Law and Religious Pluralism in Canada

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Edited by Richard Moon

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To Margaret Moon

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Law and Religious Pluralism in Canada

Introduction: Law and Religious Pluralism in Canada

Richard Moon

The connections between law and religion are many. State laws support some religious values and practices and interfere with others. And, from the other side, religious beliefs often inform or shape state laws. Even if Canadian law does not directly compel citizens to engage in religious practices, to attend church or pray, for example, it sometimes favours or advances the religious practices or values of some members of the community over those of others. And even if it does not directly restrict religious practices on the ground that they are erroneous, Canadian law, when advancing otherwise legitimate public purposes, sometimes impedes minority religious practices.

The chapters in this volume address different aspects of the relationship between law and religion. They do so in a variety of contexts (ranging from the local level of a neighbourhood, in which there are conflicting property use claims, to the more general and abstract level of constitutional debate about the proper meaning of the right to freedom of conscience and religion) and from a variety of vantage points (ranging from the perspective of a religious community that is trying to decide whether to permit same-sex marriage to that of a political actor who must decide the scope of the public duty to accommodate minority religious practices).

Despite these differences in perspective and focus, each chapter is informed by an inclusive understanding of both law and religion. Each recognizes the wide range of religions within the Canadian community that make very different, and more or less comprehensive, demands on their members and that perceive and respond to state law in very different ways. Each chapter recognizes the existence of significant debate and dissent within religious communities. Each also recognizes the multiplicity of legal or normative systems within the broader community, ranging from state law to God's law. Finally, each chapter seeks to elucidate the relationship between these different normative systems and to understand the impact of state law on religious diversity in Canada.

Equal Citizenship and Religious Pluralism

The growth in Canada over the past fifty years of both religious diversity and legal regulation has dramatically increased the potential overlap and conflict between law and religious practice. At the same time, however, this growth in diversity (and the rise of agnosticism) has led to demands for a clearer separation between law and religion.

In Chapter 5, Alvin Esau observes that state law exerts its force "in every corner of life." The same, of course, may be said of religious belief systems. As Benjamin Berger notes in Chapter 11, religion may "touch upon the whole of the committed individual or even the community." Laws dealing with a range of issues such as child care and discipline, civil marriage, possession of weapons, drug use, treatment of animals, and job safety may have an impact on religious practice, either supporting or impeding particular practices.

Along with the growth of religious diversity, there has emerged in Canada a more inclusive understanding of citizenship that involves what Lorraine Weinrib refers to as a repudiation of "faith-based privilege."[1] Each person should be treated as a full member of society regardless of religious association. The commitment to equal citizenship, or what in Chapter 4 Bruce Ryder calls "a non-assimilationist model of citizenship," requires that the state respect the individual's liberty to practise his or her faith but also that it treat different religious belief systems or communities with equal respect. In Chapter 3, David Schneiderman makes a similar argument that "democratic societies should be prepared to expand the sense of who 'we' are through processes of accommodation." The commitment to equal citizenship or religious pluralism is generally understood to preclude legal support for the values or practices of one religion over those of another and to require the legal accommodation of religious practices. Ryder argues that "at the heart of the Canadian conception of equal religious citizenship" is a requirement "that generally applicable neutral rules ... be adjusted, within reasonable bounds, to accommodate religious practices." Without this accommodation, says Ryder, "persons of faith cannot participate equally in social and economic life."

While it may once have been possible to find common religious ground – even if not entirely neutral or fully inclusive – on which to base state action, this watered-down Christianity is now seen as too partisan by those committed to a non-Christian faith or non-religious belief system. As a consequence, the requirement that the state show equal respect for different religious groups or belief systems is understood by many to entail the exclusion of religion from public life, the separation of law and religion. Others, however, argue that the privatization of religion does not advance equal citizenship or religious inclusion but instead marginalizes religious individuals or groups and undermines religious pluralism. While religion has sometimes been the cause of significant and seemingly unresolvable public conflict,

it is the source of public values for many community members. Most religions have something to say about how we should live our lives in the larger community, about the kinds of action that should be supported as right or virtuous or prohibited as harmful, and about the kind of society we should work to create. The exclusion of religious values from public decision making may limit the individual's participation in public discourse and decision making and marginalize religious practice and association. Indeed, many religious adherents regard secular law (based on non-religious values and concerns) not as a neutral ground on which different religious and non-religious groups can live within a common political community, sharing public spaces and institutions such as schools, but as the ordering of community life in accordance with the non-religious values of some in the community rather than the spiritual values of others.

Religious Values and Practices in the Public Sphere

It is widely accepted that any form of state support or preference for the religious beliefs/practices of some over those of others (even when there is no direct coercion) is incompatible with a commitment to religious freedom and equality. To base public action on religious grounds is to impose on some individuals the religious values and practices of others; to give legal support to the values and practices of some religious groups over those of others is to engage in religious discrimination. State law, on this account, should be grounded on secular (non-religious) values and interests, and religion should be confined to the sphere of private life. The irony, then, is that the requirement that different religions be treated with equal respect seems to entail the privatization of religion, the exclusion of religious values from public decision making and religious practices from the public sphere, which may be understood broadly to include any public or common space. The individual may live in the private sphere, among family and friends, in accordance with her religious beliefs and practices, but she cannot ask that her beliefs and practices be reflected in the public life of the community.[2]

However, Shauna Van Praagh's discussion in Chapter 1 of the erection of an *eruv,* a barely visible wire attached to telephone poles and other free-standing structures, by members of the Chasidic community in Montreal is a reminder that the line between public/secular and private/religious spheres of life is not always easy to draw. For the Chasidic community, the *eruv* transforms an otherwise open and public area into a private or domestic space within which members of the community may engage in physical activities that would otherwise be forbidden. Even though the *eruv* had no direct impact on others in the neighbourhood, it was viewed by some as undermining the secular or neutral character of the public sphere.[3] At issue in this case, says Van Praagh, is "the power to name, trace, and define shared public space."

The permeability of the line between public and private spheres also underlies the argument that state action may undermine an individual's religious values and practices, and her sense of belonging or recognition, even when it does not directly restrict those practices. In Chapter 2, Jennifer Nedelsky and Roger Hutchinson argue that if the institution of marriage is so important that the exclusion of same-sex couples is incompatible with equality and dignity, its redefinition to include such couples represents a significant social transformation that some religious adherents will experience as a loss or even as coercion: "The legal institution of marriage will thus no longer be a validation of but a challenge to their sense of reality. For them, the institution has lost a central meaning." Schneiderman, without directly disagreeing with this claim, argues that "[i]t is to mischaracterize same-sex marriage recognition ... to say that it represents an 'expansion of state power' or bleeds marriage of all 'normative content.'" In his view, the state should respond to differing conceptions of marriage without "privileg[ing] one group's interpretation to the exclusion of another's."[4]

Public decision makers are often cognizant of and sometimes motivated by religious values or beliefs when deciding questions ranging from the selection of public holidays to the definition of civil marriage. The courts, however, have held that state support for the practices of a particular religion amounts to religious compulsion or coercion contrary to s. 2(a) of the *Charter of Rights and Freedoms,* the freedom of conscience and religion provision. As Ryder observes, "[t]he entrenchment of freedom of religion in the Canadian Constitution has had the effect of promoting the secularization of the state in the sense that the state must refrain from adopting laws or policies that have the objective or effect of favouring one religion over another." The state, says Ryder, may facilitate or support religious life only if "it does so without discriminating against any particular religious or conscientious belief system," only if it is even-handed in its treatment of different groups or belief systems.

Yet, as I argue, it is difficult to see how the state can remain entirely neutral toward different religious practices. If a substantial portion of the population adheres to a particular religion, such as Christianity, then the state can hardly avoid taking into account its practices when, for example, fixing public holidays. Moreover, the public life of the community has in innumerable ways been shaped by the religious beliefs of earlier generations. Even if practices such as the closing of schools and businesses on Sunday (and laws that support these practices) are now justified on secular grounds, they reflect the religious history of the community and continue to benefit particular religious groups.

It is sometimes argued that religious values should be excluded from public debate and decision making because state law must be based on reasons that are accessible to all members of the community.[5] As Berger observes, liberal

theory regards the public sphere as "the realm of reason."[6] Because religious beliefs rest on faith or socialization by family or cultural community, they lie beyond the scope of reasonable public debate and cannot provide a publicly acceptable basis for law-making. Public action then must be based exclusively on non-religious values and concerns, or it must be possible for a public decision maker to defend her decisions or actions on non-religious grounds, even if her motives are religiously based. That, at least, is the view widely held in Canada.[7]

Yet, because religion matters so deeply to its adherents and is the foundation for their views about justice and the collective good, it may be unreasonable or unrealistic to expect them to leave their beliefs behind when they participate in public life.[8] In his examination of the spirituality of the Anishinabek First Nation in Chapter 7, John Borrows points out that the Anishinabek belief that the Earth is a living thing, with which they must live in community, has far-reaching political implications. American legal academic Michael Perry, in his book *Love and Power: The Role of Religion and Morality in American Politics,* argues that religious beliefs or values are so deeply held that to ask an individual to ignore them when participating in public discourse amounts to "annihilating" central parts of his or her self.[9] But his point may cut the other way. If religious beliefs are rooted in this way, then they may also be inaccessible to others and immune to external critique, and government support for these beliefs may be experienced as religious imposition or as the exercise of coercive power without democratic consent.

According to Esau, "[i]n a pluralistic liberal democratic state, religious citizens have as much right as anybody else to speak, lobby, vote, and join or form political organizations based on their convictions about what the scope and content of state law and policy should be ... [A]gnostics and atheists should have no privilege over religious believers as to the content of law."[10] Indeed, the distinction between religious and secular values is often questioned.[11] It is said that secular values, such as human dignity and equality, rest no less than religious values on faith, on a basic acceptance of their truth. It is also observed that secular moral commitments often have religious roots. While inaccessibility may be an issue in the case of revealed obligations that are highly specific, such as the ban on consuming alcohol or pork,[12] when the commitment is to an abstract value such as human dignity, the distinction between religious and secular grounding may not be particularly significant.

It is sometimes argued that a citizen or politician may be motivated by religious values when making public policy decisions provided she is able to offer a secular reason for her decisions. Schneiderman suggests a similar distinction between "deliberation, where religious sensibilities enter into public discourse, and justification, where secular considerations will be expected to prevail."[13] Public decision making about the rules of collective life

is separated from personal commitment to spiritual truth by the requirement that the former be framed in non-religious terms. But there are limits to this approach. While a religious adherent may be able to describe his values to others in non-religious terms, his commitment to these values rests on their religious foundation. For the religious adherent, this foundation is part of the justification for the value or policy. More importantly, the religious foundation or context of the value, which gives it meaning and force for the adherent, may shape its content. While the value of life, in abstract terms, may be shared by all religious and moral traditions, its implications in specific cases involving euthanasia or abortion, for example, may depend on its particular religious foundation.

There may be good reasons to avoid direct public decision making about the true faith. (One may be to avoid what Schneiderman refers to as "the debasement of religion" that will result from dependence on ephemeral laws.) But a less direct debate about the importance and application of basic values that does not entirely ignore or suppress their religious context or foundation may be unavoidable, manageable, and even beneficial. Anthony Appiah, in his book *The Ethics of Identity,* argues that we should be careful not to see our worlds as "hermetically-sealed" or as "closed off from one another."[14] While our understanding of the values and concerns of others (religious or otherwise) will always be approximate or partial,[15] we may have the capacity to give practical meaning to them and to reach some form of agreement or understanding. More than this, our attempts to understand the deep values of others may affect our own understanding of truth and right in subtle and sometimes significant ways.[16]

Secularism is generally understood to mean the ordering of public life exclusively on the basis of non-religious practices and values.[17] It is viewed by many as a neutral ground that stands outside religious controversy. This neutral ground provides the baseline for determining whether the state has compelled or restricted religious beliefs and practices or whether it has treated different religions unequally. Indeed, state enforcement of religious values, or state support for religious practices, can be seen as compelling or imposing religion, contrary to the public and constitutional commitment to freedom of religion, only if we believe that non-religious values and practices (or values and practices that can be framed or understood in non-religious terms) represent a neutral ground, a basis for public action that does not amount to the imposition of (religious) values and practices on others. For if we view non-religious values and practices as a position or worldview that is in competition with religious values and practices, then state support for any values or practices will amount to religious, or at least quasi-religious, compulsion and imposition or to the unequal treatment of different belief systems. Compulsion or inequality will be unavoidable as long as the state seeks to advance particular values or practices, which, of course, it must do.

Yet what is for some the neutral ground on which freedom of religion and conscience depends is for others a partisan, anti-spiritual perspective or worldview that accepts that the value and purpose of human life should be determined without looking to God or scripture, or that the public parts of our lives should be lived without any reference to the spiritual. Many religious adherents see the state's reliance on secular or non-religious values in the design of law as a rejection of their spiritual values and as unequal treatment.

If it is impossible to confine religion to private life, or to draw a bright line between publicly relevant secular (non-religious) values that have a legitimate role in public decision making and inaccessible religious values that do not, then any one of us may find ourselves subject to laws that reflect the religious values of others and are contrary to our own (sometimes religiously based) moral code. The challenge is to determine when a religiously motivated government act amounts to religious compulsion or favouritism. Or, put another way, if the prohibition on religious compulsion or discrimination does not preclude all reliance on religious or moral values (does not demand complete moral or religious neutrality by the state), then when is it unacceptable for the state to rely on religious or moral values? While different factors may play a role in our judgment or intuition that some forms of public reliance on religion are illegitimate, there seems to be no simple test for determining what counts as religious compulsion or inequality.

The Legal Restriction and Accommodation of Religion

Freedom of religion precludes the state from restricting a religious practice because it is mistaken, because it is the wrong way to worship God. But the freedom prohibits more than this. The general view, in Canada at least, is that even when a law advances a legitimate public purpose, such as the prevention of drug use or cruelty to animals or violence in the schoolyard, some accommodation should be made for religious practices that are impeded or restricted.[18] Accommodation – recognizing an exception to the law's application – may compromise the law's public purpose and detract from its effectiveness.

Yet why should the negative impact on a religious practice of an otherwise legitimate law not be viewed as simply a consequence or cost of the individual's religious commitment? In a democratic community, individuals are often subject to laws with which they disagree. The values, preferences, and practices of some citizens will sometimes prevail over those of others. Why should the *rejection* of an individual's religious values and practices, in the democratic law-making process, affect her sense of belonging or worth, her citizenship, any more than the rejection of another individual's political views about capital punishment or public medicare (which for others may be grounded in religion)? While the state should protect the individual's

liberty to think and act as he chooses, it is not required to compromise legitimate policy to accommodate his political views or values or personal practices. If the state is pursuing a legitimate public purpose, the detrimental impact of its actions on the (non-religious) views and practices of an individual is viewed as simply a cost that she must bear as a member of a democratic community. The obligation of the state (or the general community) to treat citizens with equal respect is satisfied as long as each person is able to participate in democratic debate and decision making, whether or not her views are adopted or her chosen practices are permitted.

The requirement of accommodation may rest on the view that it is important to protect, or create space for, different moral commitments and associations or, in the words of Schneiderman, "to facilitate the maintenance of religious pluralism." Drawing on the writings of the British pluralists, Schneiderman observes that "the fellowship offered in associational life" may give significant meaning and direction to individuals. He argues that the "dispersal of 'power' among semi-autonomous civic groups ... helps to secure the conditions for the development of political consensus built on free and deliberative communication." Ryder makes a similar claim: "These communities [religious and other] are sources of strength, support, and normative authority that provide a counterpoint to the role of the state in people's lives."

Or the requirement of accommodation may rest on the view that there is something special or significant about religious beliefs, that they are deeply rooted or are an integral part of the individual's cultural identity or membership. When the state treats an individual's religious practices or beliefs as less important or less true than those of others, or when her religious community is marginalized by the state in some way, the individual adherent may experience this not simply as a rejection of her views and values but also as a denial of her equal worth or desert, as unequal treatment that affects her dignity. When the state enacts laws that restrict the practices of a particular religious group, it fails to treat the members of that group as equal citizens, or it impedes the life and development of the group and its members. Moreover, if religious values lie outside (or are perceived to lie outside) the scope of public reason and concern, they may not be adequately taken into account in the formulation of public policy. The inaccessibility of religious values makes them threatening, but also vulnerable, in the democratic decision-making process.

Schneiderman notes that the duty to accommodate minority practices "has been criticized as a formalistic standard of review, assimilationist in its objectives, and largely oblivious to the presence of domination." Indeed, when framed in the language of reasonable accommodation, the issue of whether a ban on weapons at school should preclude a Sikh student from wearing a kirpan,[19] (or whether a ban on altering the appearance of a condominium

balcony should preclude the temporary erection of a *succah*[20]) seems to be whether or not a special exception should be made to an otherwise neutral law or whether the rights of the religious individual or group should prevail over the rights or interests of the public.[21] Yet no one is disputing that weapons should be banned from the schoolyard. The dispute is simply whether a kirpan, a religious symbol, should be viewed as a weapon or whether permitting the kirpan would in any real way undermine the school's safety policy. As Lori Beaman observes in Chapter 8, "the naming and construction of the kirpan as a weapon comprise a discursive practice that relies on a socially constructed set of categories." Similarly, the condominium's rule banning the erection of any structure on a unit balcony, for even a short period of time, reflects a particular aesthetic vision that fails to take account of the religious practices of Orthodox Jewish residents. The exemption is granted in these cases because the law reflects the cultural practices of the dominant community and fails to take into account the needs, interests, and understandings of religious minorities.

These and other freedom-of-religion issues might be better understood as involving the reconciliation or negotiation of competing practices, values, and interests in the community. Van Praagh suggests that these issues are fundamentally about "individuals living or playing or studying next to each other" and that the object should be to find "neighbourly equilibrium" through an "ongoing negotiation" or, in the words of Schneiderman, to "accommodate difference." Nedelsky and Hutchinson argue that the reconciliation of competing views and values is best achieved outside a framework of rights. In their view, the principled or rights character of legal decision making (and in particular constitutional decision making) is often oppressive and exclusionary. They use the debate within the United Church about the recognition of same-sex marriage to illustrate an approach that emphasizes respectful dialogue and "enables compromise that does not violate principle."

Yet the terms accommodation and toleration may not always be inappropriate in this context. An individual's commitment to a particular set of beliefs rests on a judgment or assumption that these beliefs are true or right and that others are false. Even if the state is required to treat religion as a private matter, and to remain neutral on the question of what is the true faith or the right way to worship God, it cannot remain neutral toward all religious beliefs and practices, particularly those that have public implications. It cannot, for example, remain neutral on issues of gender or sexual orientation equality. When the state affirms the equal value of same-sex relationships, it repudiates the view that homosexuality is wrongful or immoral. As discussed below, it may sometimes be appropriate for the state to intervene to protect individuals from oppressive or harmful religious practices. When the state does not intervene into the affairs of a religious community to prevent

sexist practices, for example, it may be described as accommodating or tolerating practices that are inconsistent with public values.

Given the depth of the religious commitment of many citizens, it would seem appropriate that the state, even when advancing an otherwise legitimate public policy, make some accommodation for religious practices. In deciding on the appropriate or just accommodation of a minority religious practice, the public decision maker must balance incommensurable public values or commitments: on the one hand, a particular conception of human good or public interest that the law aims to advance, and, on the other, a commitment to individual autonomy in spiritual matters or to the even-handed treatment of different cultural or religious communities. Relevant considerations may include the importance of the public interest advanced by the law or the seriousness of the harm that the law seeks to prevent, the availability of other means to advance the policy that are less restrictive of the religious practice, whether recognition of an exception to the law will compromise its purpose in a significant way, and whether anyone, other than the individual seeking the exemption, will suffer direct harm if the exemption is recognized.

Not all religious practices should or can be accommodated. A religious exception to the law (to a democratically selected public purpose) will be recognized only if there is no substantial cost to the rights of others or to the public interest. Esau observes that in most freedom of religion cases in Canada the claim "was upheld because it was fairly easy to do so, because the countervailing interests that had to give way for the religious practice were minimal and even trivial," or because the religious practice did not in any real way compromise the law's purpose. The courts have recognized an exception to the law in a limited number of circumstances: when the law's objective is paternalistic so that no one other than the religious adherent is directly affected by the exemption, and when the "secular" law reflects or supports the cultural or religious practices of the majority in the community (*e.g.,* when the list of statutory holidays includes Christian holidays but not the holidays of other religions).

In seeking to reconcile the public's interest (the law's purpose) with the individual's or group's religious commitment, public authorities must attempt to grasp the meaning and significance of the particular practice to the individual adherent or spiritual community. The courts, says Jeremy Webber in a recent book chapter, "must weigh the force of that interest by attempting to understand the interest in its own terms and by attempting to translate that interest into terms more familiar to the decision-maker."[22] But as Beaman notes, this must be done with great caution: "Part of thinking about religion in its own terms involves a deeper consideration of religious symbols as they are inscribed in the day-to-day lives of believers. To be sure, familiar reference points from mainstream religion may be called on to begin

this process, but those reference points cannot act as 'the rule' with the new encountered as 'the exception.'" More specifically, Borrows points to the failure of the Supreme Court of Canada in *Jack and Charlie v. The Queen* to grasp the full significance of a deer meat burning ritual, which the Court compared to Christian communion.[23]

The Canadian courts have said that a practice will be protected under s. 2(a) of the *Charter* if the individual sincerely believes that it has spiritual significance or connects him with the divine or spiritual realm. The practice need not be mandatory or part of an established belief system.[24] Beaman, however, is skeptical that a judgment about "sincerity of belief" can be made without any consideration or assessment of "the content of belief." In her view, when a court considers the sincerity of an individual's beliefs, it "cannot help but delve into the content of the beliefs" and make "value judgment[s] about 'good' religion and 'bad' religion."

When determining the necessity of a particular restriction, or the reasonableness of an accommodation, the decision maker must try to locate the practice in its broader cultural or social context. Borrows highlights the frequent failure of the Canadian legal order to take account of the holistic character of Aboriginal spirituality. In Chapter 6, Pascale Fournier notes that there has been little or no consideration "given to the complex and subtle distributional impact of state accommodating policies on women belonging to minority groups, in particular Muslim women." Fournier's discussion of the legal recognition of *mahr* payments within the Muslim community is a reminder that the consequences of recognition or accommodation may be complex and difficult to predict. Moreover, practices that on first glance appear unequal or unfair may seem less so when viewed in their cultural context, in light of other practices within the community. Or, more practically, even if a particular practice seems to be incompatible with the public commitment to gender equality, for example, in the larger religious or cultural context more harm may be caused by its legal restriction than by its preservation.

The accommodation issue becomes more complicated when the members of a religious community are not simply claiming an exemption from a law that interferes with a *particular* religious practice but are instead making a larger claim to govern the affairs of their community according to its religious norms, or what Esau calls "inside law," either with state support or more often without state interference. Fournier observes that religious communities sometimes seek recognition or protection of their particularity by "asking for a degree of autonomous jurisdiction in educational policies or in the regulation of marriage and divorce." In Chapter 5, Esau examines the claims of insular religious communities, such as the Hutterites and the Amish, to regulate their internal affairs on the basis of their understanding of higher law, even when that law is inconsistent with state law or public values.

Both Esau and Fournier note that religious norms may be given legal force through private law arrangements (relying on, for example, trespass, contract, or private arbitration laws). Esau recognizes that there are limits to legal enforcement as well as significant drawbacks. The courts will not generally enforce internal norms that are inconsistent with public values or policies. Moreover, when the courts become involved in the enforcement of religion-based contracts, they may be drawn into internal disputes about the proper understanding of religious doctrine.[25] Concern about this role leads Esau to propose that the courts abstain from enforcing such agreements and indeed avoid any involvement in the internal disputes of religious communities.[26]

The values of a religious community are always subject to internal contest as individuals or factions dissent from the dominant view. As Nedelsky and Hutchinson state, "all religions are human institutions whose practices and beliefs emerge out of contestation and change." Public authorities, however, are in no position to decide the proper understanding of religious practices or values (and to support the religious value judgments of one element of the spiritual community over those of another) when disputes arise within the community, even when the disputes have significant consequences. Schneiderman, discussing the *Hall* case,[27] in which a Roman Catholic school board was ordered to permit a same-sex couple to attend a school graduation dance, argues that "[i]t is not for state institutions and agents to sort out Catholic Church doctrine or to cleanse the church of beliefs that the state may find offensive or indefensible." "It is," he says, "beyond a court's jurisdiction and expertise ... to lay down the parameters of religious doctrine."[28]

The difficult question, though, is whether the state should intervene when the interests of individual members of the religious community and, in particular, less powerful members such as women and children are "harmed" by the community's application of higher or "inside" law.[29] When, if ever, should state law protect the rights or interests of individuals or internal minorities (according to general law or public values) and overrule the norms and judgments of the religious community? While Schneiderman agrees that the courts should "steer clear of ecclesiastical matters," he recognizes that total judicial abstinence might leave minority elements unprotected within the religious group. Should the state intervene when the husband in a Jewish marriage refuses to consent to a religious divorce, thereby preventing his wife from remarrying within the faith, or when someone is expelled from a Hutterite community, where all property is held collectively?[30]

An individual who chooses to become or remain a member of a particular religious group may be seen as voluntarily submitting to the spiritual laws of that group or to the group's authority structure. In a liberal polity, the individual should be free to follow the norms of a religious community even when they are inconsistent with the values of the larger community. If the individual objects to the group's norms (the group's interpretation

and application of higher law), she may decide to withdraw from the group and live within the larger community under state law.[31] From this it follows that the state should ensure that membership in the religious community is truly voluntary and that members have a genuine right of exit, but should not otherwise interfere in the internal operations of the community. Specifically, the state should ensure that social or economic barriers do not inhibit the individual's ability to decide whether or not to join or remain within the religious community, but once the conditions of voluntary membership have been ensured the state should not interfere, even when the community's norms are inconsistent with public values.

But can we really say that an individual's membership in a spiritual community is voluntary when he was born into the community and/or when his identity, sense of self, and place in the world are tied to that community?[32] There are some groups, says Esau, that "are so insular, exclusivist, and homogeneous that exit, even if formally available, can be very costly, and the greatest cost may well be psychological." Fournier argues that the claim "that Muslim women should be 'free' to live as they wish in the 'private' sphere ... [reflects] a neoliberal vision of 'choice' that disregards the overall socioeconomic and distributive background of Muslim women living in Canada." She notes that "factors such as the susceptibility to marry at a younger age, the precariousness of immigration status, the higher rate of unemployment, and the segregation into sectors of low-income jobs are neither mentioned nor considered in the analysis of what 'consent' represents." Weinrib, in her discussion of the sharia debate, observes that the opposition that emerged in Ontario to legally sanctioned religious arbitration "successfully raised doubts about whether women would enter into these arbitrations voluntarily – that is, free of pressure exerted by or on their spouses, families, and communities." One of the concerns was "that a woman's preference to have her claims adjudicated under Ontario family law might raise allegations of disloyalty to her immediate and extended family as well as to her community." Lori Beaman, however, reminds us that each person is connected to and dependent on others and that we should not be too quick to regard those who hold views with which we disagree or who live in more insular communities as lacking agency.

Esau observes that the focus on choice and exit does not tell us how to "deal with the treatment of children within the group." They lack the capacity to consent and the power to exit. This lack of power might justify state intervention to protect children from oppressive or limiting internal rules. Yet, as Berger notes, if we view religion "as a collective and trans-generational phenomenon," then parental or collective oversight of the education and welfare of children must fall within the scope of religious freedom. Indeed, parents are said to have a right, under s. 2(a) of the *Charter,* to oversee the spiritual welfare of their children. The courts have made it clear, however,

that this right does not extend to parental decisions that are harmful to children or impede their development as autonomous individuals capable of making their own judgments on spiritual matters.[33]

There will always be social and economic barriers to an individual's exit from her religious or cultural community that the law cannot simply nullify. How substantial must these barriers be before we decide that the individual does not have a meaningful right of exit, or that her membership in the community is not truly voluntary, and conclude that state intervention in the community's affairs is justified to protect her interests?[34] We must remember that the individual's exit from the religious community is difficult or complicated for the same reason that community autonomy is important. Exit is difficult precisely because religious community plays a central role in the individual member's life and identity.

Law's Conception of Religion and Religion's Conception of Law

Beneath these debates about the appropriate relationship between law and religion lie deeper questions about the nature of each system. A public decision maker's understanding of *religion,* its character and value, will affect her judgment about the form or degree of protection it should be given and, more specifically, about whether and when the state should compromise its laws to accommodate religious practices or refrain from favouring or supporting such practices.[35] At the same time, how *law* is understood by religious adherents, and by other members of the public, will affect their response to the issues of religion in public decision making and the accommodation of religious practice by state law. In general terms, both law's conception of religion and religion's conception of law matter in these debates.

From the perspective of the religious adherent, state law is only one form of law, a form that is human and fallible and so may fail to embody true values.[36] While the adherent may have a duty, even a religious/moral duty, to respect state law, his more fundamental duty is to a higher law, to God's law, whether it is in the form of revelation or natural law. This fundamental duty may also extend to the decisions of those within the religious community who have been given the authority to interpret or apply higher law. For many religious adherents, the legitimacy or significance of state law has been eroded by the requirement that it be based on non-religious or secular values, a requirement they regard as a partisan rejection of spiritual values. Some adherents argue that state law should be more inclusive and reflect or incorporate the religious values and practices of community members.[37] Other adherents, however, accept that state law will continue to rest on secular grounds and seek instead to live within a religious community that is significantly autonomous from state law and the secular morality of the larger community. This is Esau's view: "[R]eligionists of all persuasions should spend less time bemoaning the loss of Christendom and the ever-growing

disparity between our values and the outside law and instead start to really work on the preservation of the church as the church."

At the same time, the public or legal conception of religion has a significant effect on how lawmakers view the relationship between law and religion. Religion is sometimes viewed as a matter of cultural membership or identity that should be treated with equal respect. At other times, it is seen as a matter of personal commitment, or individual judgment, that should be protected as part of a broader public commitment to individual liberty.

According to Weinrib, the protection of religious freedom in Canada reflects the "state's commitment to individual liberty and equality." The state, she says, must respect the individual's spiritual "choices," her "right to live according to her personal faith and conscience," and it must respect her "desire to forge a more individual set of commitments, alone and in community." The focus of the right "is on the individual's embrace of her own beliefs and values." For Weinrib, this right of the individual is "premised on her status as an individual," which "stands prior to the religious precepts, needs, and preferences of the faith community."[38] Berger argues that, while "at the level of political and legal rhetoric" religious freedom in Canada is based on a "commitment to multiculturalism and the protection of plural cultural forms," in practice religion is viewed by law as "essentially individual" and "private" and "centrally addressed to autonomy and choice."[39] He is less sanguine than Weinrib about this individualistic conception of religion and observes that it "has a potentially reductionistic and context-stripping effect." He acknowledges, though, that the law may have "no choice but to conceive of religion in terms cognizable within constitutional liberalism."[40]

Yet, in the public sphere, religious beliefs and practices are sometimes viewed as different from other moral or personal beliefs and as requiring special treatment.[41] As noted above, even when the state is pursuing an otherwise legitimate public purpose (and not simply suppressing a religious practice because it is the wrong way to respect or worship God), it may be required to compromise this purpose and accommodate incompatible religious practices.[42] There is no similar state obligation to accommodate non-religious beliefs and practices.[43] Similarly, while the state may be prohibited from supporting the values and practices of a particular religion, it is not precluded from selectively supporting non-religious values and practices. Freedom of religion, on this account, is not simply part of a more general right to individual liberty. The special protection granted to the individual's *religious* beliefs and practices must rest on a belief or assumption that the individual is committed, or connected, to his religious values and practices in a way that is fundamental, and different from his commitment to other views or values.

It is sometimes argued that religious beliefs are particularly valuable or significant because they address the most fundamental questions about

existence and morality and because religious adherents often believe that divine sanction will be imposed on them if they fail to meet their spiritual obligations. While both factors may contribute to the assumption that religious beliefs or commitments are special or different, they may not provide a sufficient answer to those who argue that their non-religious beliefs about life and value are of central importance to them and are no less binding and no less deserving of respect and accommodation. A related argument is that religious values and practices deserve protection because humans are spiritual beings who have both a need and a capacity to reflect on and give form to ultimate reality and to do so in concert with others. But could we not define this human capacity or need more broadly, in a way that is not tied to the supernatural? Could we not just as easily speak of the human need to comprehend the value of life or the human capacity to act morally or create meaning? Of course, even when framed in broader terms, these needs or aspirations relate to matters that seem to lie beyond human choice or invention.[44] Even if we attach particular significance or value to the *spiritual* nature of human beings, it does not follow that the actual beliefs (the particular values and practices) of individuals or spiritual communities should be granted special protection in law. All that may follow from a recognition of the individual's spiritual need and capacity is that she should be free to seek spiritual truth and live according to her understanding of that truth, subject to laws in the public interest.

Perhaps the special protection or treatment of religion rests also, or instead, on the deep connection between the individual and his spiritual beliefs. While religious commitment or belief is sometimes described as a personal choice or judgment made by the individual that is in theory revisable (individuals convert, lose their faith, and are born again), it is also, or sometimes instead, described as a central element of the individual's identity.[45] I suggest that the significance or value of religion, from a public perspective, may depend on "its dual character – as both a *commitment* ... to certain truths or values and a deeply rooted part of her *cultural identity*." Religion, on this account, shapes the individual's worldview at a fundamental level so that the restriction or marginalization by lawmakers of her religious values and practices is experienced by the individual as a denial of her equal worth. Furthermore, because religion seems to lie outside the scope of reasoned public discourse, state reliance on religious values or practices in the making of law may be experienced by non-adherents as a form of imposition or exclusion. Yet, at the same time, because different religions make claims that can be described as true/false or right/wrong and that address the rights or interests of others, or the ordering of public institutions, they cannot be confined entirely to the private sphere, excluded and insulated from public debate.

Conclusion

The interdependence of law and religion may be unavoidable but troubling. Because religion matters deeply to the individual and often has public implications, it cannot be confined to private life and wholly insulated from the impact of state law. Yet, at the same time, the significance of religion in the life of the individual and group raises real concerns about any alliance between law and religion, about the use of law to support religious practices and values in the religiously plural political community, and about the legal restriction of particular religious practices. The chapters in this volume address what Schneiderman refers to as the "uneasy relationship," and Van Praagh calls the "ever-shifting equilibrium," between law and religion in a democracy committed to equal citizenship and religious pluralism.

Notes

1 Weinrib observes: "Fortuitous personal characteristics and/or social ties no longer determine whose autonomy and equality factor into the determination of public interest" (see p. 246).

2 As Berger notes, "when it turns its analytic gaze to the phenomenon of religion, Canadian constitutional law, itself informed by liberal political culture's commitments, views religion in a manner that comports with the taxonomy of public/private and reason/interest" (see p. 279).

3 Van Praagh describes the tension: "The Chasidim place a literal line around their own communities to facilitate religious observance, and in doing so they include within the boundary their non-Chasidic neighbours. At the same time, the municipality draws a figurative line around the entire neighbourhood, filling it in with 'public, secular' space. The question is whether these two understandings can coexist when one demands visibility and the other assumes invisibility of faith" (see p. 32). The view that private religion should not enter into the public sphere may also lie behind the movement to exclude the *hijab* and other visible signs of religion from the public schools in France, an issue that Ryder discusses.

4 See also Esau, who argues that religious adherents may be opposed to same-sex marriage on religious grounds but nevertheless tolerate it in the public sphere: "Not only does liberal theory need a richer accommodation of illiberal religious ways of life, but religionists in turn need a richer accommodation of a liberal polity ... I do not mean that religious groups must be *internally* liberal; rather, they should be *externally* liberal, giving reciprocal respect to other groups and the wider society, living by different law than the religious group lives by" (see p. 132).

5 See, for example, Robert Audi, *Religious Commitment and Secular Reason* (Cambridge, UK: Cambridge University Press, 2000).

6 In his critical account of liberalism's treatment of religion, Berger observes that "[t]he boundary between this sphere [the private] and the public is ... policed by the logic of reasonableness" (see p. 279).

7 But as Berger says, "[a]lthough the current tendency in Canada is to reject such a role for *private* religion, there is a broader spectrum of opinion on this point" (see p. 281).

8 See David M. Brown, "Freedom From or Freedom To? Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 U.B.C. L. Rev. 551 at 614-15: "Many Canadians shape their opinions on public matters through the filters of their religious beliefs which provide an overarching framework in which they assess all matters, political and non-political."

Chief Justice McLachlin, speaking about the decision-making process of a public school board in *Chamberlain v. Surrey School Board District 36* (2002), 221 D.L.R. (4th) 156 (SCC) at

para. 19, says that "[b]ecause religion plays an important role in the life of many communities, these views [of the parents and communities represented by the school board] will often be motivated by religious concerns, and cannot be left at the boardroom door."

9 M. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (New York: Oxford University Press, 1991).

10 Esau, though, also believes that the scope of public law should be reduced in order to lessen the conflict between comprehensive law and comprehensive religion.

11 David Blaike and Diana Ginn, "Religious Discourse in the Public Square" (2006) 15:1 Const. Forum Const. at 37.

12 While the religious ban on consuming pork may be rooted in health concerns, it is for most adherents not debatable on such grounds. The obligation not to consume pork remains, despite evidence that with modern techniques of meat storage, preservation, and preparation illness is no longer a concern.

13 This is not just a strategic concern of the sort suggested by Esau: "Religiously motivated expressions of policy preferences will more likely appeal to others who do not share the same religious view if the ideas are packaged in a more inclusive discourse of reasoning and justification" (see p. 133).

14 Kwame Anthony Appiah, *The Ethics of Identity* (Princeton: Princeton University Press, 2005) at 248.

15 As Georges Steiner says about language in *After Babel* (Oxford: Oxford University Press, 1975) at 170, "[n]o two individuals share an identical associative context. Because such a context is made up of the totality of an individual's existence, because it comprehends not only the sum of personal memory and experience but also the reservoir of the particular subconscious it will differ from person to person ... All speech forms and notations, therefore, entail a latent or realized element of individual specificity."

16 Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge, UK: Cambridge University Press, 1985) at 130. See also Benjamin L. Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 C.J.L.S. 39 at 52.

17 For a discussion of the terms "secular" and "secularism," see Iain T. Benson, "Considering Secularism" in D. Farrow, ed., *Recognizing Religion in a Secular Society* (Montreal: McGill-Queen's University Press, 2004) 83 at 83. A conception of secularism that seeks to move past the "areligious" and "pluralist" conceptions is suggested in Berger, *supra* note 16.

18 See, for example, the decision of the Supreme Court of Canada in *Multani v. Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256 [*Multani*], in which a Sikh student was permitted to wear a kirpan (a ceremonial dagger) to school despite the school board's general ban on knives and other weapons in the schools. For a general discussion of the duty to accommodate, see Jose Woehrling, "L'obligation d'accommodement raisonable et l'adoption de la societe à la diversité religieuse" (1998) 43 McGill L.R. 325.

19 *Multani, supra* note 18.

20 *Syndicat Northcrest v. Amselem,* [2004] 2 S.C.R. 551 [*Amselem*].

21 There are structural or institutional constraints that cause the court to frame these issues narrowly. As Berger notes, "Canadian constitutional law casts religion in terms compatible with its own structural assumptions" (see p. 265). See also R. Moon, "Discrimination and its Justification: Coping with Equality Rights under the Charter" (1987) 26 O.H.L.J. 673 at 706: "Since the focus of judicial review ... is on particular laws and not on the entire system of distribution, the courts are not free to structure the system as they see fit, ensuring that certain rights and goals in addition to equality are protected."

22 Jeremy Webber, "The Irreducibly Religious Content of Freedom of Religion" in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 178 at 186. David M. Brown, "Neutrality or Privilege? A Comment on Religious Freedom" (2005) 29 Sup. Ct. L. Rev. (2d) 221, makes a similar point that judges and lawyers must be prepared to understand religion on its own terms.

23 [1985] 2 S.C.R. 332.

24 *Amselem, supra* note 20.

25 See, for example, the dissenting judgment of Justice Deschamps in *Bruker v. Marcovitz,* 2007 SCC 54, which held that under the civil law of Quebec a contract with a religious object (such as a religious divorce) was not enforceable. Esau suggests that "[w]e may see this as part of protecting religious freedom, or we may see it as a problem for religious freedom as we grant jurisdiction to outside law to interpret the religious law of a group, and the members of a religious group turn to the violence of the state to uphold their internal polity from internal attack" (see p. 116).

26 Esau proposes that "the court would not apply the outside law to the case, nor would it apply the inside law and enforce it through the sword of the state" (see p. 125).

27 *Hall (Litigation Guardian of) v. Powers* (2002), 213 D.L.R. (4th) 308.

28 This may be why the courts have tended to limit their involvement in these religious disputes to ensuring that the authorities in the religious community adopt a fair process when determining the rights or interests of members. Esau, as noted above, argues that even this limited form of oversight may be viewed as an unacceptable interference with the internal operation of the religious community.

29 This question is examined in Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, UK: Cambridge University Press, 2001).

30 In *Bruker v. Marcovitz,* 2007 SCC 54, Justice Abella for the majority in the Supreme Court of Canada held not only that a promise to consent to a religious divorce, or *get*, was enforceable but also that public policy supported the removal of barriers to religious divorce and remarriage. Both the *Divorce Act,* R.S.C. 1985 (2d Supp.), c. 3 and the Ontario *Family Law Act,* R.S.O. 1990, c. M.3 enable the courts to pressure a spouse to give his or her consent to a religious divorce.

31 On the issue of exit, see A. Eisenberg and J. Spinner-Halev, eds., *Minorities within Minorities: Equality, Rights, and Diversity* (Cambridge, UK: Cambridge University Press, 2005).

32 See Leslie Green, "Internal Minorities and Their Rights" in W. Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) at 266: "It is risky, wrenching and disorienting to have to tear oneself from one's religion or culture; the fact that it is possible to do so does not suffice to show that those who do not manage to achieve the task have stayed voluntarily, at least not in any sense strong enough to undercut any rights they might otherwise have." Esau notes that "both choice and exit are highly contestable notions": "[t]hat people grow up within illiberal religious communities and are strongly socialized into a worldview seems to point to membership by ascription more than choice" (see p. 129).

33 *B(R) v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315. Shauna Van Praagh, "Identity's Importance: Reflections of – and on – Diversity" (2002) 80 Can. Bar Rev. 605 at 613-14, argues that the focus of the judgment on "the parent's rights, or, alternatively, on the child's rights," meant that the court paid little attention to the role of the religious community. She argues that "[t]he identities of religious individuals, both adults and children, and of families are significantly shaped by membership in religious communities," which are therefore important and interested players in such situations.

34 The individual's social and psychological ties to her community are sometimes described as barriers to her exit, similar to the economic costs that may deter her from leaving the community. The term "barrier," though, suggests that these ties interfere with the individual's judgment, prevent him from making the choices he would otherwise make, and, like material restrictions, ought to be removed. But no one argues that the state can or should nullify these barriers to exit. Instead the argument is that the state should intervene to protect the individual from unjust internal rules, because he should not have to choose between leaving the community to which he is deeply connected and remaining within the community but subject to unfair rules.

35 Berger believes that "[w]hen Canadian constitutional law turns its attention to religion, religion takes on a very particular shape that emphasizes certain aspects of religious conscience and practice while obscuring others" (see p. 265).

36 Esau defines law broadly: "Law, properly so called, includes the norms of any community that are actually binding on the community and are applied and enforced in the community by various sanctions" (see p. 110).

37 See Brown, *supra* note 8; for a similar position in the United States, see Michael McConnell, "Religious Freedom at a Crossroads" (1992) 59 U. Chi. L.R. 115.

38 Weinrib observes that "[t]he reference to 'conscience' [in s. 2(a) of the *Charter*] in addition to religion broadens one's spiritual universe; it may also protect beliefs and convictions unrelated to, or even opposed to, religious precepts, teaching, or authority" (see p. 247).

39 Berger argues that "[t]he conventional narrative casts constitutional law as the mechanism for the recognition and accommodation of diverse cultures and s. 2(a) of the *Charter* as the specific conduit for considering and making legal space for religious claims within a polity devoted to cultural pluralism" (see p. 265). He further argues that "[l]aw shapes religion in its own ideological image or likeness and conceptually confines it to the individual, choice-centred, and private dimensions of human life" (see p. 284).

40 Borrows takes a similar view: "Section 2(a)'s maze of doctrinal hurdles gives the courts many opportunities to forge religion in liberalism's image. If this occurs, Anishinabek religion risks being cast out of constitutional law's presence because of its failure to follow liberalism's tenets" (see p. 177).

41 Webber, *supra* note 22 at 184-85. See also R. Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 Sup. Ct. L. Rev. 201 at 211.

42 See the Supreme Court of Canada's judgments in both *Amselem, supra* note 20, and *Multani, supra* note 18.

43 While the courts have said that freedom of religion and conscience protects non-religious beliefs, there are almost no cases in which the courts have found that a non-religious belief or practice has been restricted by the state contrary to s. 2(a). In one of the few Canadian cases to consider a non-religious belief and practice under s. 2(a), *Maurice v. AG Canada* (2002), 210 D.L.R. (4th) 186, a federal prison inmate asked to be given vegetarian meals. The judge found that the prison authorities had a duty to accommodate Mr. Maurice's vegetarianism.

44 See Charles Taylor, "Iris Murdoch and Moral Philosophy" in M. Antonaccio and W. Schweiker, eds., *Iris Murdoch and the Search for Human Goodness* (Chicago: University of Chicago Press, 1996) 3.

45 In *Amselem, supra* note 20 at para. 39, Justice Iacobucci stated that, "[i]n essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith." The Supreme Court of Canada, in this and other judgments, formally describes religion as an individual choice. Yet the Court also seems to recognize that religious commitment is not simply a choice but is "integrally linked to one's self-definition."

1
View from the *Succah:* Religion and Neighbourly Relations

Shauna Van Praagh

The view must be spectacular from the balcony on which, following his trip to the Supreme Court of Canada,[1] Mr. Amselem confidently builds a *succah,* or temporary shelter, to celebrate the Jewish harvest holiday each fall. Situated in Le Sanctuaire, a luxury condominium building at the edge of Outremont in Montreal, Mr. Amselem's home is suspended above and at the same time deeply rooted in the neighbourhood. From his balcony and from the hundreds like it in the same building, one can look down on the schools, hospitals, parks, cafés, and synagogues that characterize that neighbourhood. One can count as neighbours the inhabitants of traditional Montreal triplexes, more modern duplexes, and mansions on the mountain. And one can locate traces of the multiple communities whose members live together and interact on a daily basis in this shared Montreal space.

This chapter takes a closer look at the sociolegal geography of the neighbourhood by mapping relations among inhabitants through the metaphor of *voisinage* provided by private law. The lessons from the law of nuisance or good neighbourly relations can be both applied and enriched by taking a tour of Outremont. We find that the equilibrium between Chasidic Jewish residents[2] and their non-religious neighbours depends on the resolution of disputes over the use of property and its impacts on noise levels, residential character, and, indeed, the view. The ongoing negotiations among neighbours include court judgments that have been incorporated into often noisy conversations in the village square, embodied alternatively by the neighbourhood newspaper, cafés, and synagogues. In revisiting those judgments and analyzing their incorporation into the neighbourhood map, we can illuminate, if only partially, the dynamic mix or, in a Montreal scholar's terms, "hybridity"[3] of co-habitation in one corner of Montreal.

The Supreme Court of Canada judgment in the *Amselem* case permitted the building of an individual condo owner's *succah* contrary to the terms of the governing condominium agreement. While the view from that *succah* over Outremont might be literal, the figurative view from the judgment

leads us into a neighbourhood in which the daily interactions of citizens – religious and not – are the stuff of communal narrative and constitution.[4] An analysis of this particular neighbourhood and the disputes in law that constitute its landmarks is but one illustration of the coexistence of religious and non-religious individuals and communities in a diverse contemporary society. That is, the phenomenon of hybridity on this particular patch of ground can be transplanted to a broader and less concrete discussion. The ongoing conversation and shared – yet continually negotiated – understandings necessarily exist beyond this local context. Lessons provided by the law of nuisance in the context of describing neighbourly relations in Outremont are thus relevant to religious diversity in Canada as a contemporary liberal state.[5]

This case study of the mixing of religious and non-religious communities in one neighbourhood, grounded in the elements of the private law of nuisance, serves an even larger inquiry into the very relationship of religion to law. As concepts, traditions, structures, and languages, religion and law live side by side in ever-shifting equilibrium as described in various ways by my co-contributors to this volume. As "neighbours," they continually interact yet always insist on the boundaries of their own space and the modalities of their use of that space.

In this chapter, neighbourly relations between religion and law – concepts that coexist and bump into one another in everyday encounters – are illustrated through the tracing of relations between real individuals and communities that live side by side. The private law of nuisance or *troubles de voisinage* provides the metaphor for capturing those relations and analyzing their sometimes precarious character. Through the lens of nuisance, particular disputes between Chasidic Jews in Outremont and their non-religious neighbours are examined below. In the map of a neighbourhood characterized as sophisticated, secular, and francophone on the one hand and traditional, religious, and Yiddish speaking on the other, those disputes can be understood as landmarks. As such, they serve as symbols, as spaces for resolving conflict and sustaining conversation, as regulators of neighbourly claims, and as tools for sensitive adjustment of neighbourly relations. In exploring these landmarks and mapping collective mixed spaces shared by communities and state actors, I hope to contribute to our understanding of the complex conversation between religion and law in Montreal and beyond.

The Metaphor of Nuisance Law

The tort of nuisance[6] is all about the ways in which neighbours live side by side. When one neighbour engages in an activity that makes life unbearable for the other, the law may label that activity "nuisance." The consequences of that label are clear: the activity must stop and relations between neighbours must be recalibrated.

Nicely captured by the civilian notion of *troubles de voisinage,* the essence of nuisance can be extracted from Article 976 of the *Civil Code of Quebec:* "Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom." Article 976 describes the usual state of neighbourly relations as those that do not invite the label of *troubles de voisinage*. Nuisance is located beyond what neighbours necessarily "suffer" as part of the normal experience of sharing the neighbourhood.

As individuals, the tort of nuisance tells us, we can live our lives as we wish in our own spaces. But that freedom is constrained by the fact that we live as neighbours; as such, we must take into account another's perception of our use and realize that our behaviour may bring with it by-products that impose themselves on people living next door. Indeed, those by-products may go beyond what is acceptable from the neighbour's perspective. The governing notion in determining the meaning of "acceptable" is that of respect for the neighbour's own right to live and flourish in his or her own space. *Voisinage,* then, implies a fragile equilibrium, or give-and-take, between my neighbour and me, us and them, my space and your space.[7]

Nuisance is fundamentally attached to private conflict and literally located in the phenomenon of physical proximity. Paradigmatically linked to individual property owners, the wrong or tort of nuisance limits the use of one's property with reference to "reasonable" complaints of residents of the neighbourhood. Given the ongoing nature of the use of property, the classic remedy for nuisance (or a violation of individual obligation based on Article 976 of the *Civil Code of Quebec*) is an injunction. The offending use must be stopped: in principle, the offending neighbours must adjust their behaviour or move away.

The requirement that complaints be "reasonable" invites questioning on the modes and means of assessment. Referring to what most people in the neighbourhood would find offensive may be problematic. While helpful in that it avoids the phenomenon of the particularly cranky (or sensitive) individual complainant, it also serves as a conservative measure to maintain cohesion and roughly similar use. Thus, when a complainant lines up fellow neighbours to testify to the odious smell emanating from a factory, collective perception is valued over the narrative of one lone (and perhaps trouble-making) tenant or homeowner.[8] The newcomer, not yet accustomed to the neighbourhood, typically must adjust expectations of communal life and the character of the space in which she finds herself. This is true of both the potential nuisance maker and the potential nuisance sufferer: the appropriate content of give-and-take in any context will be determined in light of the nature of the neighbourhood.[9]

This explicit connection between "reasonableness" of the complaint and character of the neighbourhood illustrates the flexible nature of nuisance.

Different neighbourhoods are marked by different sounds and smells. Thus, in response to a complaint, the alleged nuisance producer may point out that the neighbours in this particular place expect to live with the noise or stench. On the other hand, the complainant may point to the character or nature of the neighbourhood to justify the reasonableness of his perception that the neighbour has unacceptably violated his enjoyment. It is a core principle of the tort of nuisance, and of *voisinage* with the *Civil Code of Quebec*'s emphasis on the "nature or location of their land," that the kind of activity that will give way to a valid complaint depends on factors external to the troubling behaviour itself. As stated in a nineteenth-century English case, "whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey."[10] On the other hand, while the structure of nuisance law refers to the already-established nature of the particular neighbourhood, it also allows for potential change triggered by an individual. That is, it is possible in principle to show that the suffering caused by a particular activity is beyond what inhabitants of the district should have to put up with.[11]

While nuisance is firmly anchored in private law in its preoccupation with individual interaction, there are obvious public dimensions in the picture. That is, the law of nuisance can be assigned social functions with respect to gradual change in communities and neighbourhoods. In developing nuisance law, courts have at times explicitly acknowledged different standards of tolerance in localities differentiated on the basis of the economic status of residents. And they have explicitly emphasized the importance of certain activities as they assess claims of nuisance, a phenomenon particularly marked in the context of increasing industrialization.[12]

The Supreme Court of Canada case of *Drysdale v. Dugas*[13] illustrates the intersection of nuisance law and social policy and the resulting evolution of a particular neighbourhood. At issue was a stable on residential St. Denis Street in Montreal, characterized by the neighbours as stench producing. In response, the owner of the stable pointed to the increasing need for transportation by horse and carriage in a modern city and the resulting importance of his enterprise. Here the Court labelled the complaint reasonable and the stable a nuisance but, in denying an injunction, paved the way for the commercialization of contemporary St. Denis. A nuisance case was thus woven into the development of urban Montreal. In drawing lines around neighbourly activity, and thus designating areas residential, commercial, or industrial, courts can be said to participate in a version of zoning or the characterization of communal life.[14]

This brief description of nuisance law serves as a starting point for mapping religious life in a mixed neighbourhood such as Outremont. Several

observations drawn from the parameters and particularities of nuisance are especially relevant. First, activities, needs, and expectations are articulated and perceived in different and often conflicting ways. What appears to be normal and indeed necessary from the perspective of one neighbour may be experienced as provocative or painful by another. Nuisance does not demand a clear resolution of these differing perceptions. Indeed, it demands demonstrated willingness to live with considerable conflict. Only when one neighbour – regardless of motivation or precaution – surpasses the limit of "reasonable" patience can the complaining neighbour effect change. Second, the character of the neighbourhood – always shifting over time – interacts with the ways in which complaints are articulated and heard. What appears to be "normal" in one context may be excessive in another. Third, the activities of individuals themselves, as they are either incorporated into the neighbourhood scene or dismissed as inappropriate and harmful, help shape the neighbourhood. What the community tolerates and what it demands and expects the freedom to do become the stuff of policy, even as it is intertwined with the boundaries of individual rights and responsibilities. In other words, an area of law ostensibly centred on interpersonal relations helps paint broad landscapes that capture shared spaces and behaviours.

These three features – conflicting perceptions, contexts, and collective interests – can be identified in cases and conflicts that turn on Orthodox Jewish life in and around Outremont. These disputes are not typically cast as complaints about *troubles de voisinage* under Article 976 of the *Civil Code of Quebec*. That is, they are not usually about one neighbour making a complaint that the "neighbourhood annoyances" going on next door exceed the "normal" level that must be "suffered." But behind the language of bylaw violations, condominium conditions, and assertions of individual rights and freedoms, we find the picture of the neighbourhood mosaic embodied by Article 976. These are cases that contribute to the fragile equilibrium of neighbourhood life.

The disputes described below – over a *succah,* a synagogue, an *eruv,* and a chartered bus – act as reference points in a map of that neighbourhood. These are moments when conflicting stories and behaviours and ways of life are forced into explicit coexistence and mutual acknowledgment. The neighbourhood becomes a site of duelling narratives,[15] and it is continually created and recreated by those who live side by side within it.[16] The lens of nuisance can help us explore the connection in these disputes between conflicting individual narratives and lived experiences on the one hand and the collective story of the shared space and what it represents both symbolically and literally on the other. As in nuisance, there is a collective aspect to the space and how it is characterized; there is the possibility of reading individual arguments as representative of claims on behalf of the greater good; and there exists a tension between what a "normal" human complaint might

require on the one hand and what public policy might require on the other.

Through these cases, equilibrium among neighbours is explicitly expressed and experienced in its public or collective dimensions. Various uses of property, whether essentially religious or not, are tied to the narrative of one neighbourhood group or collection of groups. We find the language of "democracy" in arguments about what public policy – responding to "normal" (majority) sensibility – should allow (or "suffer") in terms of the use of shared space. Thus, complaints are made about religious activities, behaviours, or narratives that are perceived as damaging the neighbourhood feel. At the same time, the neighbourhood itself changes: with each *succah* and synagogue, the reality of Outremont demonstrates its ability to incorporate religious life into the fabric of the neighbourhood.

While significant as landmarks, the particularly noisy disputes described below tend to mask generally harmonious neighbourly relations. Even if not friendly or on speaking terms, neighbours in Outremont acknowledge each other from day to day. They are resigned to the quotidian degree of "suffering" or "acceptance" referred to in the *Civil Code of Quebec* such that their activities go unnoticed, woven into the living spaces of the neighbourhood.

From the *Succah:* Sharing Space after *Amselem*

If the view from Mr. Amselem's *succah* introduced us to the neighbourhood of Outremont, then the view from the *succah* in the Supreme Court decision in the *Amselem* case introduces the sociolegal map of that neighbourhood.[17] I start with *Amselem* – based on a claim alleging infringement of freedom of religion under the *Quebec Charter of Human Rights and Freedoms* – because of its potential to be recast as a quest for neighbourly peace. That is, the story of *Amselem* lends itself to a retelling in the terms of nuisance law. Both the claims in *Amselem* related to religious belief and practice and the complaints related to the side effects of those beliefs and practices can be examined in light of private law's concept of *troubles de voisinage*. The Supreme Court judgment in *Amselem* is not strictly about nuisance; instead, it is firmly grounded in public law notions of individual rights and religious freedoms. But looking at it through the window of *voisinage* shifts our focus to the neighbourly equilibrium that the case exemplifies.

In the case, Orthodox Jewish residents installed individual *succahs,* for the duration of the harvest holiday of Succot, on the balconies of their apartments in the upscale Le Sanctuaire complex. The condominium association demanded the removal of the *succahs* based on the bylaws that prohibited decorations on balconies but offered to set up a communal *succah* in the gardens. That offer was rejected, and the association applied for a permanent injunction against *succah* construction on individual balconies.

A range of stories can be imagined to capture the individual experiences of residents sharing the space of Le Sanctuaire condominium building. Respectful conversations and moments of mutual understanding would be part of everyday life. So would disagreement. With respect to the use of balconies, regulations agreed to by all owners explicitly set out the character of the neighbourhood qua condominium building. When Mr. Amselem, the principal protagonist in the story, insisted on building a *succah* on his balcony during Succot, thereby defying the regulations, his neighbours found the annoyance intolerable.

In expressing their distress, they underscored their economic, security, and aesthetic interests, with an emphasis on the appearance of their homes and the way in which they wished to be "seen by the world."[18] They argued for the reasonableness of their complaint given the expectations regarding the character of the collective space in which they lived. And they agreed in principle to a communal *succah* at Le Sanctuaire, thus demonstrating an acknowledgment of the religious affiliation, beliefs, needs, and practices of their Jewish neighbours. From their perspective, then, the necessary give-and-take of neighbourly relations could make room for a collective *succah* and the religious observance that goes along with the activity of building and living in the temporary dwelling. But equilibrium was upset by the individual activity of *succah* building and use. That practice was simply beyond the contemplation and context of this particular neighbourhood.

From the perspective of Mr. Amselem, what might be experienced as nuisance or unreasonable interference by the neighbours was perfectly legitimate and appropriately circumscribed activity. It might be true that the neighbourhood of the condominium building had not been characterized as *succah* inclusive in the past, but the complaint – in Mr. Amselem's view – was unreasonable. When supplemented by its religious nature, the activity could be presented as important not only to the individual *succah* builder but also to the diverse character of the neighbourhood's population and practices.

In the case, the "neighbourhood" spoke on behalf of individual neighbours in reasserting the character of the shared space. We never truly hear in the judgment the individual voices explaining how their use of that space has been compromised. This is in marked contrast to the Court's emphasis on the individual *succah* builder, an emphasis noted by Benjamin Berger in his discussion in this volume of the liberal lens through which Canadian constitutional law views religion. Indeed, the majority judgment turns to the voice of Mr. Amselem and respects his personal story and justification beyond consideration of the group to which he belongs. The *succah,* says the judgment, must be individual – located on the Jewish owner's balcony beside the balcony belonging to the neighbour who objects to it. In terms of weighing

inconvenience or interference, the inconvenience of a communal *succah* for Jewish residents outweighs that of individual *succahs* for non-Jewish residents. The conclusion, in terms of nuisance, finds the complaint regarding the *succah* to be unreasonable. It does so based on the individual self-fulfillment of a religious neighbour with "deeply held personal convictions or beliefs."[19]

Although this was not a nuisance case, the individual – at the heart of nuisance law – is clearly front and centre throughout the judgment. The dissenting judgment by Justice Bastarache tries to cast the case as a balancing of neighbours' rights as individuals against each other[20] and suggests that the outcome of that balancing exercise would require the *succah* to come down. But the majority of the Supreme Court resists telling the story as one of the association of religious or cultural groups, as it might be characterized by David Schneiderman in his contribution to this volume. Instead, it focuses squarely on the individual owner, thus articulating the terms of the debate in what Richard Moon describes in this volume as quintessentially liberal democratic and secular terms.

In its focus on the individual, the Court underscores the perspective of a truly religious person for whom any compromise involving a minimization of adherence would be anathema to religious observance. It pays full respect to the person who insists on his own *succah* on his own property, driven by internal faith and a sense of obligation. For the majority, then, this is not a neighbour-neighbour story of give-and-take; instead, it is told and heard as a narrative of one individual neighbour asserting use in the language of rights and freedoms in public law litigation with no countervailing narrative of an individual asserting excessive interference with interests traditionally protected by Article 976 of the *Civil Code of Quebec*.

The consequences of the judgment in the case go beyond Mr. Amselem and reshape membership both in a religious community and in the community of Le Sanctuaire co-owners and residents. Following the Supreme Court judgment, Le Sanctuaire becomes a neighbourhood in which residents must readjust their understanding of what give-and-take means, and the ongoing conversation among neighbours is thus reframed. It becomes a neighbourhood dotted with balcony *succahs* for ten days of the year: the structures are relabelled normal or reasonable interference with condo-owners' enjoyment of their spaces. The Jewish holiday of Succot, and its implications for celebrants and the people who live next to them, are inscribed on the condo map. In effect, the shared space is rezoned at the behest not of the complaining neighbour but of the neighbour whose use is the subject of complaint.

As a vantage point from which to consider the mix of Outremont, *Amselem* simply brings Le Sanctuaire in line with the neighbourhood above which it towers. Once a year Outremont balconies and tiny yards backing onto alleys

are transformed by temporary dwellings constructed with plywood, wire, even plastic giant Lego-like blocks. This particular use, along with the praying and singing, is already a part of the map of the neighbourhood on the ground, part of Outremont as literal and symbolic mosaic. Retold within a framework of nuisance, then, *Amselem* is significant as an introduction to other smaller disputes over religious practices that serve as landmarks of that neighbourhood.

The Neighbourhood Landmarks: Identités Mosaïques

As with *Amselem,* the disputes described here – over synagogues, the *eruv,* and even a chartered bus route – might be understood as part of an always-evolving project of zoning the neighbourhood. On a map of Outremont, the contours and consequences of these disputes produce the lines coloured in by daily life and interaction. This is a geographically mixed space in which the visible neighbours are Chasidic Jews – what might be termed, in a play on words, a "mosaic *mosaïque*." Chasidic Jews, more than their traditional Orthodox counterparts, are particularly easy to notice given their distinctive clothing and close communal lives.

In a book of essays exploring Jewish life in Montreal entitled *Identités mosaïques,* Alexander Werzberger, spokesperson for the numerous Chasidic communities of Outremont, addresses that visibility and explains that the geographical concentration of Chasidic Jews in the neighbourhood has both cultural and convenient advantages:

> Still today everyone belonging to each community lives in the same neighbourhood. And, because we're so visible, this bothers some of our neighbours. We live so close to each other both for cultural reasons and for more practical reasons. From a religious point of view, it's important that we live together to ensure the continuity and integrity of our faith and culture, to be near kosher grocery stores, to be able to walk to the synagogue ... From a practical perspective, we like to live close to the schools our children go to and near our families and friends.[21]

As Werzberger points out, Chasidic Jewish life brings with it behaviours dictated by religion or culture and behaviours dictated by practical needs or preferences. Indeed, building one's own *succah* – not mandatory in Jewish law – can be characterized as a practice based on both faith and convenience. The following "landmarks" trace this spectrum of justification. A synagogue is clearly required for religious reasons, while the convenience of a chartered bus route is simply attached to the pragmatic realities of Montreal's contemporary Chasidic Jewish community and its proximity to its counterpart in Brooklyn. An *eruv,* meant to lessen the impact of stringent rules of Sabbath observance, falls somewhere in between.

In all of these cases, we can ask how the conflict serves as a landmark on the map of Outremont and an indication of how relations between religious neighbours and their non-religious counterparts fill in that map. And in all of them, the lens of nuisance or *troubles de voisinage* clarifies the neighbourhood disputes by highlighting the multiple perceptions at play, the importance of context, and the collective impact of the resolution.

Landmark One: Building a Synagogue

Forget v. Ville d'Outremont (2001),[22] directed against the construction of a neighbourhood synagogue, constitutes one in an ongoing series of complaints brought by Outremont resident and past city councillor, Céline Forget. Forget could not simply go to court to complain that she did not like the idea or reality of yet another synagogue in Outremont; indeed, as the judge underlined in the case, she suffered absolutely no damage as an individual neighbour. Rather, she complained about procedural irregularities in the municipality's granting of a permit to the congregation Amour Pour Israël and the related delay of a regulation that would restrict use related to "culte et religion."[23]

According to the Superior Court of Quebec, it was permissible for the municipality to accommodate the religious congregation through discretionary application of relevant regulations. Here, according to the mayor, Outremont was attempting to meet the religious needs of the congregation with respect to having a synagogue within walking distance. Particularly with respect to the sensitive question of the religious use of property, flexibility on behalf of the municipality was clearly appropriate and, indeed, served the public interest. Furthermore, given the construction already under way, it would have been unjust to order destruction at the request of an individual who had suffered no personal damage.

If thought of through the lens of Article 976 and the legal framework of *voisinage,* and assuming the complainant lived next door, the synagogue's annoying use of property is rendered harmless. That is, a complaint about construction undertaken in an arguably less than transparent administrative context is found unreasonable. As a result, the synagogue for the Amour Pour Israël community appears to be inscribed onto the map of the neighbourhood. In reality, however, the bickering continued well after the court decision. It was only in the summer of 2006 that Outremont and the congregation finally reached an agreement to allow work to go ahead on construction of the synagogue on a street corner not technically zoned for religious buildings.[24]

Several synagogues in Outremont exist beside residential triplexes and commercial storefronts. The idea, embodied in zoning regulations, that *lieux de culte* must be separate from residential properties may clash with the notion of synagogue from the perspective of Chasidic communities. For example,

a synagogue is often located in a small home (*shtibl* in Yiddish), and the Hebrew word for synagogue – *beit knesset* – means "house of gathering." Indeed, an earlier, more direct complaint by the same individual regarding the periodic noise of prayer also failed,[25] suggesting that religious and residential uses of property cohabit fairly easily, albeit subject to municipal regulation.

We can contrast that cohabitation with the map of Val Morin,[26] a small town in the Laurentian Mountains north of Montreal and the summer "home" of Belz Chasidic Jews normally resident in Outremont. In a recent zoning dispute over a chalet used as a synagogue and religious school (in an area labelled residential), the Superior Court ruled that residential zoning was to be respected. A long-term "neighbourly" agreement whereby the town had essentially looked the other way for years was put aside. Rather than focus on hardship or damage suffered by the non-Jewish neighbours, the Court emphasized the fact that there was no hardship in freedom-of-religion terms for the congregation, which owned other land in Val Morin (within walking distance) zoned for educational and religious uses.[27] Here the synagogue already existed, but the neighbourhood around it effectively changed, thus making its continuation impossible.

If we compare the two cases as instances of characterizing *voisinage,* we see different consequences of the balancing of inconveniences. That is, when the neighbours complain about the synagogue in question, relying on non-religious reasons, the Chasidic congregation replies in freedom-of-religion terms. Accommodation of the religious needs of the members of the synagogue community appears to be more plausible when the complaint itself indicates no real inconvenience for the complainant but, if recognized, would lead to true difficulty for the alleged troublemakers. On the other hand, when denial of the synagogue in the preferred locale appears to create no substantive inconvenience (beyond having to walk further on the Sabbath) for the religious community, accommodation takes a back seat to the complaints of the neighbours on the main street in Val Morin. We get opposite results in the two cases, illustrating the different contexts: like Bermondsey and Belgrave Square, Outremont and Val Morin make room for different degrees of integration of the Chasidic Jewish residents and the uses to which they put their property.

Landmark Two: Renaming Space

In the months leading up to *Rosenberg v. Outremont* (2001),[28] known as the "*eruv* case," Chasidic communities erected wires and strings throughout Outremont. They marked *eruvin* or, in other words, public space as "domestic" or "private." For religious Jewish residents, *eruvin* that extend the domestic sphere down the street allow carrying to be done in the neighbourhood on religious holidays when such carrying would be prohibited in external or

public space. When the City of Outremont began to take down the wires, a complaint was brought by Chasidic community members against the municipality.

The Superior Court of Quebec defined the *eruv* as follows, thus understanding it as part of religious practice significant to traditional Jews:

> Essentially, an eruv is a notional concept by which an otherwise open area is closed by the attachment of barely visible wires or strings to freestanding structures. The purpose of an eruv is to avoid the prohibition in Jewish Law of removing things from one domain to another on the Sabbath and on Holidays. From a practical point of view, without an eruv, an Orthodox Jew is effectively housebound on the Sabbath and religious holidays if he or she wishes to or is required to take anything out of the house and bring it onto other property. This prevents, for example, such commonplace activity as pushing a stroller with young children, carrying medication or bringing food to a neighbour's home.[29]

According to the Court, the dismantling of the *eruvin* amounted to a failure to offer reasonable accommodation for religious practices and thus violated freedom of religion. No inconvenience or hardship for other residents was shown, and the Court rejected the suggestion that the *eruvin* somehow symbolized active state endorsement of one religion or the official characterization of Outremont as Jewish religious space. As Justice Hilton states, "In this case, the City of Outremont is not being asked ... to associate itself or its citizens in any way with the erection of eruvin. It is being asked to tolerate the barely visible wires or lones traversing City streets ... In doing so, it is not being asked to associate itself with the Orthodox Jewish faith any more than it associates itself with Christianity when it allows Christmas decorations to be displayed on City property."[30]

In the *eruv* case, the conflict is less over uses of private property (as in nuisance) than over line drawing and the power to name, trace, and define shared public space.[31] The Chasidim place a literal line around their own communities to facilitate religious observance, and in doing so they include within the boundaries their non-Chasidic neighbours. At the same time, the municipality draws a figurative line around the entire neighbourhood, filling it in with "public, secular" space. The question is whether these two understandings can coexist when one demands visibility and the other assumes invisibility of faith. As Berger writes in this volume, "Recognizing law's religion as personal and important owing to its nature as preference leads us to a final and deeply interrelated feature of law's rendering of religion: law assigns religion clearly, albeit unstably, to the realm of the private rather than the public."

While far from a nuisance conflict between individuals living side by side, the *eruv* problem is analogous to such a dispute. Differing perceptions coexist just as in the case of neighbours who understand the nature and character of their shared neighbourhood in fundamentally different ways. In a classic *troubles de voisinage* scenario, one property owner characterizes the neighbourhood as tranquil, with fresh air and space, while the other sees it as the home of a necessarily smelly business that provides a living to the residents. In the *eruv* scenario, some neighbours walk down what they see as a shared public sidewalk, while others push their strollers down the same sidewalk, reassured by the overhead wires that the ground is deemed domestic space for religious reasons. The Court here says that both views can be right.

Unlike the framework of nuisance, there exists no individual complainant with a feasible claim of unreasonable interference with the use of property. That is, no individual can simply say that her understanding of the neighbourhood is excessively interfered with by the neighbour's understanding and use. Indeed, the dispute becomes particularly awkward if forced into terms of individual practice and inconvenience. On the one hand, the Chasidic Jews have to argue for the *eruv* as crucial to individual religious observance; on the other, Outremont residents unhappy with the *eruv* have to argue that it denies them some individual freedom. It seems awkward to characterize a customary communal practice aimed at convenience as fundamental to individual faith. And it seems absurd to imagine residents of Outremont disappointed because they can't fly kites, the one activity expressly found to be curtailed by the *eruv* wires.[32]

In the case, the Court does find the *eruv* to be a matter of religious belief in that it facilitates Sabbath observance. Since kite flying in a neighbourhood so full of trees was never possible regardless of the *eruvin,* it is clear for the judge where the figurative line of "reasonable" complaint must be drawn. In the terms of Article 976 of the *Civil Code of Quebec,* the neighbours who do not like the literal lines must "suffer" or "accept" them as a necessary part of the character of the neighbourhood in which they live. Yet, as the Court is careful to point out, the space where the *eruv* is located is not fully transformed into or appropriated as private and religious space. Residents, even if acutely aware of the *eruv* lines, can still name and enjoy the space as public and secular. The case thus illustrates community-based understandings of shared land and the practices that give it meaning.[33]

This second landmark, then, permits a religious name or label for shared space in the neighbourhood. Similar to *Amselem* in that the practice in question is not strictly a religious obligation, the *eruv* differs from the *succah* in its explicitly communal character. Thus, the *eruv* signals and demarcates the communal life of Chasidic Jews within the geographical boundaries of Outremont. It represents the literal marking of the space they inhabit, move

in, and share. The equilibrium at the heart of the law of neighbourly relations reminds us, however, that no group of neighbours has a monopoly on the designation of space. As the case tells us, map drawing from a religious perspective coexists with alternative and even competing versions of the map. While the *eruv* lines serve a particular purpose for one set of residents, they are meant to be "invisible" in both a real and symbolic sense for their non-Chasidic neighbours.[34]

Landmark Three: Locating the Bus Stops

This final landmark, unlike the others, is not a dispute that has gone to court for resolution. Despite a Montreal lawyer's prediction that the relevant recent bylaw will end up being challenged all the way to the Supreme Court of Canada,[35] no complaint has been formally lodged. But the lack of formal judgment does not make the landmark any less concrete. At issue is a rule that restricts commercial bus traffic to one (busy and wide) street in Outremont, thus prohibiting commercial buses from picking up passengers on residential street corners. While enforcement of the bylaw has not always been stringent, its very existence sparks considerable controversy.[36]

From the perspective of the Chasidic residents of Outremont, the bylaw forces the rerouting of a daily charter bus from Montreal to Brooklyn that serves their communities. That is, given connections to New York City Chasidic Jewish communities, the bus is a necessary part of everyday life, and the bus route lessens the inconvenience of moving families and their luggage. From the perspective of their non-Chasidic neighbours, the charter bus contributes to inappropriate traffic on narrow residential streets. The noise and fumes and blockage of the streets are all characterized as unbearable.

At the same time that this may not be a legal dispute in the sense of being subject to a state legal framework, it may not be a dispute about religion either in the sense of involving religious belief or practice. This is the landmark furthest from a *voisinage* dispute in which one neighbour's religious use or understanding of property has an impact on the other's use or understanding. But it is the landmark most like a typical nuisance case: the offensive use is ostensibly tangible given that it involves smell and noise and general disruption.

The challenge here is whether neighbours can talk with each other to find some equilibrium in their understandings of the character of their shared space. The fact that the Brooklyn-bound bus will not stop at the corner anymore may be incorporated into the everyday lives of Chasidic Jewish residents, yet those residents may continue to insist on the transformation into a bus stop of the sidewalk in front of each home. The governing representatives who speak for the neighbourhood have offered the equivalent of the communal *succah* offered by Le Sanctuaire in *Amselem.* But in both cases,

that gesture toward collective practice appears to be less than satisfactory to the religious neighbours.

The bus dispute serves perhaps as a particularly good example of the give and take envisioned by the law of nuisance. Just as non-Chasidic Outremontais have to accept the argument that the *eruv* does not fundamentally alter their ability to use and give non-religious significance to the neighbourhood, the Chasidic neighbours are asked to accept the argument that the bus stop on Van Horne does not fundamentally alter their ability to live as religious residents in that neighbourhood. That is, the balance of inconveniences in this case appears to tip in favour of the non-Chasidic neighbours who find it difficult to cope with the noise and traffic consequences. In terms of *voisinage,* the "suffering" involved in the rerouting of the bus may be a requisite part of accepting the other within shared space.

Just as in the tort of nuisance, what looks like a "neutral" individual complaint about noise, smell, and safety may go hand in hand with a collective effort to redirect the neighbourhood and to enforce a particular vision of shared life. Noise or smell may simply be a surrogate for asserting shared values and practices and outlooks and ways of life.[37] Thus, Chasidic Jewish residents of Outremont are probably right in their perception that complaints about the bus are actually aimed at their very existence as neighbours. In a context where arguments based on freedom of religion are not readily available, they may have to figure out ways to adjust behaviour while insisting on their significant place in the neighbourhood. Cohabitation will necessarily entail maintaining a continually fragile and shifting equilibrium.

Conclusion: A Picture of Cohabitation

By using the notion of nuisance, or *troubles de voisinage,* as the lens through which we can view the stories and disputes that mark the cohabitation of Outremont neighbours, we can engage in a concrete, even physical illustration of contemporary religious life in Canada. Rather than engaging in an analysis of individual rights and freedoms, or even of the notion of reasonable accommodation in human rights jurisprudence and theory, that illustration attempts to capture the human interactions that take into account the everyday lives of religious people in real neighbourhoods.

At a broader or communal level, the structure or metaphor of *voisinage* helps us see how uses slowly settle into a pattern of equilibrium. The map is gradually filled in with lines and spaces that show points of separation and spheres of mixing. As shown by the theory and real-life consequences of nuisance disputes, what might be cast in terms of individual interaction or protection of interests is necessarily about real and symbolic interactions among communities. Thus, the give-and-take of individual residents can be studied on its own terms, but it can also be rendered on the collective level,

where the state and the communities within it are shaped by the daily interactions in our neighbourhoods.

The behaviour of all of us as individuals and members of intersecting communities entails bumping into each other. And that behaviour is constantly modified such that we can live from day to day as neighbours, each enjoying our particular space and accepting the overlapping nature of coexistence. Individuals recreate themselves in the context of those who live next door and, in so doing, realize the collective dimensions of the ways in which we act and form our expectations. Indeed, as the neighbourhood is shaped, choices are made by individuals as to whether they want to live with the others in this particular corner of the world.

The sense of living together and sharing space, captured by landmarks such as those described here, is necessarily dynamic. Referred to as "hybridity" by Sherry Simon, the dynamism comes from the contact and sharing through interaction that constitute the neighbourhood and produce moments of particularly loud conversation. In focusing on Mile End, a neighbourhood adjacent to Outremont, Simon describes the evolution of the neighbourhood over the past twenty years: "Certain historical moments, certain social situations, have triggered the debate over identity ... Culture was no longer a safe zone to protect but rather became a space of innovation where each could borrow from the other. That evolution corresponded to a time of openness to the world ... and to a confirmation of hybridity."[38]

A recent story, located at the intersection of Outremont and Mile End, provides a final illustration of these crucial and constitutive neighbourhood interactions. Here the leaders of a Chasidic synagogue and yeshiva offered to cover the cost of frosting the windows of the YMCA next door to prevent male yeshiva students from watching women exercising in the gym. The YMCA agreed. But the resulting opaque windows were less willingly accepted by YMCA members and users of the gym, some of whom protested what they thought was an imposition of religious views.[39] To restore neighbourly peace, clear windows were reinstalled, and the Chasidic community has ostensibly found other ways to control the boys. The interactions and back and forth took considerable time and energy and received much attention. Indeed, the YMCA and the synagogue have become yet another neighbourhood landmark, another site for studying the precise equilibrium between two institutional neighbours.

Each conflict that goes to the town hall, the neighbourhood paper, or the Superior Court carries with it the potential to contribute to the constant retransformation of Outremont. Each decision, whether rendered in the language of respect for administrative zoning discretion or in the language of respect for individual rights and freedoms, brings different narratives together. These are narratives of daily life, of what it means to live in Outremont, of the ways in which identity is inscribed on every street corner. And

as the narratives are told and retold and given new shape, residents continually learn how to be neighbours, and the meaning and nature of Outremont itself shift.

The landmarks on the map of Outremont are far from fixed in stone. They move and are not always easy to locate. If you look for a *succah* in December or April, you will not find one; the *eruvin* are almost impossible to spot; many of the synagogues are difficult to identify. The map, then, is full of almost invisible markers that seem to require moving to Outremont before being able to figure out what it looks like. And the markers are in flux. Seasonal shifts, so obvious with the *succah* example, are accompanied by shifts among participants in the dialogue (elected representatives, community leaders) and in the actual priorities for all groups of residents. Indeed, what marks the particular neighbourhood today may change tomorrow, not because the religious members of that community disappear but because practices (rather than religious obligations) shift in nature.

The microcosm of a neighbourhood explored here may have potential for thinking about other instances of shared space in which religious belief gives rise to practices that have impacts on others. Whether the kirpan in the schoolyard or prayer in the corridors of a university, the complaint is always framed in violation of freedom-of-religion terms, a challenge that necessarily produces a particular form of response focused on the individual's rights vis-à-vis the state or another administrative body. But these cases are fundamentally about individuals living or playing or studying next to each other. They are often starting points (or "starting again" points) for ongoing interactions. And they take place against a backdrop of conversations – sometimes arrested, sometimes fruitful – between communities.

Ongoing narrative and legal analysis of claims based on religion may well benefit from a conceptual retelling as stories of neighbourhood or *voisinage*. When an individual religious child drops his kirpan in the schoolyard and has to listen to his neighbour's version of the story, it illustrates the nature of collegial negotiated space for learning, playing, and growing up together.[40] The private law model of nuisance or *troubles de voisinage* may capture a tangible element often missing from the discussion, that of daily interaction and the ways in which space is shared and mapped by those who live within it. Thus, the metaphor of neighbourly equilibrium may be particularly helpful in appreciating the stories, communities, and real people woven into the very character of the neighbourhood.

Nuisance reminds us of the importance of context and of the interactions among neighbours that constitute the narrative of the neighbourhood. It reminds us that fixed definitions of individual freedom of religion are elusive in that the consequences of a claim to religious freedom take on shape and significance depending on context. And nuisance puts accommodation and acceptance to the test: the tangible act of living side by side as good neighbours

can be a true sign of incorporating religious identities into the fabric of Canadian communities. Both religious and non-religious neighbours make up the neighbourhood; each individual or group contributes to the meaning of citizenship for the people next door.

Finally, the picture of *voisinage* – the "suffering of normal neighbourhood annoyances" – may help the ongoing project of appreciating the interactions of religion and law, the project at the heart of this volume. When religion meets law, the two may intersect at points yet insist on making particular uses of their own spaces; indeed, those uses may be limited according to the character and sensibility of the other. In nuisance, as we have seen, a duel between neighbours can be transformed into a complex and continuing conversation about shared norms and understandings of coexistence in a neighbourhood. Similarly, what might be characterized and sometimes experienced as a duel between religion and state law can be recreated as a fragile mutual respect, acknowledgment of the other, and even hesitant – yet necessary – remodelling of the self as a result of neighbourly interactions.

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Notes

1 *Syndicat Northcrest v. Amselem,* [2004] 2 S.C.R. 551, 2004 SCC 47 [*Amselem* cited to S.C.R.].

2 See Shauna Van Praagh, "The Chutzpah of Chasidism" (1996) 11:2 Can. J. of L. and Soc. 193. Other general references on Jewish life in Montreal, Chasidism, and Chasidic communities include Julie Chateauvert and Francis Dupuis-Deri, *Identités mosaïques* (Montréal: Boreal, 2004); Pierre Anctil, Ira Robinson, and Gerard Bouchard, *Juifs et Canadiens Français dans la societé québécoise* (Montréal: Septentrion, 1999); Julien Bauer, *Les Juifs Hassidiques* (Paris: Presses Universitaires de France, 1994); and Malka Zipora, *Lekhaim! Chroniques de la vie hassidique à Montréal* (Montréal: Les Éditions du Passage, 2006). For accounts of Chasidim in the United States, see Robert Eisenberg, *Boychiks in the Hood: Travels in the Hasidic Underground* (San Francisco: Harper Collins, 1995); see also Stephen Bloom, *Postville: A Clash of Cultures in Heartland America* (New York: Harcourt, 2000).

3 Sherry Simon in François Laplantine and Alexis Nouss, *Métissage: De arcimboldo a zombi* (Paris: Pauvert, 2001) at 425, describes the *métissage* of Montreal's Mile End neighbourhood (next door to Outremont) as "l'hybridité," a model of cohabitation distinct from multiculturalism: "un modèle de coexistence culturelle, l'hybridité suggère un mode de circulation, d'interaction et de fusion imprévisible des traits culturels" [as a model of cultural coexistence, hybridity suggests movement, interaction and the unforeseeable fusion of cultural traits] (my translation). See also Sherry Simon, *Hybridité Culturelle* (Montréal: Ile de la tortue, 1999).

4 See, generally, Robert M. Cover, "Foreword: *Nomos* and Narrative" (1983-84) 97 Harv. L. Rev. 4. See also Roderick A. Macdonald and David Sandomierski, "Against Nomopolies" (2007) 57 N. Ir. Legal Q. 610, in which the authors argue for a theory of law that rejects the separation between citizens (traditionally legal subjects) and those who make and administer the law and thus challenges the central importance of judges and judicial opinions.

5 See Shauna Van Praagh, "Identity's Importance: Reflections of – and on – Diversity" (2001) 80 Can. Bar Rev. 605, in which private law sources are included in an exploration of the Supreme Court's relationship to "multiculturalism."

6 For general discussions on tort law and nuisance, see Lewis Klar, *Tort Law* (Toronto: Thomson Carswell, 2003); Allen Linden, *Canadian Tort Law,* 7th ed. (Markham, ON: Butterworths, 2001); Tony Weir, *A Casebook on Tort,* 9th ed. (London: Sweet and Maxwell, 2000); John G. Fleming, *The Law of Torts,* 8th ed. (Sydney, Australia: Law Book Company, 1992); and Ernest Weinrib, *Tort Law: Cases and Materials,* 2d ed. (Toronto: Emond Montgomery Publications, 2003).

7 Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile* (Cowansville, QC: Yvon Blais, 2003) at para. 211: "L'article *976 C.c.* énonce que les voisins doivent accepter les inconvénients 'normaux' de voisinage s'ils n'excèdent pas la norme de tolerance mutuelle ... Le test paraît donc, du moins à première vue, être objectif puisque le texte ne fait référence ni à l'intention de nuire, ni à l'exercise excessif et déraisonnable du droit" [Article 976 of the civil code of Quebec provides that neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other ... The test appears objective, at least initially, in that no reference is made either to intention to disturb or to the unreasonable and excessive use of one's property] (my translation).

8 See *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 (Div. Ct.), in which the complainant established his reasonableness by showing that fellow residents also complained of "a most sickening smell" and "very, very offensive odours."

9 See *Rushmer v. Polsue and Alfieri Ltd.,* [1907] 1 Ch. 234 at 250 (C.A.).

10 *Sturges v. Bridgman* (1879), 11 Ch.D. 852 at 865.

11 See, generally, *Canada Paper Co. v. Brown* (1922), 63 S.C.R. 248, in which one summertime resident of a factory town convinced the court to order the cessation of activity that provided jobs to townspeople.

12 On the subject of how nuisance may be understood as a vehicle for and a reflection of the developments that communities undergo, see, generally, Philip Osborne, *The Law of Torts* (Toronto: Irwin Law, 2003) at 339. See also Jennifer Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930" in David Flaherty, ed., *Essays in the History of Canadian Law,* vol. 1 (Toronto: University of Toronto Press, 1981) 281; and Oliver Wendell Holmes, "Privilege, Malice, and Intent" (1894) Harv. L. Rev. 1 at 3-4, 9.

13 *Drysdale v. Dugas* (1896), 26 S.C.R. 20.

14 For a discussion of the relationship between zoning and notions of community morality, see Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003).

15 See Kathryn Bromley Chan, "The Duelling Narratives of Religious Freedom: A Comment on Syndicat Northcrest v. Amselem" (2005) 43 Alta. L. Rev. 2. Bromley Chan notes the competition between the narrative of religious obligation and that of secular public space and the difficulty (or impossibility) of conversation leading to cohabitation.

16 See Julie Elizabeth Gagnon, "Cohabitation interculturelle, pratique religieuse et espace urbain: Quelques réflexions à partir du cas des communautés hassidiques juives d'Outremont/Mile-End" (2002) 3:1 Cahiers du Grès 39 at 45.

17 See, generally, B. De Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 J.L. & Soc'y 279. De Sousa Santos draws on cartography to analyze the interplay between law and society, arguing that the relationship between law and social reality is analogous to the relationship between maps and spatial reality.

18 "While there are security and insurance concerns about succahs and balconies, the co-owners' primary concern is the appearance of their home as an expression of how they

wish to be seen by the world. This is related to maintaining the value of their investment." *Amselem* at para. 193, per Justice Binnie.

19 *Amselem* at para. 39. See *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at 346, cited in *Amselem* at para. 41: "The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided ... only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own." We find here the language of *voisinage* and nuisance in an explicit discussion of constitutional religious freedom guarantees.

20 *Amselem* at para. 176: "In the case at bar, not only is there a conflict between the right to freedom and religion and property rights, but the right to freedom of religion is also in conflict with the right to life and personal security, and with contractual rights."

21 Translated from the French. *Identités mosaïques, supra* note 2 at 57.

22 *Forget c. Outremont (Ville d'),* [2001] R.J.Q. 1565 (C.S.).

23 *Ibid*. at 1581.

24 Nadielle Kutlu, "Une synagogue verra finalement le jour sur l'avenue Van Horne: Un nouveau permis est octroyé à la congregation Amour pour Israël" *L'Express d'Outremont* (8 juin 2006.

25 See "American Jewish Yearbook 2002," online: American Jewish Committee <http://www.ajcarchives.org/AJC_DATA/Files/Vol_102_2002.pdf> at 298. The excerpt refers to Céline Forget's unsuccessful complaint about the noise emanating from an Outremont synagogue. The court found that no one living near the synagogue had complained prior to Ms. Forget's move into the neighbourhood and thus that the unusual complaint should be rejected.

26 *Municipalité de Val-Morin c. Congregation of the Followers of the Rabbis of Belz to Strengthen Torah* (2005), EYB 2005-94783; 2005 CarswellQue 7355 (C.S.) [*Val Morin*].

27 *Ibid*.

28 *Rosenberg v. Outremont,* [2001] Q.J. No. 2858 (Quebec S. Ct.) [*Rosenberg*].

29 *Ibid*. at para. 7, per Justice Hilton.

30 *Ibid*. at para. 25.

31 See Davina Cooper, "Talmudic Territory? Space, Law, and Modernist Discourse" (1996) 23:4 J.L. & Soc'y 529. Cooper uses similar *eruv* debates in the United Kingdom, the United States, and elsewhere as a vehicle for a discussion of identity politics and the value of diversity. See also, specifically on linguistic diversity in Montreal, Sherry Simon, *Translating Montreal* (Montreal: McGill-Queen's University Press, 2006).

32 *Rosenberg, supra* note 28 at para. 32.

33 See Gagnon, *supra* note 16: "Ces tensions nous apparaissent certes tributaires d'une certain compétition pour l'espace entre deux groupes dans un contexte socio-démographique en transformation."

34 See Shauna Van Praagh, "Navigating the Transsystemic: A Course Syllabus" (2005) 50 McGill L.J. 701, for a brief discussion of cartography as a way to study competing and coexisting normative orders of multiple groups of people.

35 David Lazarus, "Outremont Bus Bylaw Could End Up in Highest Court: Lawyer" *Canadian Jewish News* (29 May 2003).

36 See David Lazarus, "Rival Bus Service to Brooklyn Offered to Chassidic Jews" *Canadian Jewish News* (3 August 2006).

37 A similar neighbourhood dispute – this time over noisy air conditioners associated with Orthodox Jews given their practice of leaving the air conditioners running overnight on the Sabbath – recently resulted in a change to the rules related to noise (Arrondissement d'Outremont, Bylaw no. AO-21, *Règlement sur le bruit* (15 March 2005) s. 4c).

38 Translated from the French. Simon, *supra* note 3.

39 See Ingrid Peritz, "Gym, Jews Don't See Eye to Eye" *Globe and Mail* (8 November 2006) A1.

40 See Shauna Van Praagh, *Hijab et kirpan: Une histoire de cape et d'épée* (Sainte Foy, QC: Presses de L'université Laval, 2006).