadian anti-Semitism<sup>13</sup> to the persecution of

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<sup>10</sup> Maurice A. Léger, “La déportation et la religion”, in Ronnie-Gilles LeBlanc, ed., *Du grand dérangement à la déportation : Nouvelles perspectives historiques* (Moncton : Chaire d’études acadiennes, 2005) 105, at 129; James Laxer, *The Acadians: In Search of a Homeland* (Toronto: Doubleday Canada, 2006), at 89-96.

<sup>11</sup> Hilda Neatby, *Quebec: The Revolutionary Age, 1760-1791* (Toronto: McClelland & Stewart, 1966), at 125-41, makes that point according to John McLaren, “The Doukhobor Belief in Individual Faith and Conscience and the Demands of the Secular State” in John McLaren & Harold Coward, eds., *Religious Conscience, the State, and the Law: Historical Contexts and Contemporary Significance* (Albany: State University of New York Press, 1999), at 134, note 60 [hereinafter “McLaren, ‘The Doukhobor Belief’”]. *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83.

<sup>12</sup> Micheline Milot, “Les principes de laïcité politique au Québec et au Canada” (2005) 13 *Bulletin d’histoire politique* 13.

<sup>13</sup> See Irving Abella & Harold Troper, *None Is Too Many: Canada and the Jews of Europe, 1933-1948*, 3d ed. (Toronto: Key Porter, 2000), at 340; *Noble v. Alley*, [1951] S.C.J. No. 34, [1951] S.C.R. 64 (S.C.C.). See also William W. Black, “Religion and the Right of Equality” in Anne Bayefsky & Mary Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 131.

religious minorities such as the Doukhobors,<sup>14</sup> the Hutterites<sup>15</sup> and the Jehovah's Witnesses.<sup>16</sup>

It is therefore not surprising that early iterations of the rule of law in *Roncarelli v. Duplessis*<sup>17</sup> were articulated in a context of religious discrimination, already denounced in *Saumur v. Quebec (City)*<sup>18</sup> and *Chaput v. Romain*.<sup>19</sup> In this latter decision, Taschereau J. evokes the links between freedom of religion and privacy, between freedom of religion and freedom of conscience, and between freedom of religion and tolerance for religious minorities. His words encapsulate the complexity of the protection to be given to freedom of religion:

In our country there is no state religion. Nobody is obliged to adhere to any belief. All religions are equal, and all Catholics and indeed all Protestants, Jews and other adherents of various religious denominations, have the greatest freedom to think as they wish. The consciousness of each is a personal matter and the concern of nobody else. It would be distressing to think that a majority can impose its religious views on a minority. It would be an unfortunate mistake to believe that serving your country or religion, by denying in a province, a minority the same rights that we claim ourselves with reason, in another province.<sup>20</sup>

The “accommodation of religious minorities” model followed the early recognition of the necessity of tolerance for minorities: adjustments to work schedules<sup>21</sup> were made. In hospitals or prisons, special meals were offered<sup>22</sup> and alterations to uniforms<sup>23</sup> were also implemented. From the beginning, it was anticipated that the issue of “accommodation” might be

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<sup>14</sup> McLaren, “The Doukhobor Belief”, *supra*, note 11; William Janzen, *Limits on Liberty: The Experience of Mennonite, Hutterite and Doukhobor Communities in Canada* (Toronto: University of Toronto Press, 1990) [hereinafter “Janzen”].

<sup>15</sup> Janzen, *id.*

<sup>16</sup> William Kaplan, *State and Salvation: The Jehovah's Witnesses and Their Fight For Civil Rights* (Toronto: University of Toronto Press, 1989).

<sup>17</sup> [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.).

<sup>18</sup> [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 (S.C.C.).

<sup>19</sup> [1955] S.C.J. No. 61, [1955] S.C.R. 834 (S.C.C.).

<sup>20</sup> *Id.*, at 840 (translation).

<sup>21</sup> *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536 (S.C.C.) [hereinafter “*Simpsons Sears*”]; *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.J. No. 75, [1992] 2 S.C.R. 970 (S.C.C.).

<sup>22</sup> Pierre Bosset, “Le régime alimentaire des détenus de foi hébraïque : obligations des autorités carcérales”, *Québec Human Rights Commission* (May 1991), online : <[http://www.cdpcj.qc.ca/fr/publications/docs/aliments\\_hebraique.pdf](http://www.cdpcj.qc.ca/fr/publications/docs/aliments_hebraique.pdf)>.

<sup>23</sup> *Grant v. Canada (Attorney General)*, [1994] F.C.J. No. 1001, [1995] 1 F.C. 158 (F.C.A.), aff'd [1995] F.C.J. No. 830 F.C.A.), leave to appeal refused [1995] S.C.C.A. No. 394 (S.C.C.).

difficult. Justice McIntyre in *Simpsons Sears*, seems to aptly predict the current debates:

No problem is found with the proposition that a person should be free to adopt any religion he or she may choose and to observe the tenets of that faith. This general concept of freedom of religion has been well-established in our society and was a recognized and protected right long before the human rights codes of recent appearance were enacted. Difficulty arises when the question is posed of how far the person is entitled to go in the exercise of his religious freedom. At what point in the profession of his faith and the observance of its rules does he go beyond the mere exercise of his rights and seek to enforce upon others conformance with his beliefs?<sup>24</sup>

In the context of the Charter, more ambitious statements were voiced attempting to define a “freedom analysis”, nevertheless grounded in a recognition of the value of diversity. The words of Dickson J. (as he then was) in *Big M Drug Mart* exemplify this:

A truly free society can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*.<sup>25</sup>

Perhaps the most ambitious “freedom of religion as freedom” statement comes when Dickson J. goes on to explain:

Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. *But the concept means more than that.*

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such

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<sup>24</sup> *Supra*, note 21, at para. 21.

<sup>25</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 94 (S.C.C.) [hereinafter “*Big M Drug Mart*”].

blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.<sup>26</sup>

Despite these auspicious words, soon enough public objectives would be argued to curtail individuals' and groups' assertions of religious freedom. For example, determining a holiday day more convenient for everyone (Sunday) was an appropriate objective in *Edwards Books and Art*,<sup>27</sup> where the Court seemed to accept a wider sphere of discretion for governments to determine "public safety, order, health, or morals". In my view, the McLachlin Court was initially quite critical of "majoritarian" justifications: refusing aesthetic objectives in *Syndicat Northcrest v. Amselem*<sup>28</sup> or security ones in *Multani v. Commission scolaire Marguerite-Bourgeoys*<sup>29</sup> (albeit in the two cases, the justifications were not articulated by governments, but by private actors in *Amselem* and a public authority — a school board — in *Multani*). The Court equally pursued an agenda of tolerance and respect in *Trinity Western University v. British Columbia College of Teachers*,<sup>30</sup> *Chamberlain v. Surrey School District No. 36*<sup>31</sup> and in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*.<sup>32</sup>

Freedom of religion is an interesting terrain of exploration of majority-minorities conflicts, as an expression of a respect for diversity. I have argued that courts generally feel comfortable in this role of arbiter between majority and minorities, because it means acting as the refuge against the "tyranny of the majority", an acceptable role for courts sensi-

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<sup>26</sup> *Id.*, at paras. 94-95 (emphasis added).

<sup>27</sup> *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.) [hereinafter "*Edwards Books*"].

<sup>28</sup> [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter "*Amselem*"].

<sup>29</sup> [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.) [hereinafter "*Multani*"].

<sup>30</sup> [2001] S.C.J. No. 32, [2002] 1 S.C.R. 772 (S.C.C.) [hereinafter "*Trinity Western*"].

<sup>31</sup> [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.) [hereinafter "*Chamberlain*"].

<sup>32</sup> [2004] S.C.J. No. 45, [2004] 2 S.C.R. 650 (S.C.C.) [hereinafter "*Congrégation St-Jérôme*"].



tive to criticisms of excessive activism.<sup>33</sup> This role of arbiter requires a sensibility to power imbalances, a will to understand in a non-judgmental way the minority's point of view and a capacity to assess critically the majority's concerns. In my view, the Supreme Court has often practised that role of arbiter between majority and minorities. A fair representation of this arbiter role can be found in the decision in the *Reference re Secession of Quebec*<sup>34</sup> and, in general, can be seen as a way to explain freedom of religion cases.

Among other things, this analysis of the courts as arbiter between minorities and majority explains one of the most controversial aspects of freedom of religion: the refusal to define the content of religion. The decision in *Amselem*<sup>35</sup> has generated criticism because it opened the door to what some say are idiosyncratic minority religious obligations. It will be recalled that, in the case, the practice of installing a succah was at issue: it is not a compulsory practice in Judaism and therefore it was possible to maintain a religious affiliation while obeying the requirements of the condominium contract not to erect any structure on the balcony. Nevertheless, the Supreme Court recognized the freedom of believers to define the content of their faith and of their religious obligations. Indeed, according to Iacobucci J.:

... an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine ... irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief.<sup>36</sup>

The recognition of this subjective conception of the relationship with the divine has raised fears of the emergence of far-fetched beliefs and practices. However, the decision to maintain the more subjective concept

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<sup>33</sup> Nathalie Des Rosiers, « Le poids de l'histoire : les années McLachlin et la liberté de religion », in David A. Wright and Adam M. Dodek, *Public Law at the McLachlin Court: The First Decade* (forthcoming).

<sup>34</sup> [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.). For a discussion of some of these ideas, see Nathalie Des Rosiers, "From Québec Veto to Québec Secession: The Evolution of the Supreme Court of Canada on Québec-Canada Disputes" (2000) 13 Can. J. Law & Juris. 171.

<sup>35</sup> *Supra*, note 28.

<sup>36</sup> *Id.*, at para. 56.

of freedom of religion can be explained in several ways: it is a design that closely resembles the “freedom” aspect. Indeed, just as courts try to recognize a broad interpretation of the freedom of expression and to analyze its limits in the context of section 1 of the Charter, rather than as part of an ontological exercise of what expression is, one may think that freedom of religion should equally avoid asking an exact definition of what religion is, especially, as pointed out by Iacobucci J., when this definitional exercise would put the courts in the middle of ecclesiastical debates.

I also believe that this subjective interpretation allows the minority member and the minority community to express its expectations and ways of seeing without being subject to the need for external objectification. In a way, it enables the expression of the minority group’s difference without having to justify the nature of this difference, its origins or ramifications. Such an interpretation of freedom of religion is understandable in a context of minorities-majority relations in which it is important to allow the minority to articulate for itself its aspirations before they are circumscribed or appropriated by the justifications of the majority. It does not give *carte blanche* to minorities nor require that all their demands be accepted but it does create a listening space where exchanges are possible. The study of the negotiations or exchanges between minority-majority — regardless of the type of minority, be they cultural, political, linguistic or religious — reveals a need for room for the expression of the “interest” by the minority. When the majority speaks for the minority, when members of majority religions or secular beliefs define the mandatory content of minority religions, the risk of stereotyping is always present. Although a subjective content of religion can lead to exaggerated or individual interpretations that go well beyond the ways of life of a minority group, it is preferable to uphold this broad interpretation rather than a narrow interpretation requiring external validation. The real debate should not be held under the definition of freedom of religion but in the context of the justifications offered to limit its exercise pursuant to section 1 of the Charter.

Under section 1, one would hope for the court to be skeptical toward majoritarian explanations in order to allow for the protection against tyranny. *Multani*<sup>37</sup> is certainly the most controversial<sup>38</sup> decision of the past

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<sup>37</sup> *Supra*, note 29.

<sup>38</sup> The decision may have been a trigger for the media furor surrounding reasonable accommodation in Quebec that prompted the establishment of the Bouchard Taylor Commission, otherwise known as the Consultation Commission on Accommodation Practices Related to Cultural

decade despite the fact that it seemed to come squarely within the tradition of *Simpsons Sears*.<sup>39</sup> In fact, the findings of the trial judge were quite clear about the need for tolerance and a practical resolution of the majority's apprehensions about the students' safety was offered: the kirpan had to be sewn in the pocket of the student. The Supreme Court expressed doubts about the alleged fear for the safety of students and required convincing evidence of danger, not simply projecting prejudices or ignorance to justify the claims of the majority.

*Amselem*<sup>40</sup> can be read the same way. One can note the same skepticism toward the claims of aesthetic needs. Justice Iacobucci is severe in this regard:

... protecting the co-owners' enjoyment of the property by preserving the aesthetic appearance of the balconies and thus enhancing the harmonious external appearance of the building cannot be reconciled with a total ban imposed on the appellants' exercise of their religious freedom. Although residing in a building with a year-long uniform and harmonious external appearance might be the co-owners' preference, the potential annoyance caused by a few succahs being set up for a period of nine days each year would undoubtedly be quite trivial.<sup>41</sup>

A comparison with *Edwards Books*<sup>42</sup> is interesting in this regard: recall that Dickson C.J.C. had used section 1 to justify the constitutionality of the Ontario legislation, suggesting that the legislature could decide which day of the week was the most practical for a holiday if it was accommodating, even sparingly, the minority.

This short history of freedom of religion indicates that the ideals of diversity and tolerance explain the development of freedom of religion in Canada.<sup>43</sup> They forged a "made in Canada" method of analysis about the issue that was particularly consistent with Canada's history, and reflected a progressively deeper commitment to religious pluralism as an expres-

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Differences. In its report, *Building the Future: A Time for Reconciliation* (2008), the Commission advocates "open secularism" as the model to be pursued in Québec. See online at: <<http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>>.

<sup>39</sup> *Supra*, note 21.

<sup>40</sup> *Supra*, note 28.

<sup>41</sup> *Id.*, at para. 86.

<sup>42</sup> *Supra*, note 27.

<sup>43</sup> For additional analysis, see Nathalie Des Rosiers, "Free Religions or Freedom from Religion? Canada, Federalism and Religion", in Joseph Maria Garcia, *Diversidad, derechos fundamentales y federalism* (Barcelona: Atelier Libros jurídicos, 2010) 185.

sion of multiculturalism. However, the work of Andrée Lajoie<sup>44</sup> would invite us to consider that in approaching the majority-minorities debate and the will to “live together” in a tolerant and accepting pluralist society, the Court will not go so far as to dramatically change the economic structure nor redistribute income. Andrée Lajoie suggests that the minority’s gains are mostly symbolic, and never stray too far from majoritarian values. Lajoie’s work may help explain how, as the ideas of tolerance or multiculturalism become more debatable, the ambivalence will find its expression in judicial decisions.

### III. THE DECISION IN *HUTTERIAN BRETHREN*, FREEDOM OF RELIGION AND MULTICULTURALISM

The decision in *Hutterian Brethren* pits the small Alberta community of Hutterites who believe that the Second Commandment prohibits its members from having their photographs taken against a new requirement in Alberta that all drivers of motor vehicles be photographed. Like elsewhere, Alberta requires that all persons who drive motor vehicles hold a driver’s licence and since 1974, each licence has borne a photograph of the licence holder, subject to exemptions for religious objectors such as the Hutterian Brethren. In 2003, the province adopted a new regulation and removed the exemption in order to put all the photographs in a facial recognition data bank. There were at the time about 450 exemptions, most of them members of Hutterian Brethren colonies. The province proposed two measures to lessen the impact of the universal photo requirement but, since these measures still required that a photograph be taken for placement in the province’s facial recognition data bank, they were rejected by the members of the Wilson Colony. The Hutterian Brethren proposed instead that no photograph be taken and that non-photo driver’s licences be issued to them marked “Not to be used for identification purposes.” When they could not reach an agreement, the Hutterian Brethren challenged the constitutionality of the regulation alleging an unjustifiable breach of their religious freedom. The Canadian Civil Liberties Association intervened in the case.<sup>45</sup> The case proceeded on an admission that there was a violation of freedom of religion. All the

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<sup>44</sup> Andrée Lajoie, *Jugements de valeurs* (Paris : P.U.F., 1997); A. Lajoie *et al.*, « Les représentations de “société libre et démocratique” à la Cour Dickson : La rhétorique dans le discours judiciaire canadien » (1994) 32 Osgoode Hall L.J. 295.

<sup>45</sup> The CCLA factum at the Supreme Court of Canada is available online: <<http://ccla.org/wp-content/uploads/2009/02/2008-09-18-hutterian-brethren-of-wilson-colony.pdf>>.

Alberta courts had found that the violation was not justified under section 1 of the Charter. In a 4-3 decision, the Supreme Court disagreed.

Chief Justice McLachlin and Binnie, Deschamps and Rothstein JJ. found that the regulation was justified under section 1, because it ensured the integrity of the driver's licensing system and minimized the risk of identity theft. The universal photo requirement was deemed necessary to ensure that each licence was connected to a single individual, and to no more than one individual. Such was clearly a goal of pressing and substantial importance even if it was not strictly necessary to ensure safe driving on highways. The four judges found that the regulation satisfied the proportionality test: it was rationally connected to the objective, and exemptions from the photo requirement would increase the vulnerability of the system. They also found that there was no alternative that would similarly uphold the integrity of the system: any exemption would have the same effect. Even if there were over 700,000 Albertans who do not hold driver's licences and whose pictures would never appear in the data bank, the majority suggested that the objective of the driver's licence photo requirement was not to eliminate all identity theft, but simply to minimize it.

In reaching this conclusion, the Court rejected the accommodation approach and suggested that when the constitutional validity of a law was at stake, the doctrine of reasonable accommodation should not be used as an equivalent to the section 1 *Oakes* analysis.<sup>46</sup> The government is entitled to justify the law, not by showing that it has accommodated the claimant to the point of undue hardship, but by establishing that the measure is simply rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects. The Court concluded as well that the effect of the violation were not so serious: the negative impact on the freedom of religion of Colony members who wish to obtain licences did not outweigh the benefits; they could hire cars or cabs and while this could impose a cost, there was no evidence that this would be prohibitive.

Justice Abella dissented, arguing that because more than 700,000 Albertans had no driver's licence, the benefit of adding the photographs of around 250 Hutterites was marginal. She saw the impact on the collective way of life of the Hutterites as significant and applying Dickson C.J.C.'s famous formulation,<sup>47</sup> concluded that the mandatory photo requirement

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<sup>46</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

<sup>47</sup> The famous paragraph has been previously quoted: see text accompanying note 26.

was a form of indirect coercion that placed religious observers in the untenable position of having to choose between compliance with their religious beliefs or giving up on their community's self-sufficiency.

Justices LeBel and Fish equally dissented, adding to Abella J.'s comments that the majority had minimized and understated the nature and importance of the impact on community life as an important aspect of the guarantee of freedom of religion. Skeptical about the ability to really prevent identity fraud through the mechanism of compulsory photos in digital facial recognition banks, LeBel J. suggested that allowing the limited number of exceptions would not unduly compromise the security of Alberta residents and that other alternatives existed to prevent identity theft.

Generally, the decision in *Hutterian Brethren* can be viewed as a departure from the critical assessment of majority rationales expressed in *Multani* or *Amselem* or from the way even in which the Supreme Court in *Edwards Books* relied on exceptions to justify a legislative scheme that violated religious freedom. In the end, the decision in *Hutterian Brethren* validates a no-exception rule for an administrative decision whose democratic legitimacy, necessity and efficiency still have to be demonstrated. Several aspects of the decision could be discussed (the relaxed section 1 approach at the minimal impairment stage<sup>48</sup> or the tolerance for financial costs for the exercise of one's religious commitments).<sup>49</sup> I will focus on three aspects that have been less considered but that may illustrate a tendency toward a decreased tolerance for difference:

- (1) The decision generously accepts secondary purposes to a legislation through a regulatory change.
- (2) The decision completely rejects a "duty to accommodate" approach for a government dealing with a religious minority.
- (3) The decision undermines a marginalized set of beliefs.

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<sup>48</sup> Buckingham, *supra*, note 7.

<sup>49</sup> See Mahmud Jamal, "Recent developments in Freedom of Religion", 8th Annual Charter Conference, Ontario Bar Association, (September 2009), available online: <<http://www.softconference.com/oba/publication.aspx?userID=620209621646151127112010125129&code=09CCL0918C>>.

## 1. Acceptance of Secondary Justifications

Courts have always been skeptical of changes to legislative purposes. In *Big M Drug Mart*,<sup>50</sup> the government had tried to argue that the *Lord's Day Act* had a new purpose, not religious but social, to facilitate a common day of rest. Justice Dickson rejected that argument in the following terms, quoting from a Report from the Law Reform Commission of Canada:

... it would seem apparent that any recharacterization of the *Lord's Day Act* in a modern context so as to provide a clarification of the province's role with respect to Sunday legislation is a task *the Parliament of Canada and the provincial legislatures will have to take up directly*.<sup>51</sup>

In Alberta, the redefinition of the driving licence as an identity measure rather than a simple attestation of the capacity to drive did not occur through a legislative amendment (by the Alberta legislature) but rather by a regulatory change, which eliminated previous exemptions. Although one can presume that the increased budgetary costs to create the facial recognition data bank were approved by the legislature, the “new” and additional purpose of the *Traffic Safety Act*<sup>52</sup> of Alberta was not approved by the legislature. Indeed, this was a point noted by Conrad J.A. at the Alberta Court of Appeal, writing for the majority.

The Chief Justice dismissed this concern by considering that the problem of identity theft, and the legitimacy of attempting to curb it by the mandatory participation in the facial recognition data bank, was a “collateral effect”<sup>53</sup> of having a driver's licence scheme:

The Province was entitled to pass regulations dealing not only with the primary matter of highway safety, but with collateral problems associated with the licensing system. It was therefore entitled to adopt a regulation requiring photos of all drivers to be held in a digital photo bank, thereby minimizing the risk of identity theft to the extent possible.<sup>54</sup>

One should be concerned that such large deference is given to the executive branch acting without the approval of the legislative branch.

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<sup>50</sup> *Supra*, note 25.

<sup>51</sup> *Id.*, at para. 92 (emphasis added). *Lord's Day Act*, R.S.C. 1970, c. L-13.

<sup>52</sup> R.S.A. 2000, c. T-6.

<sup>53</sup> *Hutterian Brethren*, *supra*, note 5, at para. 45.

<sup>54</sup> *Id.*

Typically, courts aim to enhance the democratic process by providing the other branches of government full opportunity to act in the context of their responsibilities. What would have been the loss to our democracy in requiring that the introduction of a digital photo bank, and the elimination of all exemptions from it, be the subject of public debates and legislative approval? This does not appear to be an undue burden on the government. During the legislative process, the Hutterian Brethren could have voiced their concerns in front of the legislative assembly. Other citizens may have also expressed doubts about the effectiveness of the digital photo bank. The problem of identity theft may have provoked the discussion of a larger range of options: changes in banking practices or in credit card companies security measures, for example.

It might be dangerous to cavalierly accept secondary purposes defined by regulation under the guise of protecting the integrity of an administrative scheme, and then treat them with deference equivalent to a legislative enactment: could a bureaucracy decide that a compulsory identity card is helpful and essential to ensure the integrity of the social benefits scheme? Of immigration programs? Could civil servants devise an invasive supervisory apparatus for parolees or people who are seeking a pardon in order to minimize the risk of fraud? Should that be done without legislative approval, and then sanctioned by the courts as a mere response to collateral effects of existing systems? Is requiring that such violations of rights be done legislatively the “height of formality”<sup>55</sup> or democratic accountability?

Neither dissenting judge discusses this issue. Justice Abella accepts that the objective is legitimate and LeBel J. focuses on the necessity to avoid rigidly defining the objective in a way that prevents a meaningful analysis of the alternatives. I certainly share his concerns: one should worry about a governmental objective to “reduce or eliminate crime”, and the consequence that any alternative that does not completely meet the objective will be discarded. Surely, this ought not to be the result of the Chief Justice’s analysis of minimal impairment. One would hope that future cases will continue to require that governments not define unattainable goals as a way to escape accountability on the range of alternatives that they evaluate and the impact on rights and civil liberties that they inflict. This is particularly dangerous in the context of “secu-

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<sup>55</sup> Justice Slatter describes the suggestion that the prevention of the misuse of a driver’s licence not being one of the purposes of the *Traffic Safety Act* as the “height of formality”. He is quoted with approval by the Chief Justice in *Hutterian Brethren*, *supra*, note 5, at para. 44.



rity” objectives, where the perspective of security experts is often premised on a risk analysis where the long-term impact on other values, such as civil liberties, is not quantified and is generally undervalued: for many security experts, there can never be enough security, no matter what the costs.

In conclusion, under this part, secondary purposes ought to be treated with less deference than primary ones, particularly when they have not been the subject of legislative debates. This will need to be developed in future litigation: it could also be that politicians ought to demand greater involvement in issues couched as mere regulatory exercises that affect citizen’s constitutional rights.

## 2. Rejection of the Model of Reasonable Accommodation

The decision in *Hutterian Brethren* will be known for its clear rejection of the model of reasonable accommodation when governments deal with individuals through legislation or regulation. The Chief Justice explains:

Minimal impairment and reasonable accommodation are conceptually distinct ...

Where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis ... The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing the right and proportionate in its effects.<sup>56</sup>

This is certainly correct. The model of reasonable accommodation is conceptually different than reasonable accommodation and is no substitute for a proper section 1 analysis. However, despite the fact that the reasonable accommodation model has its faults, it allows for a dialogue between the government and the minority, and a mandatory exchange and consideration of the views of the minority. Although one understands the Court’s preference for the *Oakes* model that prevents a minority hijacking the process of defining the appropriate exceptions, one should worry about losing the obligation to consult that is implicit in the duty to accommodate. If, as was the case here, one group is particularly affected by a change in the law, it might be appropriate to consult and ensure that

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<sup>56</sup> *Hutterian Brethren, id.*, at paras. 68, 71.

its views are properly taken into account. Otherwise, one risks devising a section 1 process in abstract, indifferent or deaf to the preoccupations of the people directly affected, particularly, as here, when the process is regulatory and not legislative and where the opportunity for public discussions is minimal.

Hopefully, the decision in *Hutterian Brethren* will not be read as a dismissal of the consultative process adopted by the Alberta government with the Brethren. This would be a tragedy. Many have suggested that section 1 ought to have a “procedural component”, one that recognizes that the process of devising alternatives, of valuing the pros and cons, of testing social sciences evidence cannot be done without some participation of the groups potentially affected. Although the Aboriginal context is very different because Aboriginal people’s claims to rights of self-government and sovereignty are engaged in determining acceptable limits to ancestral rights, there is value in exploring the benefits of consultation mechanisms as part of section 1, as *R. v. Sparrow*<sup>57</sup> and subsequent cases have done for the justification of limitations on Aboriginal rights. Participation in governance, invitations to be heard and consultative mechanisms are ways in which minorities can enhance their sense of belonging as well as their voice within a polity. We need rich instruments to enhance democratic participation. As was the case here, the majoritarian “first past the post system” will not provide a voice nor will it provide representation to a small marginal group. A pluralist society must give itself more sophisticated mechanisms of democratic participation that should be anchored in constitutional law. This is a terrain for further exploration: it is to be hoped that the decision in *Hutterian Brethren* will not be seen as a *fin de non-recevoir* to such discussions.

In the context of majority-minorities relationships in a multicultural society, the decision in *Hutterian Brethren* in its unambiguous and absolute rejection of the reasonable accommodation model may prove unhealthy. The justification for the rejection of the reasonable accommodation model seems to present a disembodied process, disconnected from the people who could potentially be affected by the legislation (even more so in the context of a regulation) and with no obligation to reach out and understand the potential impact:

By their very nature, laws of general application are not tailored to the unique needs of individual claimants. *The legislature has no capacity*

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<sup>57</sup> [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.).

*or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe Charter rights.*<sup>58</sup>

Modern legislative processes should aim to have the capacity to ascertain whether individuals or groups will be seriously affected by the law. Transparent processes and consultation mechanisms may also help in ensuring that the impact of the law is known *before* it is enacted. The Supreme Court seems to be suggesting a fairly esoteric legislative process, isolated and uninterested in its impact on voters or individuals. One would hope for more. Again, I would suggest that the regulatory process may offer less opportunity for public discussion and engagement, and indeed this may warrant a different assessment of the level of deference to be given to a governmental decision in that regulatory context.

In summary, in the case of *Hutterian Brethren*, the Alberta government had certainly engaged in a dialogue with the Hutterite community. It would be unfortunate if the outcome of the case was that it was no longer necessary for governments to engage in dialogue with minorities. On the contrary, participatory and consultative approaches with affected groups by governments should be valued by the Court and recognized as a prerequisite to exercising deference to government. Language to that effect or, at a minimum, an acknowledgment of the value of such discussions with minority groups, would have been a welcome addition to the decision.

### 3. Intolerance of Marginal Beliefs

The Hutterites constitute a very small minority in Canada. The Jehovah's Witnesses are more numerous and more nationally distributed, but they nevertheless constitute a small portion of religious adherents in Canada. The decision in *C. (A.)*, which involved the access by a Jehovah's Witness mature minor to autonomous medical decision-making, concludes by a more forthright respect for freedom of religion and religious preferences in the test for the "best interests of the child". It remains to be seen whether lower court judges will indeed give weight to a mature adolescent's wish to forego a recommended medical treatment. Will a medical decision seen by most as unpalatable ever be accepted as

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<sup>58</sup> *Hutterian Brethren*, *supra*, note 5, at para. 69 (emphasis added).

in the best interest of a mature adolescent? Can our multicultural and pluralist society accept and respect marginal beliefs?

The question is also raised in the decision in *Hutterian Brethren*, where the majority reasoning raises fear that Canadian society has reached a less tolerant phase of its history. Justice LeBel, in his dissent, worried that the majority was “belittling” the Hutterian Brethren’s beliefs.<sup>59</sup> Justice Abella shared the same concerns.<sup>60</sup> The majority decision in *Hutterian Brethren* reflects some language unsympathetic to the Hutterites’ religious freedom:

- In the introduction, the majority refers to the fact that freedom of religion does not protect “trivial” burdens, and seems to express doubts as to the existence of a real interference with beliefs, but the Court must accept the concessions made by the Attorney General and the assumptions on which courts below had proceeded.<sup>61</sup>
- The decision appears to recognize the threat that accommodation of non-mainstream beliefs would have on governments’ ability to implement social policy: “Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs ... to the overall detriment of the community.”<sup>62</sup>
- The facial recognition data bank is described as a “creative solution” to the “difficult”, “complex” problem of identity theft,<sup>63</sup> and the government is not required to show that it will produce the forecast benefits.<sup>64</sup>
- The response that the Hutterian Brethren can just hire a cab to get anywhere they need to go could be read as an inconsiderate dismissal of their way of life that trivializes the issue.<sup>65</sup>

In my view, at stake was not so much the right or the privilege to drive but the concept of tolerance and the acceptance of exceptions as a

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<sup>59</sup> *Id.*, at para. 201.

<sup>60</sup> *Id.*, at paras. 167-171.

<sup>61</sup> *Id.*, at para. 34.

<sup>62</sup> *Id.*, at para. 36.

<sup>63</sup> *Id.*, at para. 37.

<sup>64</sup> *Id.*, at para. 85.

<sup>65</sup> *Id.*, at para. 99.

way of life in Alberta. It appears that the preference is for the imposition of a more homogenized view of society in search for an elusive security.

Since religious pluralism partly symbolizes Canadian multiculturalism, it is not surprising that a more restrained version of religious toleration emerges when multiculturalism is under attack as it is now. Multiculturalism was once associated with a desirable cosmopolitan identity that would enhance Canadian life, but it is now often labelled a failure or a vehicle for the development of cultural ghettos. Indeed, if the majority decision in *Hutterian Brethren* is read in light of Lajoie's work,<sup>66</sup> it could signal not only an internalization of the criticism of government by the judges but the incorporation of what media have described as the new Canadian values: the "tougher Canada", one where tolerance for difference is replaced with unequivocal demands for faster and more complete integration. The message of the "tougher Canada" could be an appeal to more homogeneity, more pride, less guilt, more flags, less money for multicultural events.

In this context, the model of religious toleration is under stress: the decisions studied seem to discount what is perceived to be a marginal belief, attempting to narrow freedom of religion to the less taxing task of tolerating beliefs acceptable to the majority. Because the Jehovah's Witnesses and the Hutterian Brethren observe commandments that are alien to most Canadians, that is, refusals to accept necessary blood transfusions and refusals to be photographed, their beliefs are undervalued. It appears that multiculturalism and freedom of religion accept difference, provided that it is not too different.

One has a sense that there is a tightening of the multicultural model. Many have criticized the multiculturalism model as being more symbolic than real, à la *Noblesse oblige*, that is, more benevolent than transformative. It is as though even this lukewarm model is seen as too generous, as though the noblesse had obliged and was now tired of it. Is *Hutterian Brethren* the response to the backlash from *Multani*? Is it a redefinition of Canadian values with security trumping tolerance or solidarity? Much depends on the way in which it will be interpreted.

#### IV. CONCLUSION

Religion has always been a complex phenomenon for believers and non-believers alike. For believers, it represents a special relationship that

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<sup>66</sup> *Supra*, note 44.

may structure one's being. The way one works, dresses, eats, organizes one's time, marries or not, saves, gives or spends, speaks out or stays quiet could well be inspired by the teachings of one's religion. Being religious may at the same time foster a sense of community or feel like an oppressive or limited way to live; it can provide the possibility of engaging with non-believers or isolate one from others. Whether one's religion is popular, mildly adhered to or not, increases or decreases the complexity of interacting with the secular world. For Christians in North America, life is relatively easy: the religious holidays define the working calendar; stores feature the appropriate reminders of religious obligations, and rituals are supported by the media and the cultural life. Minority religions, Islam and Judaism in particular, may be equally well integrated into the social life of a community depending on the density of the population in a particular region. Not so for the less popular religions, such as Jehovah's Witnesses or Hutterites.

For non-believers, religion may appear either irrelevant or very dangerous: is it simply a private way for some people to manage their lives? Or does it more ominously threaten to transform democratic societies into theocracies where rights and freedoms would be curtailed? Does discrimination within religion, against women for example, justify or even compel interference with religious life and religious communities?

In this context, the issue of religion is becoming more complex for governments as well: is it a part of the stable socio-cultural institutional structures as it once was? Is it a partner for social development? Is it a force to be ignored, managed, controlled or feared? Does it help or hinder social harmony and progress? All these questions will continue to be at the forefront of public debates. In this context of increased public anxiety, courts will continue to play a role in questions of religion. The way in which courts understand their role with respect to the interplay of governmental action and religion was the focus of this paper.

"In a multiethnic and multicultural country such as ours...": with these words, Iacobucci J. begins his explanation for rejecting the aesthetic objectives of condominium owners in favour of religious freedom in *Amslem*.<sup>67</sup> The analysis of freedom of religion as an example or rather a battlefield for multiculturalism and diversity is becoming clearer.

This paper sought to analyze the decisions of the Supreme Court in 2009 in light of this conflation of ideas of freedom of religion and multiculturalism. It posits that freedom of religion and multiculturalism have

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<sup>67</sup> *Supra*, note 28, at para. 87.

been mutually reinforcing but that there is a possibility that as commitment to multicultural values diminishes, so will the protection of freedom of religion. This paper criticizes the decision in *Alberta v. Hutterian Brethren*, suggesting, first, that the reliance on secondary purposes of regulatory amendments (as opposed to legislative ones) is incompatible with a protection of democratic values and respect for the role of Parliament and legislative assemblies; second, that the rejection of the accommodation model ought not to be interpreted as rejecting negotiations and consultations with affected minority groups; third, that the protection of religious minorities, particularly the ones holding very marginal beliefs, raises particular challenges in the appreciation of proportionality in a multicultural society. Religious beliefs are difficult to explain and attempting to justify them in the context of earthly concerns seems pointless. *Hutterian Brethren* is a decision that could be interpreted as demonstrating a significant shift in the protection of multicultural values in Canada.