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SUPREME COURT OF CANADA ADOPTS BROAD VIEW OF RELIGIOUS FREEDOM

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A. INTRODUCTION

Following on the heels of the Federal Court of Appeal's decision in *Fuaran Foundation v. Canada Customs and Revenue Agency*, 2004 FCA 181 (the "*Fuaran Foundation* decision"),[1] which narrowly construed the practices constituting "advancing religion" in the charitable sense, the Supreme Court of Canada, in a landmark 5-4 ruling in *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, 2004 SCC 47 (the "*Amselem* decision"), has said the State cannot regulate personal religious beliefs. In the *Amselem* decision, the Court held that when courts undertake to analyze religious doctrine in order to determine the truth or falsity of a contentious matter of religious law, or when courts attempt to define the very concept of religious obligation, "they enter forbidden domain." This *Charity Law Bulletin* will review the Court's decision and discuss some of the implications of this case on religious freedom in Canada.

[1] See *Charity Law Bulletin No. 50*, available at www.charitylaw.ca.

B. FACTS OF THE CASE

The Appellants, all Orthodox Jews, owners of condominium units in Place Northcrest, two luxury buildings forming part of a larger complex in Montreal, Le Sanctuaire du Mont-Royal (the "Sanctuaire"). Under the terms of the Sanctuaire's by-laws in the declaration of ownership, the balconies of individual units, although "common portions" of the immovable, were nonetheless "reserved to the exclusive use" of the co-owners of the units to which they were attached.

At issue was the Appellants ability to erect "succah" (a small enclosed temporary hut or booth made of wood or other material, such as fastened canvas, and open to the heavens) on their individual balconies during the nine-day Jewish festival of Succot (or Sukkot - a harvest festival beginning five days after Yom Kippur and commemorates the forty-year period during which the Children of Israel were in the desert and living in temporary shelters). The Sanctuaire denied a request to erect succah, but upon intervention by the Canadian Jewish Congress, proposed setting up a communal succah in the Sanctuaire's gardens. In rejecting the compromise, the Appellants proceeded to set up individual succah on their respective balconies. In response, the Sanctuaire filed an application for permanent injunction prohibiting the Appellants from setting up succahs and, if necessary, permitting their demolition. The application was granted by the Superior Court and upheld on appeal.

1. Superior Court decision

   Justice Rochon, of the Quebec Superior Court, found the declaration of co-ownership clearly prohibited the Appellants from erecting succahs on their balconies; that the restrictions were "justified by the destination of the immovable, its characteristics or its location," as required by art. 1056 of the *Civil Code of Quebec,* S.Q. 1991, c. 64 (the "Civil Code"), and that the restrictions had been applied in a uniform manner. He asserted that in order for a contractual clause to infringe an individual's freedom of religion, "the impugned contractual clause must, whether directly or by adverse effect, either compel individuals to do something contrary to their religious beliefs or prohibit them from doing something regarded as mandatory by their religion." He asserted that a claimant must prove that a practice is required by the official teachings of the religion in order for it to be protected as freedom of religion under the Quebec *Charter of Human Rights and Freedoms,* R.S.Q., c. C-12 (the "Quebec *Charter*"). It

is not sufficient for a claimant to possess a sincere belief that a particular practice is required. In granting the permanent injunction, Rochon held there was no religious obligation requiring practicing Jews to erect individual succahs, and no commandment respecting where they must be erected.

2. Court of Appeal decision

Justice Dalphond, writing for the majority in the Quebec Court of Appeal, agreed with the trial judge, holding that although the impugned provisions of the declaration of co-ownership restrict the Appellants' rights, prohibiting succahs on their balconies, those restrictions were valid under art. 1056 of the Civil Code. The impugned provisions were neutral in application, and even with a distinction, it would not nullify or impair the Appellants' rights to freedom of religion amounting to discrimination, since the Appellants were not obligated by their religion to erect succahs on their balconies. He further asserted that when the Appellants signed the declaration of co-ownership, they effectively waived their rights to freedom of religion.

Concurring in the result, Justice Morin of the Quebec Court of Appeal found the trial judge had adopted an "unduly restrictive" interpretation of freedom of religion and held that the impugned provisions of the declaration of co-ownership infringed the Appellants' rights to freedom of religion. In considering the duty to accommodate, Justice Morin applied the three-step test set out in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3. He concluded that the goal of establishing restrictions was rationally linked to the goal of administering the building and that restrictions had been enacted on the basis of a *bona fide* belief they were necessary to fulfil its mandate. As for undue hardship, Justice Morin concluded that it was the intransigent attitude adopted by the Appellants that made any accommodation practically impossible, and consequently discharged the respondent from any obligation of accommodation beyond the communal succah already proposed. As such, he concluded the respondent would suffer undue hardship if forced to fully accommodate the Appellants.

3. Issues before Supreme Court of Canada

Three issues were before the Supreme Court of Canada:

a) whether the clauses in the by-laws of the declaration of ownership, containing a general prohibition against decorations or constructions on each balcony, infringed the Appellants' freedom of religion protected under the Quebec *Charter*;

b) if so, whether the refusal by the respondent to permit the erection of succahs was justified by its reliance on the co-owners' rights to enjoy property under s. 6 of the Quebec *Charter* and their rights to personal security under s. 1; and

c) whether the Appellants waived their rights to freedom of religion by signing the declaration of co-ownership.

C. FINDINGS OF THE COURT

1. Freedom of Religion and Infringement

Writing for the majority, Chief Justice McLachlin and Justices Major, Arbour and Fish, Justice Iacobucci found the trial judge and the majority of the Court of Appeal took a "dubious, unwarranted and unduly restrictive" view of freedom of religion. He concluded that the basic principles underlying freedom of religion consists of

> the freedom to harbour beliefs and undertake practices, 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, irrespective of whether a particular practice or belief is required by official religious dogma or in conformity with the position of religious officials.

Objective and personal notions of religious belief, obligation, precept, commandment, custom or ritual are encompassed by this freedom.

Consequently, Justice Iacobucci held that both obligatory and voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. As it is the religious or spiritual essence of an action, not the mandatory nature of its observance, that attracts protection, Justice Iacobucci asserted that an inquiry into the mandatory nature of an alleged religious practice is both inappropriate and

plagued with difficulties. He stated, "the State is in no position to be, nor should it become, the arbiter of religious dogma. … Courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, …[such] secular determinations … unjustifiably entangle the court in the affairs of religion."

Justice Iacobucci explained that those advancing a freedom of religion claim must show the court that:

- 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 or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or in conformity with the position of religious officials; and
- he or she is sincere in his or her belief.

Only then will freedom of religion be triggered.

Once religious freedom is triggered, a court must ascertain whether there has been sufficient interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion. It will suffice for a claimant "to show the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial." [emphasis in original] In this respect, "not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion." Justice Iacobucci asserted that this reflects a broad and expansive approach to religious freedom under both the Quebec and Canadian *Charters*, and should not be narrowly construed prematurely. Harmful conduct or conduct interfering with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the conflict's context.

Applying these principles to the facts of the case, Justice Iacobucci concluded that the lower courts failed to recognize that freedom of religion under the Quebec (and the Canadian) *Charter* does not require a person to prove that his or her religious practices are supported by any mandatory doctrine of faith. Justice Iacobucci wrote:

> Regardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion, it should trigger the protection of s. 3 of the Quebec *Charter* or that of s. 2(a) of the Canadian *Charter*, or both, depending on the context. [emphasis in original]

Justice Iacobucci held that the Appellants had demonstrated a sincere belief with respect to the need to build individual succahs, because the alternatives of either imposing on friends and/or family or celebrating in a communal succah would, subjectively, lead to extreme distress, and thus impermissibly detract from the joyous celebration of the holiday

With respect to dwelling in a succah, Justice Iacobucci concluded that the burdens placed upon the Appellants by the impugned clauses, either by imposing on others or by forcing the holiday's celebration in a communal succah, were substantial, representing a non-trivial interference with their protected rights.

2. Justification for Limit on the Exercise of Freedom of Religion

The Sanctuaire justified the blanket prohibition claiming the erection of succahs on balconies would interfere with the co-owners' rights to the peaceful enjoyment of their property and to personal security, protected under ss. 6 and 1 of the Quebec *Charter*, respectively. More specifically, this prohibition served to preserve the economic and aesthetic value of their property. However, under the circumstances Justice Iacobucci found the alleged intrusions or deleterious effects on the respondent's rights or interests were, at best, minimal and could not be considered valid limits on the exercise of the Appellants' religious freedom. The exercise of this freedom, otherwise significantly impaired, clearly

outweighed the unsubstantiated concerns of the co-owners regarding the decrease in property value. Justice Iacobucci noted that living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others. In this regard, labelling an individual's steadfast adherence to his or her religious beliefs as "intransigence" fails to further an enlightened resolution of the dispute before the Court.

The Sanctuaire's further justification of the restriction – that it ensures that the balconies remained unobstructed in the case of emergency, thereby protecting the co-owners' rights to personal security – was also rejected. The Appellants' offer to erect their succahs so as not to block doors, obstruct fire lanes, or pose any threat to safety or security, made such concerns unnecessary.

3. Waiver of Freedom of Religion

Justice Iacobucci rejected Justice Dalphond's contention that the Appellants waived their right to freedom of religion when they signed the declaration of co-ownership. While the respondent claimed succahs were "plainly" and unconditionally prohibited under s. 2.6.3b) of the declaration of co-ownership, Justice Iacobucci found the ambiguity created by s. 9.3, which permits the covering and enclosure of balconies with consent of the co-owners/directors, obviated any explicit or implicit waiver claim.

Second, Justice Iacobucci held that a waiver of any right would have to be voluntary and freely expressed, with a clear understanding of the consequences. In this case, the Appellants had no choice but to sign the declaration of co-ownership, and it would be "insensitive and morally repugnant" to suggest the Appellants should "move elsewhere if they took issue with a clause restricting their rights to religious freedom." Absent real choice, it would be incorrect to find a voluntary and valid waiver of rights. Further, by signing the declaration without reading the provisions, there was no clear understanding of the consequences of the alleged waiver

Justice Iacobucci concluded that the waiver of a fundamental right, like freedom of religion, would have to be voluntary, explicit and expressed in unequivocal terms. Not only would a general prohibition on constructions in the declaration of co-ownership be insufficient to ground a waiver, but the same would apply in any document lacking explicit reference to the affected *Charter* right. In Justice Iacobucci's view, the Appellants did not voluntarily, clearly and expressly waive their rights to freedom of religion. Justice Iacobucci also noted that the record showed that some of the Appellants purchased their units specifically for the unobstructed balconies, so as to erect succah.

4. Conclusion and Disposition

Justice Iacobucci concluded that the impugned provisions in the declaration of co-ownership prohibiting constructions on the Appellants' balconies infringed the their religious freedoms under the Quebec *Charter*. The Appellants were not held to have waived their rights nor to implicitly agree not to erect succahs by signing the declaration of co-ownership. Under the circumstances, Justice Iacobucci found the respondent's justificatory claims for this infringement unfounded, the co-owners' personal security concerns largely resolved and their property interests minimally intruded upon. The Appellants were thus legally entitled to erect succah for a period no longer than the holiday of Succot, on condition they conformed with building and fire codes and, where possible, the general aesthetics of the property.

D. DISSENTING JUDGMENTS

The two dissenting judgments, while based upon different arguments, took a drastically different view of the scope of freedom of religion.

1. Justice Bastarache's Dissent

Justice Bastarache, writing for Justices LeBel and Deschamps, agreed that the Court has interpreted freedom of religion as protecting both religious beliefs, which are considered to be highly personal and private in nature, and consequent religious practices. However, he asserted that "religious precepts constitute a body of objectively identifiable data that permit a distinction to be made between genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience." A basis for objectively establishing whether fundamental rights are violated is provided by connecting freedom

of religion to precepts. This approach requires both a personal belief or the adoption of a religious practice that is supported by a personal belief, and a genuine connection between the belief and the person's religion.

Justice Bastarache proposed three factors that a claimant must demonstrate if relying on conscientious objection: (1) the existence of a religious precept; (2) a sincere belief that the practice dependent on the precept is mandatory; and (3) the existence of a conflict between the practice and the rule. Unless the impugned provisions or standards infringe the claimant's rights in a substantial manner, the freedom of religion guaranteed by the two Charters is inapplicable. According to Justice Bastarache, "while the purpose of freedom of religion is defined broadly, the right to freedom of religion is restricted."

2. Justice Binnie's Dissent

Justice Binnie's reasons differed from those of Justice Bastarache in the weight placed on the private contract among the parties to govern their mutual rights and obligations, including the contractual rules contained in the declaration of co-ownership, and the co-owners' offer of accommodation. To Justice Binnie, there is a vast difference between using religious freedom as a shield against State interference, and as a sword against co-contractors in a private undertaking. It was for the Appellants to ensure in advance of their unit purchase that their particular religious beliefs could be practiced. They chose to invest in the building, and undertook to abide by the rules of the building. Justice Binnie further found that the rejected accommodation – a communal succah - was not inconsistent with the Appellants' sense of religious obligation in circumstances where individual succah were simply unavailable.

E. IMPLICATIONS OF THIS CASE

In the increasingly politicized environment concerning religious freedom, be it questions of religion in schools or same-sex marriage, there are several important implications to draw from the *Amselem* decision in addition to it being the first time that the Supreme Court of Canada has given a definition to religion.

The first is that the case is an affirmation by the Supreme Court of Canada of the paramountcy of religious freedom. The decision makes clear that religious practice, as opposed to religious belief only, must be

accommodated and that religious practice cannot be easily trumped by matters of taste or personal preference of others impacted by religious practice.

Second, it provides a clear test to determine when freedom of religion is triggered: the party advancing a freedom of religion claim must show the court that 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, and that belief must be sincere. Only then will freedom of religion as a right be recognized.

Third, the decision does away with the obligatory/optional distinction in the protection of religious freedom. This could have a significant impact in other situations, such as those where public officials deny Christians the right to assemble for Bible study and/or prayer because it is considered an optional religious practice.

Fourth, it makes clear that the State and judges must not inquire into the validity of an individual's religious beliefs or practices, and therefore may impact on the extent to which CRA will consider what constitutes advancing religion when reviewing applications for charitable status by organizations whose activities are believed by their members as advancing religion but which are not necessarily mandated by the doctrine, teaching or practice of that particular faith.

Finally, in certain situations, the decision enables the religious freedom protections found in provincial and federal charters or bill of rights to prevail over declarations of co-ownership and similar contractual documents.

F. CONCLUSION

It is clear that the *Amselem* decision will be a benchmark decision and will be relied upon in the future, both with respect to freedom of religion and what constitutes advancing religion in Canada, as it confirms that courts confronted by religious freedom claims should limit the individual review to assessing the sincerity of the claimant's belief and refrain from adjudicating on questions of religious doctrine or practice. The decision also recognizes that profit and the aesthetics of individuals affected should not trump validly held religious beliefs and practices, regardless of whether the claimant can demonstrate that their beliefs are objectively recognized as valid by other members of the same religion.

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