

Social Processes in Canadian Religious Freedom  
Litigation:  
Plural Laws, Multicultural Communications, and Civic  
Belonging

by

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A thesis submitted in conformity with the requirements  
for the degree of Doctor of Juridical Science

Faculty of Law  
University of Toronto

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# Social Processes in Canadian Religious Freedom Litigation: Plural Laws, Multicultural Communications, and Civic Belonging:

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2013

## Abstract

Though there is significant academic interest in the law of religious freedom in Canada, there has been little research into the experiences of participants in religious freedom litigation. Based on a qualitative analysis of participant interviews and legal documents in three decisions of the Supreme Court of Canada, this dissertation explores the social processes at play in that litigation. At issue in the three cases were, respectively, (1) the right of Jewish condominium co-owners to install ritual huts (*succoth*) on their balconies; (2) the right of a Sikh student to wear a ceremonial dagger (*kirpan*) in a public high school; and (3) the right of a Hutterite group to be exempted from the photo requirement on driver's licences for religious reasons. This dissertation adds to the existing academic commentary by looking beyond the judicial decisions and incorporating firsthand accounts of lawyers, litigants, and expert witnesses in these cases. The substantive analysis is divided in three sections. First, the dissertation examines themes of overlapping legal systems in participant narratives. Litigants understood themselves to be subjects of both state and religious laws, and the particular interactions between these legal systems help refine theories of legal pluralism. Second, the work analyzes religious freedom litigation as cross-cultural communication. Specifically, the dissertation employs the normative criteria of respect and self-awareness found in the literature on cross-cultural communication to approach participant

narratives and judicial decisions, finding both successes and failures in this regard. Third, the dissertation engages issues of belonging to the Canadian civic community inherent in participant narratives. All litigants told the stories of their litigation as part of their larger immigration and integration narratives, and successful litigants were quick to give positive accounts in this regard. The unsuccessful litigants told more complex stories of integration, complicating the analysis of the impact of a judicial decision on their narratives of civic belonging. Nevertheless, the dissertation argues that the notion of civic belonging ought to be explicitly taken into account by Canadian judgments when dealing with issues of religious freedom.

## Acknowledgments

I am deeply indebted to my supervisor, Prof. Ayelet Shachar, for her wisdom and guidance throughout the preparation of this dissertation. I hope that some reflection of her brilliance and generosity can be found in these pages. I also owe much to Prof. Ping-Chun Hsiung, who graciously instructed me in a methodology with which I was mostly unfamiliar, and took time and great care in this endeavour. I am also grateful to Prof. Jean-François Gaudreault-Desbiens for his thoughtful comments that, on many occasions, deepened and sharpened the analysis presented in this work. Thanks also to Prof. Shauna Van Praagh, whose mentorship and support throughout my legal education has been invaluable.

I owe enormous thanks to my partner, Dr. Naomi Lear, without whom I would not have had the drive or the patience to complete this work and stay true to our goals as a family. The birth of our son, Gabriel, in the midst of this project gave me another reason to redouble my efforts and strive to create a work of which he could be proud. I also thank my parents, Joe and Linda Kislowicz, and my other parents, Judith and Paul Lear, whose support has been ever-present. Thanks to Rabbi Barry Kislowicz and Jonathan Lear for their insights over the years.

Of course, a work of this kind depends crucially on the generosity of interview participants. Each of these individuals taught me an enormous amount with no hope of personal gain, and for this I am deeply thankful.

I have also been fortunate to be part of a dedicated and vibrant community of scholars, and I thank my colleagues in the doctoral program at the University of Toronto's Faculty of Law, and other trusted friends made throughout the years, for our ongoing conversations. Thanks go to Nicole Baerg, Senwung Luk, Richard Haigh, Gail Henderson, Zoë Sinel, Ubaka Ogbogu, Patrícia Galvão Ferreira, Stuart Hargreaves, Mike Nesbitt, Mike Pal, David Sandomierski, Derek McKee, Sagi Peari, Eddie Clark, Jacob Shelley, Saad Abuelghanam, Mai Taha, Amar Bhatia, Hélène Mayrand, Nick Sage, and Megha Jandhyala.

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# Chapter 1 Overview and Methods

## 1 Introduction

### 1.1 Background

Controversies over religious freedom have blossomed in Canadian public discourse in the last decade. Quebec's provincial government, for example, recently introduced a bill aimed at *niqab*- and *burqa*-wearing women, stating the "general practice" that people are to show their faces when providing or receiving government services.<sup>1</sup> At a legislative hearing on this bill, the legislature unanimously decided to exclude *kirpan*-wearing Sikhs from the legislature building.<sup>2</sup> In Ontario, a recent Court of Appeal decision addressed the issue of whether a complainant in a sexual assault case could testify while wearing a *niqab*; the Supreme Court has heard the appeal, though has not yet issued a decision.<sup>3</sup> Furthermore, in the last 15 years, the Supreme Court of Canada has made a number of decisions implicating the religious practices of Canadians, adding substance to the legal doctrine of religious freedom. The Court has held that the failure to provide a religious divorce is a legal harm compensable in damages;<sup>4</sup> that members of a small religious group who object to having their photos taken need not be exempted from a universal photo requirement for driver's licenses;<sup>5</sup> that a Sikh high school student in Quebec could not be prevented from bringing his *kirpan* to class;<sup>6</sup> and that a condominium owner in Quebec could not

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<sup>1</sup> Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, online: <<http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html>>.

<sup>2</sup> "Kirpan banned at Que. National Assembly" (9 February 2011) online: cbc.ca <<http://www.cbc.ca/news/canada/montreal/story/2011/02/09/pq-kirpan-measure.html>>. Members of the World Sikh Organization had been invited to testify on the bill's potential impact.

<sup>3</sup> *R v S(N)*, 2010 ONCA 670, leave to appeal granted [2010] SCCA No 494.

<sup>4</sup> *Bruker v Marcovitz*, 2007 SCC 54.

<sup>5</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Wilson Colony*].

<sup>6</sup> *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [*Multani*].



be prevented from erecting a *succah* on his balcony, despite having signed an agreement to the contrary.<sup>7</sup>

The discourse in these situations typically focuses on how far freedom of religion should extend. However, while Canadian courts have expounded upon the legal doctrines of religious freedom and there has been significant academic commentary in the field, little attention has the litigation process itself and its effects on participants. The general aim of the current project is to probe behind formal judgments in the field of religious freedom and provide a more detailed picture of the social processes at play in religious freedom litigation. The project then draws on this data to engage with existing theories of legal pluralism and cross-cultural communication.

The bodies of literature engaged with in this project are relevant to all cultural minorities, not just those who identify as religious minorities. This project will focus on religious minorities, however, for three reasons. First, because religious freedom is given explicit constitutional protection while other forms of cultural expression are not, there is a significant body of case law, and hence a reasonably large number of litigants, to draw upon as resources. Second, religions typically provide norms and rules that draw their authority from a source other than the state. Exploring how religious Canadians view the interplay of religious norms and state norms will refine the theory of legal pluralism, which, as discussed below, is the theory that inspired this project. Third, a focus on religious *minorities*, as opposed to members of dominant or relatively large religious groups, is justified because minority needs are less likely to be taken into account by laws of general application. Indeed, all the leading religious freedom case law in Canada has emerged from claims made by adherents of minority religions.

## 1.2 Research Problem

There is a dearth of scholarship in Canada examining the experiences of participants in religious freedom litigation. Accordingly, this project's guiding question is: in what ways are participants (litigants, counsel, expert witnesses) in religious freedom cases affected by their experience with the legal system? As discussed further below, the complexities of this question are best explored through a qualitative methodology. A particular strength of qualitative inquiry

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<sup>7</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*].

is its ability to expose the nuances of the various processes that individuals go through in particular social settings;<sup>8</sup> it highlights the often divergent interpretations that different people can give to the same event. The questions that guide qualitative analysis are more effective when they remain open to the varying experiences of study participants, and do not seek a simple yes or no answer. As such, while some legal scholarship might focus on whether or not, in a given situation, there is a violation of religious freedom and whether such violations are justified, the question that guides this project is deliberately more open-ended, and capable of being answered in many different ways. I lay out some more specific iterations of this question below in Section 3.

In seeking clarification of this open-ended question, I engage with the perspectives of litigants, lawyers, and expert witnesses. I assess these points of view by reviewing court records of testimony and argument, and, more importantly, by interviewing the participants directly. By asking individuals directly about their experiences, the project explores the issues of state law's relationship to cultural and religious norms, collects first-hand accounts of cross-cultural encounters, and examines participants' narratives of belonging to the Canadian civic community. The methodology of data gathering and analysis will be based on the rich literature in sociological qualitative research, discussed below in Section 4. Before turning to these details, however, I provide a brief overview the theoretical perspectives that guide this project.

## 2 Theoretical Perspectives: Legal Pluralism & Cross-Cultural Communication

Scholarship in legal pluralism inspired this project's design. As will be seen in more detail in Chapter 2, the basic orientation of legal pluralism is to oppose the view that "law is and should be the law of the state... exclusive of all other law."<sup>9</sup> Generally speaking, legal pluralist scholars emphasize that cultural and religious rules and norms can be understood as "laws" in

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<sup>8</sup> Jeff Goodwin & Ruth Horowitz, "Introduction: The Methodological Strengths and Dilemmas of Qualitative Sociology" (2002) 25(1) *Qualitative Sociology* 33 at 35-36.

<sup>9</sup> John Griffiths, "What is Legal Pluralism?" (1986) 24 *J Legal Pluralism* 1 at 3.

their own right, and are often equal in significance with state laws in regulating people's lives.<sup>10</sup> By insisting that non-state normative systems can be *legal*, and examining the state's legal system in these comparative terms, legal pluralism can help expose some of the unstated and unquestioned assumptions inherent in state legal doctrines and procedures.<sup>11</sup> As Franz von Benda-Beckman has argued,

the condition of legal pluralism challenges the exclusiveness and self-evidence of any single normative system. One is no longer concerned with the question of whether or not to reproduce elements of 'the' law as against non-legal modes. Choices between legal systems are thinkable. Orientation at and invocation of one of the alternatives therefore require an explicit justification.<sup>12</sup>

Before conducting the interview and text-based research for this project, I had a number of concerns that stemmed from this legal pluralist perspective. I hypothesized that participation in the litigation process might inadvertently impinge upon religious freedom in non-trivial ways. When individuals litigate, they must adopt the language of statutes and legal precedents in order to be successful. This exercise encourages individuals to present their lives and problems, usually through their lawyers, in ways that are not necessarily their own.<sup>13</sup> To be pressured to present one's self in a manner dissonant with one's sense of identity, I thought, could impose a cognizable harm. Litigant interviews did not support this hypothesis. Litigants did not describe their testimony, generally provided through affidavits and out of court cross-examinations, as harmful, nor did their narratives bear any signs of trauma in this regard. Nevertheless, the legal pluralist literature provided a rich vantage point from which to analyze litigant narratives, bringing to light the subtle interrelationships between state and religious norms. The legal

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<sup>10</sup> There is some disagreement within the field of legal pluralism as what should be called "law;" see discussion below in Chapter 2, Section 2.5.

<sup>11</sup> See Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (London: Glasshouse Press, 2005); Suzanne Last Stone, "The Intervention of American Law in Jewish Divorce: A Pluralist Analysis" (2000) 34(2) *Isr L Rev* 170.

<sup>12</sup> Franz von Benda-Beckman, "Who's Afraid of Legal Pluralism?" (2002) 47 *J Legal Pluralism & Unofficial Law* 37 at 691

<sup>13</sup> See James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) at 34.

pluralist literature is surveyed in Chapter 2; analysis of the data drawing on this literature is contained in Chapter 4.

Once data had been gathered,<sup>14</sup> my initial analysis suggested that the body of theoretical literature on cross-cultural communication would be useful in further unpacking participants' narratives. Participants frequently spoke in terms of being understood or misunderstood, and their narratives related many instances of communication breakdown. Indeed, some scholars have already theorized that religious freedom litigation can be understood as a cross-cultural encounter.<sup>15</sup> Using this as a starting point, I surveyed the literature on cross-cultural communication. This provided an additional lens through which to view participant experiences, and provided some normative criteria against which to assess judicial decisions. The literature is surveyed in Chapter 2; its insights are applied to the data in Chapter 5.

These two bodies of literature are based in separate disciplines and are most often are not engaged with each other.<sup>16</sup> Scholars of cross-cultural communication are interested in much more than just law, and this may not even be a primary concern. Legal pluralist scholars might argue that multiple legal systems can exist even when individuals share a similar cultural background, or where individuals from different cultural backgrounds come together to generate a series of norms and rules specific to their interaction.<sup>17</sup> Still, there is a significant overlap in the situations that these sets of literature address, as both are concerned in part with social fields where individuals of diverging backgrounds interact. As shown in Chapter 2, section 2.1, contemporary legal pluralist scholarship has roots in studies of colonial societies, where separate legal systems were easily identifiable, and often recognized in some fashion by the colonial power. In such scenarios, the meeting between legal systems was part of the cross-cultural encounter that accompanied imperial expansion. In post-colonial and immigrant societies, such

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<sup>14</sup> See sections 4.4 and 4.5 of this chapter for more details on this project's methods of data collection and analysis.

<sup>15</sup> Benjamin L Berger, "The Cultural Limits of Legal Tolerance" (2008) 21 Can JL & Juris 245 ["Cultural Limits"].

<sup>16</sup> Berger's "Cultural Limits", *ibid*, is an exception to this generalization; he engages explicitly with both legal pluralist scholarship (Robert Cover's work) and theories of cross-cultural encounters (Fred Dalmayr's work).

<sup>17</sup> Sally Falk Moore's description of the garment industry in New York City provides an example of the latter: Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978).

legal and cultural interactions have become more complex and the boundaries between cultures and legal systems more porous. Legal pluralists and scholars of cross-cultural communication share an interest in these moments of interaction and their associated power dynamics.

Employing these bodies of literature as lenses for the analysis of religious freedom litigation in Canada proved fruitful. Participants often presented religious obligations in legal terms, and told stories of both successful and unsuccessful moments of cross-cultural communication. The insights of each body of literature refined and structured the analysis of the interview and textual data (the data gathering methods are described in section 4.3 below).

### 3 Research Questions

At the stage of this project's conception, I had in mind several different types of specific research questions that guided initial data collection and analysis. The first related to individuals' personal understandings of the concept of religious freedom. Is this understanding, as Robert Cover suggests, filtered through their own narratives?<sup>18</sup> How so? Relatedly, I was interested in how participants understand the relationship between religious normative systems and state law. Do they understand the relationship as hierarchical, or some other way? Does one set of laws have more impact in their daily life? What did it mean to them when a court said that religious freedom did not protect a particular practice?

A second set of questions dealt with litigants' reflections on their experience in the litigation process. How did the litigation change their life in practical ways? What did they learn about court processes? Do they have regrets? Do they think they were treated fairly? Do they think their religion was treated fairly? Did this change throughout the process, depending on whether they were successful or not? Following from these more factual questions, a deeper set of questions focused on the participants' interpretation of the events emerges: What did the litigation mean to them? How did they interpret their experiences? What lenses did they use to make these interpretations? What do the processes of interpretation tell us about the lived meaning of religious freedom and its relationship to state institutions for these individuals?

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<sup>18</sup> Robert Cover, "Nomos and Narrative" in Martha Minow, Michael Ryan & Austin Sarat eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) 95-173.

I also set out to inquire into the relationship between the litigations and litigants' senses of belonging to various levels of community. Did their experience with the courts change the way they thought about themselves as individuals, as members of their religious communities, as Canadians? Do they have a new interpretation of the Canadian legal process due to their particular experiences?

These questions shaped the interview process and data analysis. With some minor exceptions (noted below), however, the interviews left the identification and definition of key terms to the participants, in order to avoid predisposing the interview towards particular kinds of answers. The goal was to encourage the participants to tell their own stories, in their own words. As alluded to above, this allowed me to consider additional theoretical perspectives suggested by participant narratives.

## 4 Methods

### 4.1 Case selection

This project focuses on three religious freedom cases pursued to the Supreme Court of Canada: *Wilson Colony*,<sup>19</sup> *Multani*<sup>20</sup> and *Amselem*.<sup>21</sup> The choice of these cases is deliberate. First, because they are relatively recent, interview participants had strong memories of them. Second, because these cases were all pursued to the highest court, participants had several iterations of interacting with the state legal system on a question of religious importance. Third, in all of the cases, participants had both successful and unsuccessful encounters with the state legal system and its rules on religious freedom. This allowed participants to provide insight into a broader range of experience. Fourth, the litigants in these cases represent three different religious traditions: Orthodox Judaism, Orthodox Sikhism, and Hutterianism. The nature of this project implies that it will not be able to offer general conclusions about the influence of a particular religious tradition on the experience of participants. However, the varied religious

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<sup>19</sup> *Supra* note 5.

<sup>20</sup> *Supra* note 6.

<sup>21</sup> *Supra* note 7.

backgrounds of interview participants arguably makes the commonalities in their experience all the more meaningful in terms of assessing the impact of state policies on religious adherents. Fifth, though the cases involve three different religions, in each case the religious freedom claimant sought an exemption from a generally applicable rule. This differentiates these three cases from *Bruker v. Marcovitz*,<sup>22</sup> another recent Supreme Court of Canada case implicating religious freedom, where the issue was not one of exemption. This commonality made comparison across cases more straightforward. Finally, because these cases were pursued to the Supreme Court, there is a large and centralized documentary record of the cases.

## 4.2 Why Qualitative Analysis?

Qualitative inquiry, a familiar methodology for disciplines like anthropology and sociology, is rarely employed in legal scholarship, with some notable exceptions.<sup>23</sup> By engaging with rich data sets and focusing on the nuanced processes of interpretation at play in a particular social setting, a qualitative approach provides an ideal way of assessing the individualized experiences of participants in the court processes surrounding freedom of religion. Some critics of qualitative inquiry have suggested that qualitative analysis focuses on too small a sample size to draw meaningful or generalizable conclusions.<sup>24</sup> This argument is misplaced in the context of current project for two reasons. First, there is good reason to doubt the proposition that qualitative research does not contribute to valid theories about social life, even though it usually involves a smaller number of study participants. Indeed, it has been persuasively argued that qualitative research provides a proximity to the object of study unobtainable using quantitative tools, and that this proximity allows for nuanced adaptation of theories.<sup>25</sup>

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<sup>22</sup> *Supra* note 4.

<sup>23</sup> See Angela Campbell, “Bountiful Voices” (2009) 47 Osgoode Hall LJ 183; Eve Darian-Smith, ed, *Ethnography and Law* (Aldershot: Ashgate, 2007); John M Conley & William M O’Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (Chicago: University of Chicago Press, 1990); Shauna Van Praagh, “The *Chutzpah* of Chasidism” (1996) 11 Can JL & Soc 193; Falk Moore, *supra* note 17. The Journal of Legal Pluralism and Unofficial Law also frequently publishes ethnographic-style accounts of legal practices, particularly in post-colonial environments.

<sup>24</sup> Goodwin & Horowitz, *supra* note 8 at 36.

<sup>25</sup> *Ibid* at 37.

Second, Canadian legal analysis is self-consciously focused on the individual. It is the individual who is guaranteed the constitutional right to freedom of religion, who initiates a lawsuit, and who bears the burden of proving that his or her rights were infringed. Even if it were true that qualitative analysis can only reveal meaningful information about idiosyncratic experiences (which is doubtful), these experiences can, in principle, be significant for legal scholarship. The relevant question for Canadian courts is not how many people suffer an infringement of their rights, but rather whether the infringement of one person's rights is grave enough to be legally recognized<sup>26</sup> and, if so, whether the infringement is justifiable as being within the reasonable limits of a free and democratic society.<sup>27</sup> Inspired by this legal analysis, this project attempts to uncover more about individual experiences in religious freedom litigation. Interestingly, interviews revealed that participants' connections to their respective religious communities were significant in all cases, suggesting a tension between the legal rules related to religious freedom and the lived experiences of participants.

### 4.3 In-depth Interviews

The primary sources of data for this project are in-depth interviews conducted with litigants, lawyers and expert witnesses from the three cases identified above. These interviews provide the rich data that are needed to explore the complex themes related to religious freedom litigation. As John M. Johnson writes,

if one is interested in questions of greater depth, where the knowledge sought is often taken for granted and not readily articulated by most members, where the research question involves highly conflicted emotions, where different individuals or groups involved in the same line of activity have complicated, multiple perspectives on some phenomenon, then in depth interviewing is likely the best approach, despite its known imperfections.<sup>28</sup>

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<sup>26</sup> *R v Jones*, [1986] 2 SCR 284 at 313; *Amselem*, *supra* note 7 at para 58.

<sup>27</sup> *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1.

<sup>28</sup> John M Johnson, "In-Depth Interviewing" in Jaber F Gubrium & James A Holstein, eds, *Handbook of Interview Research: Context & Method* (Thousand Oaks: SAGE Publications, 2002) 103 at 105.



These are exactly the kinds of questions at play in this project. Individuals' relationships to their religion, religious community, the political community, and the state are multi-layered and complex, as are their self-understandings. There are likely many unspoken assumptions that individuals make with respect to these issues that are worth exploring.

Of particular interest for this project are the ways in which engagement with the state's legal system influences litigants' sense of belonging to the Canadian civic community. The relationship between the state and the individual in this regard is unlikely to be linear. Rather, individuals are more likely to bring their own agency to bear on the images of Canadian-ness perpetuated by state institutions, arriving at a negotiated conceptualization of what being Canadian means to them.<sup>29</sup> Information about these processes would likely be beyond the scope of a uniformly administered survey; moreover, asking interview participants to choose from a predetermined set of responses could distort their actual impressions and experiences. As Miller and Crabtree write:

formally develop[ing] a common set of questions, lists, or ratings... runs the high risks of phrasing the researcher's own concerns into the mouths of respondents and never giving voice to the interviewee's own perceptions and meaning making... It also ignores the role of the interviewer in this meaning-making process. Qualitative depth interviews are an option that accounts for these risks.<sup>30</sup>

The approach of asking open-ended questions and allowing interviewees more freedom in framing their answers to questions reflects the general epistemology of qualitative analysis, which "tends to be more constructionist than positivist."<sup>31</sup> When qualitative practices are employed, interview subjects are more likely to be understood as active agents in the construction of meaning rather than "passive conduits for retrieving information from an existing vessel of answers."<sup>32</sup>

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<sup>29</sup> Thanks to Prof. Ping Chun Hsiung for this nuanced insight. See also Tully, *supra* note 13 at 11-13.

<sup>30</sup> William L Miller & Benjamin F Crabtree, "Depth Interviewing" in Sharlene Nagy Hesse-Biber and Patricia Leavy eds, *Approaches to Qualitative Research* (Oxford: Oxford University Press, 2004) 185 at 186.

<sup>31</sup> Carol AB Warren, "Qualitative Interviewing" in Jaber F Gubrium & James A Holstein, eds, *Handbook of Interview Research: Context & Method* (Thousand Oaks: SAGE Publications, 2002) 83 at 83.

<sup>32</sup> *Ibid* at 83.

There are, of course, drawbacks to using a qualitative methodology. By focusing on particular aspects of individuals' experiences, important contextualizing factors can be lost or given too short shrift.<sup>33</sup> In this project, for example, issues of social class or gender do not figure directly in the interview questions, despite the high likelihood that these are contributing factors to subjects' experiences. The limited duration of the interviews meant that some contextual factors remained under-explored. While greater attention to these contextual factors would certainly enrich the understanding of interviewees' lived experiences, a qualitative methodology is nonetheless the most suitable for this particular project. First, it is hard to imagine that a quantitative approach would offer a better solution to this problem. More importantly, as I argued above, since legal analysis concerns itself with the details of the individual experience, the rich and focused data that emerge from in-depth interviews are the most fruitful for answering the research questions identified above.

A further concern with the use of in-depth interviews is that interview participants do not necessarily present to interviewers all aspects of their identities. Rather, they are more likely to

negotiate how they want to be known by the stories they develop collaboratively with their audiences. Informants do not reveal an essential self as much as they perform a preferred one, selected from the multiplicity of selves or personas that individuals switch among as they go about their lives.<sup>34</sup>

Furthermore, leading writers Gubrium & Holstein note that “stories are not complete prior to their telling but are assembled to meet situate interpretive demands... product and process are reflexive, mutual constitutive.”<sup>35</sup> The tendency of interview participants to selectively perform their identities in an interview setting, tailoring their stories to the particular context of an interview, saying what they think the interviewer wants to hear, or trying to get the “right” answer, can be problematic.

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<sup>33</sup> Miller & Crabtree, *supra* note 30 at 188.

<sup>34</sup> Catherine Kohler Riessman, “Analysis of Personal Narratives” in Jaber F Gubrium & James A Holstein, eds, *Handbook of Interview Research: Context & Method* (Thousand Oaks: SAGE Publications, 2002) 695 at 701.

<sup>35</sup> Jaber F Gubrium & James A Holstein, “Narrative Practice and the Coherence of Personal Stories” (1998) 39(1) *The Sociological Quarterly* 163 at 166.

On the other hand, if this tendency is taken into account during the analysis phase, participants' choices in the way that they tell their own stories can be revealing. Thus, Catherine Kohler Riessman has argued that personal narratives "are of interest precisely because narrators interpret the past in stories rather than reproduce the past as it was."<sup>36</sup> In other words, the aspects of their personal narratives that participants emphasize as being meaningful can shed light on the way that they understand their own lives. In this vein, Richard Cándida Smith writes that the "stories that interviewees share provide insight into the narrative and symbolic frameworks they use to explain why things turned out as they did."<sup>37</sup> Indeed, Cándida Smith also notes that the contemporary analysis of narratives is structured by a set of contradictory ideas. On one hand, language provides a set of rules that "impose categories of knowledge upon speakers."<sup>38</sup> Simultaneously, however, storytellers "push against boundaries established by genre, content, or form of expression" in unique ways.<sup>39</sup> Building on this insight, it seems likely that the particularized languages of specific institutions like courts provide an even more constrained set of knowledge categories. Taking this tension into account certainly complicates the analysis of the stories that respondents tell. However, it also provides a richer and more nuanced picture of the storytelling that occurred during the interviews. Participants' engagement in the legal process likely shaped the way that they think of their personal narratives; uncovering how participants' narratives were affected by legal categories (both state and non-state) is crucial to this project.

### 4.3.1 Interview Procedures

Ethical approval was obtained from the University of Toronto's Office of Research Ethics on November 9, 2010 (protocol reference # 25840). As a condition of this approval, the names of the participants have been omitted. Before obtaining consent for each interview, I explained to participants that the number of religious freedom cases that have been decided by

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<sup>36</sup> Riessman, *supra* note 34 at 705.

<sup>37</sup> Richard Cándida Smith, "Analytic Strategies for Oral History Interviews" in Jaber F Gubrium & James A Holstein, eds, *Handbook of Interview Research: Context & Method* (Thousand Oaks: SAGE Publications, 2002) 711 at 711-712.

<sup>38</sup> *Ibid* at 718.

<sup>39</sup> *Ibid*.

the Supreme Court of Canada is limited, and that I could not completely guarantee their anonymity. Readers may be able to draw connections between participant narratives and particular cases, which are matters of public record in which litigants, lawyers, and expert witnesses are referred to by name. I contacted participants in various ways. Lawyers are listed in the reports of cases, and were easily contacted by searching for their contact information in public records, and this was the method used to contact some litigants and the expert witness participant. For other litigants, either lawyers acted as intermediaries to see if their former clients were interested in participating, or I was able to contact them through mutual acquaintances. In total, I interviewed 10 participants: four litigants, four lawyers, one expert witness, and one representative of a community organization that intervened in one of the cases. The last interview proved not to be useful to this project except for general background information, as the direct knowledge of the participant of the organization's involvement in the litigation process was limited. Interviews lasted 60-90 minutes, and proceeded in the semi-structured form described in the next paragraph.

Sociologists who write about in-depth interviewing suggest using between one and 12 “grand tour questions” to structure the interview.<sup>40</sup> It is generally advised to start with relatively easy, rapport-building questions to create a comfortable atmosphere for the interview, and elicit some biographical details of the participant. Then, interviewers employ open-ended questions more directly related to the research topic and designed to elicit narrative answers from interview participants.<sup>41</sup> These questions are followed by more specific inquiries into the answers provided by the participant. In order to be able to make comparisons between interviewees, the “grand tour” questions for each class of participant were largely the same. However, in order to allow for flexibility in the process and provide room to explore the particular experience of each participant, follow-up questions differed in each interview. Moreover, I did not rigidly follow the interview guide; at times, participants raised issues that I had initially intended to explore later in the process, and it made sense to explore it as it arose. In addition, grand tour questions were

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<sup>40</sup> Miller & Crabtree, *supra* note 30 at 191; Warren, *supra* note 31 at 87.

<sup>41</sup> Miller & Crabtree, *ibid* at 191-192.

refined as the research progressed.<sup>42</sup> The following questions made up the interview guides that I employed. The italicized text beside each question explains the question's rationale.

#### 4.3.1.1 Litigants

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| <p>1. Please tell me a bit about your background.</p> <ul style="list-style-type: none"> <li>a. Where were you born?</li> <li>b. Where did you grow up?</li> <li>c. What religion do you practice?</li> <li>d. How did you learn about your religion?</li> </ul> | <p><i>This is an introductory set of questions designed to get the participant talking and make him/her feel at ease.</i></p>  |
| <p>2. How did you come to be involved in a lawsuit over a matter of religious freedom?</p>   | <p><i>This question is aimed at getting the participant to start talking about the lawsuit, to jog his/her memory. Further, the circumstances that the participant chooses to emphasize may be significant.</i></p>  |
| <p>3. What aspect of your religion or religious practice was the subject of litigation?</p> <ul style="list-style-type: none"> <li>a. How does the practice figure in your life?</li> </ul>  | <p><i>This question is designed, first, as a factual matter, for the respondent to explain (if he/she has not already) precisely what religious practice was the subject of a dispute. Then, the follow-up question is meant to determine what role the practice plays in the participant's life, and hopefully shed light on why the participant felt it was necessary to pursue the matter in court.</i></p> |

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<sup>42</sup> Jeffrey C Johnson & Susan C Weller, "Elicitation Techniques for Interviewing" in Jaber F Gubrium & James A Holstein, eds, *Handbook of Interview Research: Context & Method* (Thousand Oaks: SAGE Publications, 2002) 491 at 499.

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| <p>4. How did you decide to go to court?</p>   | <p><i>This question is designed to explore the elements that went into the decision to litigate: what factors were significant? With whom (if anyone) did the litigant consult?</i></p>  |
| <p>5. How were you involved in the court processes?</p> <p>a. How did you prepare for the various stages?</p>          | <p><i>The way in which participants answer this question may reveal how they saw their role in the process, their relationship with their counsel and their relationship to the court.</i></p>   |
| <p>6. Did you have contact with the organizations that intervened in your case?</p> <p>a. How did this come about?</p> | <p><i>In each of the cases, there were several organizations that intervened to make separate presentations to the Supreme Court. This question is designed to explore the connections, if any, between the litigants and these organizations.</i></p>   |
| <p>7. What does the concept of “freedom of religion” mean to you?</p>  | <p><i>This is a key concept for my project. I use the constitutional language deliberately, to see if participants take this as a cue to begin framing the issue in more legal terms. This question breaks from the pattern of the rest of the questions in that it does not seek to ground the concept in specific experiences; further, qualitative researchers usually allow participants to use their own terminology. This question, however, invokes a legal term that will certainly be familiar to the participants, given their experiences with the Canadian legal system. It is in part designed to test Robert Cover’s claim that constitutional protections take on meaning in people’s lives through their unique worldviews (see Chapter 2, section 4).</i></p> |

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| <p>8. Could you explain the argument that you (or your lawyers) made to the court about your freedom of religion?</p> <p>a. Did your thinking about the issue change throughout the process? How?</p> <p>b. Is there a difference between the way you would explain the argument to your friends and the way you would explain it to someone with legal training?</p> | <p><i>The initial question here is designed to see how the participant internalized the argument made by their counsel. The follow-up questions ask the participant to reflect on events or moments that may have influenced their thinking, and the difference between a legal understanding of religious freedom and a lay understanding of the same concept.</i></p>   |
| <p>9. Did you provide any testimony?</p> <p>a. How did you prepare for your examination and cross-examination?</p> <p>b. How did your testimony go?</p>   | <p><i>This series of questions will be crucial for the project, and will likely require the most spontaneous follow-up questions. The question is left deliberately open, so that participants will be free to describe their experiences in their own words. In particular, I am interested to look at the source of any discomfort in the litigation process: does this stem from unfamiliarity with the environment, nervousness, or is there some deeper reason for the discomfort? Is talking about one's religious beliefs and practices in a litigation context somehow disconcerting to participants?</i></p> |
| <p>10. How would you describe your identity or identities?</p>  | <p><i>This open-ended question asks the participant to situate him- or herself. The relative importance of each identity</i></p>  |

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|   | <p><i>will likely be significant, and orient the participant to answering the next questions.</i></p>  |
| <p>11. How does your religion affect your life-choices? Could you give specific examples?</p> <p>a. How is this similar/different from state laws in your life?</p> | <p><i>This question assumes that the participant will bring up their religion in response to the question about their identity. Given the intended population of participants, this seems a safe assumption. The question asks the participant to reflect on the specific ways in which their lives are guided by their religion. It then asks subject to compare the role that religion plays in their lives to the role that state law plays. This question emerges from the theory of legal pluralism, but does not suggest explicitly that religion is a form of law. This will be for the participants to determine in their answers.</i></p> |
| <p>12. Do you think your views about Canada and/or your province changed at all as a result of your experience in the courts? How?</p>                              | <p><i>This question shifts gears to the question of Canadian identity; there may or may not be a connection to the participants' answers to the identity question above. The aim of this question is to ask participants to reflect on whether being an active participant in the state's legal institutions affects the way that they think of themselves in relation to those institutions. Does the degree of success of the lawsuit have a bearing on whether participants feel included or excluded from the broader national community?</i></p>  |
| <p>13. Did your relationship your religious community change as a result of your court experience?</p>  | <p><i>This question is aimed at allowing participants to reflect on any positive or negative consequences the lawsuit had on their relationship with their community. Did the litigation strengthen community ties? Were there community members who did not want the lawsuit to</i></p>   |



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|  | <i>proceed? Was there fallout between the litigant and the community?</i>   |
| 14. Did anything else change as a result of your involvement in the legal process? | <i>This last question will allow participants the chance to explore issues that the previous questions did not address.</i> |

#### 4.3.1.2 Lawyers

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| 1. Please tell me a bit about your background.<br>a. Where were you born?<br>b. Where did you grow up?<br>c. How long have you practiced law? | <i>As above, this set of questions is designed to introduce the participant and put him or her at ease.</i>   |
| 2. How did you come to act for this particular client?  | <i>This question is designed to allow the participant to tell the story of the case from his or her perspective. It is left deliberately open in order for the participant to structure his or her own narrative of the case.</i>   |
| 3. How would you explain your role in the litigation process?   | <i>The way that lawyers understand their role may turn out to be significant. Are they advocates, translators, confidantes, teachers? Are they instigators of social change? Hired professionals? Do they perpetuate the law's imperfections by making the best available argument on the existing law?</i> |

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| <p>4. How did you prepare with your client for this trial?</p> <p>a. Were you involved in preparing evidence?</p> <p>b. How did preparation work at the various stages of the case?</p>                        | <p><i>This question aims to track the process of translation that occurs between the story as told to the lawyer and the story as told to the court. Choosing points of emphasis and relevance are central to providing sound legal counsel; at the same time, the process may silence aspects of litigants' stories.</i></p> |
| <p>5. How did you prepare your argument in this case?</p> <p>a. Did you explain the argument differently to the client than to other lawyers?</p> <p>b. Was there a difference between this and the court?</p> | <p><i>This question aims to distinguish between the general preparation of a case and the preparation of the legal argument in particular, and to track the distance between the lawyer's argument and the clients' understandings of the case.</i></p>   |
| <p>6. How did you prepare with others (lawyers, support staff, etc.) for the case?</p>   | <p><i>This question is designed to explore whether there are additional significant players in religious freedom litigation whose names do not appear on the record of counsel, and to examine the import of their contributions, if any.</i></p>   |
| <p>7. How did you react when you and your client were successful?</p>  | <p><i>As noted above, all the cases selected had varying degrees of success at the different stages of the appeal process. The question is designed to see how lawyers fit their case into their</i></p>  |

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| Unsuccessful?   | <i>broader narrative of law and justice; was the case an example of the court doing justice? Are the decisions political?</i>  |
| 8. What does the concept of “freedom of religion” mean to you?<br>a. Do you think this is similar to your clients’ understanding? | <i>This question, posed in the abstract, is designed for comparison to the litigants’ perspectives.</i>  |
| 9. How would you describe your identity or identities?<br>a. Follow up on each, seeking specifics.                                | <i>This question is designed to raise the issue of identity, in order to shed light on the answers given to previous and subsequent questions.</i>   |
| 10. How were issues of identity raised by this case<br>a. For your client?<br>b. For you?   | <i>This question asks the participants to reflect on how the case affected their clients’ sense of identity and their own. Did the case make them identify more/less strongly as Canadians, as members of particular communities? How did this come about?</i> |
| 11. Are you connected to the client’s community?  | <i>This question further inquires into the lawyer participants’ motivations for acting in religious freedom cases. Are they active members of the communities they represent? If not, do they feel connected in other ways?</i>                                |
| 12. Did anything else change as a result of your involvement in this  | <i>This question is designed to let the participant fill in any gaps.</i>  |

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| particular case? |  |
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#### 4.3.1.3 Expert Witnesses

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| <p>1. Please tell me a bit about your background.</p> <ol style="list-style-type: none"> <li>a. Where were you born?</li> <li>b. Where did you grow up?</li> <li>c. What is your occupation?</li> <li>d. How long have you been in this occupation?</li> </ol> | <p><i>As above, this set of questions is introductory, designed to get the participants talking about themselves and to provide some general context.</i></p>  |
| <p>2. How did you come to be involved in the case?</p>   | <p><i>This question is designed to let the participants begin to tell the story of the case from their perspective, and to jog their memory.</i></p>   |
| <p>3. What was the specific matter on which you were asked to give expertise?</p> <ol style="list-style-type: none"> <li>a. Could you explain the significance of this practice?</li> </ol>  | <p><i>This question focuses on the details of the particular religious practice that was at issue in each case. The participant's explanation of the practice's significance will likely shed light on the privileged role religion plays in the life of the affected community.</i></p> |

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| <p>4. How did you prepare to testify?</p> <ul style="list-style-type: none"> <li>a. How did you go about preparing your report?</li> <li>b. Tell me about providing testimony in court.</li> <li>c. Were you surprised by any of the advice that legal counsel gave with respect to your opinion?</li> </ul> | <p><i>This set of questions explores how legal procedures map on to the expectations of religious leaders, who may be used to a particular way of sharing their expertise with members of their own community. The issues they see as most relevant may not match entirely with the issues that lawyers and judges see as relevant; these questions are designed to engage that potential tension.</i></p> |
| <p>5. How did you react when you heard about the decision in the case?</p> <ul style="list-style-type: none"> <li>a. At trial?</li> <li>b. On appeal?</li> </ul>   | <p><i>The expert witnesses' reaction to the judicial decision may be revealing about the way they understand the role of legal institutions in their lives. Do they feel they must abide by the decision even if they disagreed? Did they consider the decision legitimate?</i></p>  |
| <p>6. Were you contacted by any media?</p>   | <p><i>This question is designed to explore the effects of the case beyond the courtroom, to explore whether expert witnesses acted as spokespeople for the religious community.</i></p>  |
| <p>7. How would you explain the central aspects of this case?</p> <ul style="list-style-type: none"> <li>a. Do you agree with the way the various courts characterized the religious issue?</li> </ul>   | <p><i>This question is designed to track the potential distance between expert witnesses' account of the legal case and the accounts presented by lawyers and litigants.</i></p>   |

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| <p>8. What does the concept of freedom of religion mean to you?</p> <p>a. Do you think the lawyers involved would share this perspective?</p> <p>b. Do you think this is the same as the courts' concept of freedom of religion?</p> | <p><i>As above, this question is meant to explore Robert Cover's claim that constitutional legal rules take on meaning within the particular narrative of the community and individuals to whom they apply.</i></p> |
| <p>9. How would you describe your identity or identities?</p> <p>a. Follow up on each, seeking specific examples.</p>  | <p><i>This question is designed to raise the issue of identity.</i></p>   |
| <p>10. How did your participation in this case affect your perception of the legal system?</p>   | <p><i>This question is designed to ask the participant to reflect directly on the issue of identity in the particular context of the court case.</i></p>  |
| <p>11. Did your participation in the case affect your relationship with members of your community?</p>   | <p><i>This question is designed to explore whether an expert witness's participation in litigation created tensions and/or strengthened ties within the affected community.</i></p>                                 |

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| 12. Did you experience any other changes in your life or your way of thinking as a result of being involved in the court process? | <i>This question is designed to allow the participant to fill in any gaps.</i> |
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#### 4.4 Textual Analysis

A second data set for this research project is contained in documents more familiar to legal analysis: the affidavits submitted in litigation setting out parties' version of the relevant facts, the transcripts of testimony in direct and cross-examination, the factums which set out parties' legal arguments, and the transcripts of counsel's oral arguments. This project uses these texts as a source of "triangulation," an additional data set that can help verify the conclusions drawn from the analysis of interview transcripts. Of course, the textual material must be approached with a keen awareness that it is designed as advocacy of a particular position, with the goal of obtaining a particular legal conclusion. Nonetheless, as Cover showed in his well-known essay "*Nomos and Narrative*," litigants' particular framing of their legal claims can help reveal their unique understanding of state law concepts. Cover argued that Anabaptist groups had a "special jurisprudence of exile and martyrdom" tied to their narrative understandings of their particular history.<sup>43</sup> This, in turn, shaped their understandings of the American Constitution's First Amendment, which protects religious freedom. He grounded this argument, in part, in a careful analysis of the legal briefs presented by Amish litigants in religious freedom cases. My project will, in similar fashion, draw on the legal materials available at the Supreme Court of Canada's archives.

#### 4.5 Data Analysis

One of the main attractions of a qualitative approach for this project is the tendency among its practitioners to treat data analysis as emergent; from the moment the researcher

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<sup>43</sup> Cover, *supra* note 18 at 152.

begins to engage with the data, findings can begin to emerge.<sup>44</sup> These findings become clearer and more refined throughout the process of data gathering, and are further tested once the data has been collected and a stage of further reflection begins. In other words, the drawing of insights from the data is an iterative, cumulative process. In keeping with this orientation, I maintained records of my impressions from the interviews and textual analysis by drafting periodic memoranda. These aided in progressing the analysis and generating new insights,<sup>45</sup> which, in turn, led me to adjust the interview schedule the interview schedule.<sup>46</sup> Further, while this project was inspired by the theory of legal pluralism, and the topics of interest to legal pluralism will helped structure the interrogation of the data sets, the emergent nature of the analysis meant that findings were not be confined to confirming or refuting the claims of legal pluralism. Rather, I approached the data with an eye to exploring other theoretical literature. In my analysis, themes of cross-cultural communication and belonging were recurrent themes; this led to additional theoretical research and a broader and deeper analysis of the data.

Once the interview data was gathered, I sequentially employed the methods of open and focused coding to the interview transcripts and selected documents.<sup>47</sup> Open coding involves reading the transcripts and documents line-by-line, and generating as many “codes” as possible.<sup>48</sup> The codes describe the thoughts, feelings and intentions of the respondent at a slightly higher level of abstraction, in order to allow for comparison to other data. The codes can be descriptive or analytical. For example, where a respondent tells a story about her upbringing, different codes might mark the emotions she describes, the role of religious ritual, or ideas about identity. This kind of engagement allows the data to speak for itself, while also aiding in the identification of recurrent patterns. Once the open coding process is complete and I generated a set of stable codes, I revisited all the data using the method of “focused” coding. In this method,

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<sup>44</sup> Ping-Chun Hsiung, *Lives and Legacies: A Guide to Qualitative Interviewing*, online: <<http://www.utsc.utoronto.ca/~pchsiung/LAL/analysis/introduction>>.

<sup>45</sup> *Ibid.*

<sup>46</sup> Miller & Crabtree, *supra* note 30 at 189.

<sup>47</sup> Documents selected included those, like affidavits, where litigants recounted their own versions of facts.

<sup>48</sup> Hsiung, *supra* note 44, online: <<http://www.utsc.utoronto.ca/~pchsiung/LAL/analysis/opencoding>>.



data are re-coded in the light of a specific theme.<sup>49</sup> I used a computer application specially designed for qualitative research, Weft QDA,<sup>50</sup> to assist with the aggregation of the coded data and allow for easier comparison across interviews. For example, on the basis of codes generated during open coding, I revisited all the transcripts with a specific focus on the rules of a religion, and again searching for instances of cross-cultural communication.

Once both these exercises were complete, I moved on to the mapping of “thematic networks.” Thematic networks organize the data at three levels of abstraction: basic themes, organizing themes, and global themes.<sup>51</sup> The basic themes are derived from analysis of the coded data; they are simple premises which “on their own they say very little about the text or group of texts as a whole.”<sup>52</sup> However, when seen in conjunction with other basic themes present in the data, they can be categorized according to the data’s organizing themes. Organizing themes are middle-order themes that help sort the data into sets of related ideas; they are “clusters of signification that summarize the principal assumptions of a group of Basic Themes, so they are more abstract and more revealing of what is going on in the texts.”<sup>53</sup> The organizing themes are then further categorized into “global themes,” which can be conceived as the conclusions of the research. Jennifer Attride-Stirling helpfully analogizes the development of thematic networks to the construction of an argument. In her view, global themes are tenets reached by grouping together organizing themes to form an argument. The argument is supported by the basic themes that emerge most directly from the data.<sup>54</sup> In the final presentation of this dissertation, each global theme is treated as a separate chapter, and the organizing themes are treated as sub-headings within each chapter. The basic themes serve as

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<sup>49</sup> *Ibid*, <<http://www.utsc.utoronto.ca/~pchsiung/LAL/analysis/focusedcoding>>.

<sup>50</sup> “Weft QDA is an easy-to-use, free and open-source tool for the analysis of textual data such as interview transcripts, fieldnotes and other documents.” online: “Weft QDA” <<http://www.pressure.to/qda/>>.

<sup>51</sup> Jennifer Attride-Stirling, “Thematic networks: an analytic tool for qualitative research” (2001) 1(3) *Qualitative Research* 385 at 388.

<sup>52</sup> *Ibid* at 389.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*.

examples within each sub-heading. This organization allows for a concept-by-concept exploration of the data and engagement with the theoretical literature.

## 5 Dissertation Structure

This dissertation is structured in seven chapters. This chapter has provided an overview of the research problem and theoretical orientation of the project; it then discussed the methods employed to examine the social processes at play in Canadian religious freedom litigation.

Chapter 2 provides a literature review of two separate, though related, fields of scholarship. First, it traces the development of the contemporary theory of legal pluralism, which inspired this project. Current legal pluralist scholarship is highly concerned with how legal and normative systems interact and influence one another, and for that reason is helpful in analyzing the engagements between the state legal system and religious legal systems. In my view, these engagements can also be seen as moments of cross-cultural encounter. For that reason, the body of literature on cross-cultural communication is useful in developing the analysis of the data gathered in this project.

Once the theoretical foundations for the project have been laid out comprehensively, Chapter 3 provides the next necessary element of the project's groundwork: detailed summaries of the judicial decisions in the three cases studied in this project. These summaries allow the subsequent chapters to bring the judicial decisions into conversation both with participants' firsthand accounts and with the bodies of theoretical literature canvassed in Chapter 2.

Chapter 4 then begins the more substantive analysis of this project. Drawing principally on the legal pluralist literature discussed in Chapter 2, it develops the theme of "overlapping legal systems" by engaging with participant narratives and court documents. This chapter aims to be more descriptive than normative in its orientation, though I acknowledge that legal pluralist theory contains its own normative commitments.<sup>55</sup> It begins by setting out the ways in which litigation participants used legal terminology to describe their religious obligations. It then

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<sup>55</sup> See Chapter 2, section 2.1

explores participant narratives, finding unstable hierarchical relationships between legal systems and mutual influences between state and religious norms.

Taking the interaction between legal systems as a point of departure, Chapter 5 examines the three cases under review as episodes of cross-cultural encounter. It draws on the cross-cultural communication literature surveyed in Chapter 2, and also engages theoretical literature more specific to the legal context. In this chapter, I use two central values of cross-cultural communication, respect and self-awareness, as criteria for assessing the successes and failures of legal processes and judicial decisions. I argue that the Supreme Court's decision in *Multani* fares best in this respect, the majority decision in *Wilson Colony* leaves the most to be desired, and the majority decision in *Amselem* falls somewhere in between.

Whereas Chapters 4 and 5 are concerned mostly with differences between religious freedom litigants and state institutions, whether at the level of legal systems or cultures, Chapter 6 focuses on a question of commonality. Specifically, this chapter investigates the theme of belonging to the Canadian civic community within participant narratives. Interestingly, all litigants related some narrative of migration, raising issues connected to their immigration and integration into Canadian society. The litigants interviewed who were eventually successful in their litigation told narratives of Canada as a country in which they could be included in public life and institutions without forgoing their religious practices. The narratives told by litigants who were unsuccessful were more complex. Though their narratives contained themes of rejection and exclusion, these particular litigants did not have a desire to integrate into mainstream Canadian society. Nevertheless, prior to the litigation, their image of Canada was that of a country that gives broad protection to religious freedom. Losing their court case threw this narrative into question. In all cases, litigants folded the stories of their religious freedom litigation into their larger narratives of their relationship with the Canadian state, showing an additional layer of meaning for litigation in the lives of participants.

Chapter 7 offers some concluding thoughts. It begins by exploring the links between the themes developed in the preceding chapters. It then considers some of the potential implications of this project for the law of religious freedom in Canada. Though I do not suggest any revolutionary reforms, I recommend some modifications in approach that would make proportionality analyses more reliable and help make judicial reasons more consistent with the

values of cross-cultural communication. Finally, this chapter suggests avenues for future research.

# Chapter 2 Literature Review: Legal Pluralism, Cross-Cultural Communication, and Religious Freedom

## 1 Introduction

This chapter will start by providing an overview of the legal pluralist perspective that inspired this project, and underlies the analysis in Chapter 4, “Overlapping Legal Systems.” As intimated in Chapter 1, I will argue that, by insisting that non-state normative systems can be *legal*, legal pluralism prompts a re-examination of the state’s legal system in comparative terms. This type of analysis can help bring to light some unquestioned assumptions inherent in state legal doctrines and procedures. Further, the deep connections between religious normative systems, community narratives,<sup>1</sup> and personal narratives<sup>1</sup> can also illuminate the complex ways in which members of religious communities interact with the state’s judicial organs.

Part 3 of this chapter surveys a different, though related, field of scholarship. Over the course of participant interviews and through analysis of the data, I noted that participants’ narratives repeatedly raised issues related to cross-cultural communication. The ways in which they explained themselves to the courts and their counsel and the ways in which they understood and internalized judicial decisions were prominent features of their narratives. Accordingly, this chapter also provides a general overview of literature in cross-cultural communication, providing the foundation for Chapter 5, which analyzes the data through this lens.

## 2 Dimensions of Legal Pluralism

### 2.1 Basic Notion and Development

What is legal pluralism? John Griffiths famously asked this question in the early days of the theory’s development. For him, at its simplest, legal pluralism means “the presence in a social field of more than one legal order,”<sup>2</sup> or, more specifically, “that state of affairs, for any

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<sup>1</sup> Robert Cover, “*Nomos and Narrative*” in Martha Minow, Michael Ryan and Austin Sarat, eds., *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) 95.

<sup>2</sup> John Griffiths, “What is Legal Pluralism?” (1986) 24 *J Legal Pluralism* 1 at 1.

social field, in which behavior pursuant to more than one legal order occurs.”<sup>3</sup> Some have argued that the basic insight that multiple sets of laws and norms exist in a particular setting “dates back from at least Montesquieu (if not the Romanistic distinction between *ius civile* and *ius gentium*), and could be seen in the early 20th-century writings of jurists like Santi Romano and Gurvitch as overt legal imagery.”<sup>4</sup> However, the modern theory of legal pluralism emerged only in the 1960s and ‘70s,<sup>5</sup> “through studies of law in colonial and post-colonial situations.”<sup>6</sup> These situations presented clear examples where both indigenous and colonial legal orders claimed authority in a single social setting.<sup>7</sup> The theory painted itself as a reaction to what legal pluralists perceived as “legal centralism,” an

ideology [according to which] law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.<sup>8</sup>

According to Griffiths, by taking a single sovereign or *grundnorm* as a given, the centralist idea presents a fundamentally flawed description of how social life actually operates:

A situation of legal pluralism – the omnipresent, normal situation in human society – is one in which law and legal institutions are not all subsumable within one ‘system’

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<sup>3</sup> *Ibid* at 2.

<sup>4</sup> Martha-Marie Kleinahans & Roderick A Macdonald, “What is a *Critical* Legal Pluralism?” (1997) 12 Can JL & Soc 25 at 28-29. Romano’s work will be taken up in more detail in Chapter 4, Section 5.

<sup>5</sup> Kleinahans & Macdonald locate the origins of modern legal pluralism in the 1960s, *ibid* at 28; Tamanaha writes of the 1970s as the time when “[l]egal pluralism first began to garner attention within academia in legal anthropology... through studies of law in colonial and post-colonial situations,” Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney L Rev 375 at 390 [Tamanaha, “Understanding”]. John Gillisen’s edited collection *Le Pluralisme Juridique* (Brussels: Éditions de l’Université de Bruxelles, 1972) provides an example from this time period. Both Griffiths and Melissaris locate some of the theoretical origins of legal pluralism in the sociological thought of Eugen Ehrlich, who discussed the notion of “living law” in the 1930s, Griffiths, *supra* note 2 at 26; Emmanuel Melissaris, “The More The Merrier? A New Take On Legal Pluralism” (2004) 13 Social & Legal Studies 57 at 59.

<sup>6</sup> Tamanaha, “Understanding,” *ibid* at 390.

<sup>7</sup> Sally Falk Moore’s study of the Chagga of Mount Kilimanjaro is a classic in this field, see Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978).

<sup>8</sup> Griffiths, *supra* note 2 at 3.

but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that the ‘law’ which is actually effective on the ‘ground floor’ of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.<sup>9</sup>

Marc Galanter gives concrete shape to legal pluralism by emphasizing the plurality of social processes aimed at achieving justice in any social field. He argues that legal centralism, “[t]he view that the justice to which we seek access is a product that is produced – or at least distributed – exclusively by the state... is not an uncommon one among legal professionals.”<sup>10</sup> Galanter takes a contrary view to this mainstream account, claiming that “the national (public, official) legal system is often a secondary rather than a primary locus of regulation.”<sup>11</sup> The legal centralist tendency among legal professionals obscures the importance of non-state actors in the regulation of everyday life. Like Griffiths, Galanter emphasizes that legal centralism cannot hold as a descriptive theory of law; rather, it is a statist ideology.

Also like Griffiths, Galanter eschews the notion that the state sits atop a hierarchy of norm-generators and enforcers. But whereas Griffiths focuses on the norms that make up a legal system, Galanter is more interested in the “pluralism in dispute processing.”<sup>12</sup> By focusing on the plurality of dispute processing mechanisms actually at play in people’s lives, Galanter emphasizes the role of non-state actors such as the family, the corporation and the business network in the creation of notions of justice and normative perspectives. The “centripetal image” associated with the idea of access to state courts shifts to a “centrifugal image of courts as one component of a complex system of disputing and regulation.”<sup>13</sup>

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<sup>9</sup> *Ibid* at 39.

<sup>10</sup> Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” (1981) 19 *J Legal Pluralism* 1 at 1 [Galanter, “Many Rooms”]. Though Galanter made this remark in 1981, Gordon Woodman made the same observation in 1998; see Gordon R Woodman, “Ideological Combat and Social Observation: Recent Debate about Legal Pluralism” (1998) 42 *J Legal Pluralism* 21 at 22. A cursory glance at any law school curriculum in North America shows the overwhelming pre-occupation with state law in the professional training of lawyers.

<sup>11</sup> Galanter, “Many Rooms,” *ibid* at 20-21.

<sup>12</sup> See Woodman, *supra* note 10 at 32.

<sup>13</sup> Galanter, *Many Rooms*, *supra* note 10 at 17.

Building on these insights but veering away from this more sociological/anthropological conception of legal pluralism, in the 1980s Boaventura de Sousa Santos developed the idea that legal pluralism was not merely a feature of a social field, but also an attribute of each individual in the social field. He writes:

Legal pluralism is the key concept in a postmodern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of relentless everyday life... Our legal life is constituted by an intersection of different legal orders, that is, by *interlegality*.<sup>14</sup>

In other words, for Santos, it is not only the case that different groups of people can be associated with different legal orders.<sup>15</sup> Crucially, Santos adds that the individual members of different communities are subject to the multiple claims of legal authority within their sphere of existence. The notion of law in the mind of each person is actually a hybrid of the various legal orders to which he or she is subject.<sup>16</sup>

In the 1990s, Martha-Marie Kleinmans and Roderick Macdonald further pursued legal pluralism at the individual level, arguing for a “critical” form of legal pluralism. In their view, the prevailing notion of legal pluralism provides many useful insights, but fails to honour the agency of the individual legal subject:

Social-scientific conceptions of legal pluralism disempower the subject and its construction of law... Law, on this view, is an anthropomorphic creation that regulates itself in the guise of a plurality of social fields; the legal orders of these social fields become themselves the legal subject...

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<sup>14</sup> Boaventura De Sousa Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law” (1987) 14(3) *JL & Soc’y* 279 at 296-297.

<sup>15</sup> According to Santos, legal orders emanate from six stable places of social relations: “the *household*place, the *workplace*, the *marketplace*, the *community* place, the *citizen*place and the *world*place”: Melissaris, *supra* note 5 at 64; Melissaris’s article provides an excellent summary of the thought of Santos, Teubner and Cover.

<sup>16</sup> There are parallels between this view and the “aspectival” view of identity posited by 11. In Tully’s view, because of the heterogeneous nature of culture, “the experience of cultural difference is *internal* to a culture” and individuals experience “otherness” in a manner internal to their own identities, James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) at 13.



As an instrumental theory of law, [legal pluralism] fails to discuss fundamental questions about how legal subjects understand themselves and the law.<sup>17</sup>

In contrast, Kleinhans and Macdonald's theory emphasizes the capacity of legal subjects to create law for themselves. In this view, it is not enough to say that legal orders interact with each other; in addition, the individual legal subject must be seen as an agent of this interaction. "Legal subjects are not wholly determined; they possess a transformative capacity that enables them to produce legal knowledge and to fashion the very structures of law ... Legal subjects are 'law inventing' and not merely 'law abiding.'"<sup>18</sup> In addition to giving credence to individual agency, this view holds individuals accountable for their normative creations, making them responsible for the laws they create.

This is not to say, however, that each individual creates his or her own law out of whole cloth. Rather, Kleinhans and Macdonald's variant of legal pluralism insists on the relational nature of the legal subject's self while leaving room for individual agency in the creation of norms; "[s]ubjects construct and are constructed by the State, society and community through their relations with each other."<sup>19</sup> As constructors of their own narrative biographies, subjects explore and reflexively evaluate "how they want to live *in the worlds open to them*,"<sup>20</sup> which is to say that an individual's social experience provides some limits to his or her available normative choices.

In addition, the notion of "reflexive evaluation" allows for the important insight that the legal subject can critically evaluate the various sets of norms in his or her life through the lens of other sets of norms.<sup>21</sup> Thus, a religious believer may come to believe that some of the norms in

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<sup>17</sup> Kleinhans & Macdonald, *supra* note 4 at 36.

<sup>18</sup> *Ibid* at 38-39.

<sup>19</sup> *Ibid* at 43. For similar emphases on the role of the legal subject within legal pluralist analysis, see Masaji Chiba, "Other Phases of Legal Pluralism in the Contemporary World" (1998) 11(3) *Ratio Juris* 228 at 239 and Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (London: Glasshouse Press, 2005) at 8-9.

<sup>20</sup> Kleinhans & Macdonald, *supra* note 4 at 42-43 (emphasis added).

<sup>21</sup> This notion is central in Chapter 4, which demonstrates how participants internalized state laws through their particular religious lenses, and how they presented their own religious norms as consistent with state values.

his or her religious community should be altered on the basis of insights offered by liberal thought, as can arguably be seen in Reform Judaism's commitment to gender equality,<sup>22</sup> for example, or in the Muslim Canadian Congress' opposition to the burka.<sup>23</sup> Likewise, religious norms can be used to critique state laws, as Martin Luther King Jr. famously used religious themes to lead the civil rights movement in the United States in the 1960s,<sup>24</sup> or as religious norms are used to inform both sides of the contemporary same-sex marriage debate.<sup>25</sup>

In summary, the contemporary notion of legal pluralism can be seen in its infancy as emerging from the study of colonial and post-colonial societies in which competing sources of legal authority could be clearly delineated. From there, legal, anthropological and sociological scholars developed legal pluralism into a new descriptive theory of law, insisting on the presence of multiple legal orders in any given social field. More recent scholarship has emphasized the multiplicity of legal orders at play at the level of the individual legal subject, and the subject's role in generating normative meaning and law. The question of whether the theory of legal pluralism necessarily implies any normative prescriptions is debated in the literature. Stolzenberg and Myers note that

a normative claim is also implicit in [the legal pluralist] conception of law. By taking extra-state "law" seriously, legal pluralism reveals the harms that result from the incursion of official state law into autonomous legal realms – harms which would not be apparent were we blinded to the existence of extra-official law.<sup>26</sup>

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<sup>22</sup> "What is Reform?", Union for Reform Judaism, online: <<http://urj.org/about/reform/whatisreform/>>.

<sup>23</sup> "Muslim Canadian Congress wants Canada to Ban the Burka" (8 October 2009), Muslim Canadian Congress, online: <<http://www.muslimcanadiancongress.org/20091008.html>>.

<sup>24</sup> Joseph H Carens & Melissa S Williams, "Muslim Minorities in Liberal Democracies: The Politics of Misrecognition" in Rainer Bauböck *et al*, eds, *The Challenge of Diversity: Integration and Pluralism in Societies of Immigration* (Aldershot: Avebury, 1996) 157 at 160.

<sup>25</sup> See Jennifer Nedelsky & Roger Hutchinson, "Clashes of Principle and the Possibility of Dialogue: A Case Study of Same-Sex Marriage and the United Church of Canada" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 41. See also *Chamberlain v Surrey School District No. 36*, [2002] 4 SCR 710, where the Supreme Court of Canada held that religious perspectives could not be validly excluded from public debates on a school board's use of materials depicting same-sex parents in its curriculum.

<sup>26</sup> Nomi Maya Stolzenberg & David N Myers, "Community, Constitution, and Culture: The Case of the Jewish *Kehilah*" (1991) 15 *UMich JL Ref* 633 at 655.

However, as Stolzenberg and Myers go on to note, it is not the case that “legal pluralists unwaveringly favor the protection of unofficial against official law.”<sup>27</sup> Emmanuel Melissaris writes that legal pluralism can be employed as legal theory “because it looks for an answer to the question of what the law *is*,” but can also be employed as jurisprudence to structure claims about what is right. In this sense, legal pluralism “sets itself a positive, normative, quasi-legal task.”<sup>28</sup> For example, notions of legal pluralism can be invoked to justify claims for greater community autonomy.<sup>29</sup> On the whole, it is probably most accurate to say that legal pluralism functions primarily as a descriptive theory of law and as an analytic tool, which asks the questions familiar to legal analysis in new contexts. To the extent that it reflects a particular normative stance, it is in the insistence that non-state legal orders, which are often oppressed by the state, ought not to be belittled. Kleinmans and Macdonald express this latter point well:

The intellectual point of legal pluralism has been to ask the central questions of legal analysis across a range of normative activity. These include, for example: What are the rules? What are the institutions? What are the processes? What are the criteria of legitimization? What conception of legal personality is imagined? The ideological point of legal pluralism is to undercut the hierarchy of normative orders based on some source-based criterion, and to valorize otherwise suppressed normative orders and normative discourses.<sup>30</sup>

## 2.2 Identifying Situations of Legal Pluralism

What does legal pluralism look like in practice? The International Council on Human Rights Policy (ICHRP), a non-governmental think tank, provides a helpful starting point:

Plural legal orders occur in numerous circumstances: for example, where different family laws apply to specific ethno-cultural groups, where customary dispute resolution mechanisms operate without state sanction, where non-state legal orders

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<sup>27</sup> *Ibid.*

<sup>28</sup> Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Burlington, VT: Ashgate Publishing Company, 2009) at 25.

<sup>29</sup> See Shah, *supra* note 19.

<sup>30</sup> Kleinmans & Macdonald, *supra* note 4 at 33-34.

(such as chiefs' courts) are officially recognised, or where quasistate legal orders (such as alternative dispute resolution mechanisms) are established.<sup>31</sup>

In other words, in terms of their relation to the state, non-state legal orders can receive various degrees of recognition, but in all cases, non-state legal orders can exert a regulating influence on people's lives.<sup>32</sup>

These instances of legal pluralism can be further sub-divided. For example, Griffiths distinguishes between "weak" and "strong" forms of legal pluralism. He includes in the "weak" category situations where a state applies different bodies of law to different groups in the population. "Within such a pluralistic legal system, parallel legal regimes, dependent from the overarching and controlling state legal system, result from 'recognition' by the state of the supposedly pre-existing 'customary law' of the groups concerned."<sup>33</sup> The Ottoman *millet* system, which granted a measure of autonomy to groups on a confessional basis, is a classic example of this type of arrangement; the personal law systems in both India and Israel provide more contemporary examples.<sup>34</sup> For Griffiths, this arrangement is only a "weak" form of pluralism because it "is merely a particular arrangement in a system whose basic ideology is centralist,"<sup>35</sup> as recognition by the state is still viewed as a precondition to effectiveness.

Griffiths also argues that a situation in which multiple laws emanating from the same source apply to the same situation is not, properly speaking, an instance of legal pluralism. For example, the fact that a fraudulent act might give rise to both penal and civil consequences does not make a situation legally plural, and likewise for the case where a judge-made rule and a legislated rule both apply to the same set of facts. Both legislation and judge-made rules, after

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<sup>31</sup> International Committee on Human Rights Policy, "When Legal Worlds Overlap: Human Rights, State and Non-State Law" (Geneva: ICHRP, 2009), online: <[http://ichrp.org/files/reports/50/135\\_report\\_en.pdf](http://ichrp.org/files/reports/50/135_report_en.pdf)> at iii.

<sup>32</sup> *Ibid* at 4.

<sup>33</sup> Griffiths, *supra* note 2 at 5.

<sup>34</sup> See Marc Galanter & Jayanth Krishnan, "Personal Law Systems and Religions Conflict: A Comparison of India and Israel" in Gerald James Larson, ed, *Religion and Personal Law in Secular India: A Call to Judgment* (Bloomington: Indiana University Press, 2001) 270.

<sup>35</sup> Griffiths, *supra* note 2 at 8.

all, emanate from the same statist system.<sup>36</sup> Griffiths emphasizes that legal pluralism exists where there are a multiplicity of legal orders in the same social field:

Legal pluralism is an attribute of a social field and not of “law” or of a “legal system”... It is when in a social field more than one source of “law”, more than one “legal order”, is observable, that the social order of that field can be said to exhibit legal pluralism.<sup>37</sup>

So, to return to the example of fraud, it may be that a non-state legal order has norms and consequences surrounding the issue of fraudulent behaviour. If a religion has a prescribed form of punishment or restitution for fraud that exists alongside the state law consequences, the person who is subject to both sets of rules is in a legally plural situation by Griffiths’s definition.<sup>38</sup>

Some scholars have pointed out that, prior to the rise of the modern bureaucratic state, consciousness of legal pluralism (under different terminology) may actually have been higher than it currently is. Contemporary conceptions of the state as the sole source of legal normativity

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<sup>36</sup> See Franz von Benda-Beckman, “Who’s Afraid of Legal Pluralism?” (2002) 47 *J Legal Pluralism & Unofficial Law* 37 at 62-63. There, von Benda-Beckman argues that there is

no reason why one should not be able to speak of duplicatory institutions or mechanisms for ‘the same’ within one legal order as legal pluralism. One legal system may have alternative forms of marriage (civil, religious). If an analytical definition of marriage/legitimate cohabitation is employed, there may be a ‘common law’ marriage and/or publicly acknowledged and registered forms of co-habitation different from the formal so-called legal marriage. Why not see this as one possible manifestation of legal pluralism as well?

André-Jean Arnaud takes a similar view: André-Jean Arnaud, “Legal Pluralism and the Building of Europe” in Hanne Petersen & Henrik Zahle, eds, *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth Publishing Company, 1995) 149 at 149-150. I would count as legally plural those situations that Griffiths calls “weak legal pluralism,” where the state gives official recognition to the views and actions of non-state actors, e.g. giving official legal consequences to religiously solemnized marriages. However, I think it more difficult to maintain that a state that recognizes multiple forms of co-habitation (e.g. common-law, civil union, solemnized marriage) is legally plural. These, I think, are more properly seen as modalities of state law.

<sup>37</sup> Griffiths, *supra* note 2 at 38.

<sup>38</sup> There is some disagreement about the degree of interaction required between various sets of norms for a situation to count as legally plural. Woodman notes: “Whereas Vanderlinden specifies that the constituent elements of any instance of legal pluralism (in his view, legal mechanisms) must each apply to identical situations, Hooker requires that the elements (in his view, ‘laws’) must ‘interact’”: Woodman, *supra* note 10 at 27. While I am inclined to adopt Vanderlinden’s more open-ended definition in order to be able to observe more plural situations, I share Kleinhans and Macdonald’s and view that individuals are generally able to critically reflect on the multiple sets of norms at play in their lives (Kleinhans & Macdonald, *supra* note 4).

have eclipsed many historical examples of legal pluralism.<sup>39</sup> Giving a tangible example of this older pluralism, Tamanaha writes that in the medieval period,

“[m]any offences could in principle be tried either in a secular or in an ecclesiastical court.” Not only did separate legal systems and bodies of legal norms coexist, a single system or judge could apply distinct bodies of law. In the 8th through 11th centuries, for example, under the “personality principle,” the same judges applied different laws depending upon whether one was Frankish, Burgundian, Alamannic, or a descendent of Roman Gaul.<sup>40</sup>

Marianne Constable, who does not invoke the notion of legal pluralism specifically, raises similar issues in her study of the “mixed jury” practice in medieval England. She notes that “[w]hen persons from two communities were involved in a dispute, both communities would be represented [as members of the jury].”<sup>41</sup> It was up to the jury to determine the appropriate way to resolve disputes, without reference to the contemporary distinction between law and fact. The practice of the mixed jury recognized the multiple norms at play in medieval English society.

How is it that much contemporary legal thought has seemingly lost consciousness of the normative multiplicity that was taken into account by medieval practices? Tamanaha explains that as non-state norms were pushed into the private sphere by the ever-expanding modern state, the state’s norms came to be identified as the sole source of law. In the statist conception, customary and religious laws came to be seen as norms, and deprived of their former legal status.<sup>42</sup> In other words, the state asserted (and in the popular conception, acquired) a monopoly over that which could properly be considered law. This development was contemporaneous with a re-conceptualization of law itself; instead of being a reflection of enduring customs and

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<sup>39</sup> Tamanaha, “Understanding,” *supra* note 5 at 376 (internal citations omitted); see also Roderick Macdonald, “Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism” (1998) 15 *Ariz J Int’l & Comp L* 69 at 74-75; Arnaud, *supra* note 36 at 152; John Gillisen, “Introduction à l’étude comparée du pluralisme juridique” in John Gillisen, ed, *Le Pluralisme Juridique* (Brussels: Éditions de l’Université de Bruxelles, 1972) 7 at 12-13.

<sup>40</sup> Tamanaha, “Understanding,” *ibid*, at 377-378 (internal citations omitted).

<sup>41</sup> Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago: University of Chicago Press, 1994) at 25.

<sup>42</sup> Tamanaha, “Understanding,” *supra* note 5 at 380-381.

principles, law came to be seen as a tool for meeting social objectives.<sup>43</sup> These were facets of state-centred ideology that had faith in the possibility of scientifically solving social problems.<sup>44</sup>

But other sources of normativity did not simply go away; they retained a powerful influence over people's lives. According to Tamanaha, the continued relevance of customary and religious laws can be seen in the history of colonialism, and in colonizing states' approach to local legal orders:

When colonising powers undertook to expand the reach of law, three basic strategies were applied to incorporate customary or religious law: the codification of customary or religious law; the application by state courts of unwritten customary or religious law in a fashion analogous to the common law; and the creation or recognition of informal or "customary" courts run by local leaders...

All of these strategies suffered from various defects, and none were entirely successful in replicating customary or religious law. The basic problem is that local norms and processes could not be removed from their original medium without losing their integrity.<sup>45</sup>

Thus, the theoretical unity of law, while still a mainstay of academic and popular thought, is belied time and again by experiences of legal multiplicity.

## 2.3 Distinctions between State and Non-State Law

To this point, I have discussed the basic notion that multiple legal orders are at play in social life and provided a discussion of what multiple legal orders look like in practice. But what

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<sup>43</sup> *Ibid* at 381. Constable similarly describes the disappearance of the mixed jury as a story about

the emergence of a world in which the law of officials assumes exclusive standing as law, in which the territorial jurisdiction of a state replaces the principle of personality of law (that one lives and is judged according to one's own law), in which social science transforms the practices of a people in to propositional knowledge of norms, and in which law becomes an instrument of social policy directed toward the management of a population.

Interestingly, however, Constable argues that the disappearance of law as custom cannot be located in a single point in time; rather, "the fact of an official practice has always already begun to emerge." Constable, *supra* note 41 at 1, 70)

<sup>44</sup> See Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Cambridge, Mass.: Harvard University Press, 2005); Barbara J Shapiro, "Law and Science in Seventeenth-Century England" (1969) 21 *Stan L Rev* 727.

<sup>45</sup> Tamanaha, "Understanding," *supra* note 5 at 383-384.

qualities set non-state law apart from state law, other than the source of regulation? It is tempting for jurists to think of non-state law as subordinate to state law, and to focus on how much independence and autonomy state law will allow to non-state legal orders. Indeed, this is the image evoked in the writings of the current Chief Justice of Canada, Beverley McLachlin, whose views may be seen as characteristic of the mainstream in the legal profession. She writes: “[t]he law faces the seemingly paradoxical task of asserting its own ultimate authority while carving out a space *within itself* in which individuals and communities can manifest alternate, and often competing, sets of ultimate commitments.”<sup>46</sup> Her writing evokes the image of concentric circles, where all other forms of normative ordering are brought within the subordinating power of state law. Perhaps even more fundamentally, when Chief Justice McLachlin refers to “the law,” she is talking about state law; this manner of phrasing reveals much about her perspective on what truly counts as “law.”

Tamanaha provides a typical legal pluralist response to this position, arguing that, in the eyes of individuals and communities, non-state laws are often “viewed as ‘legal’ on their own terms... entirely apart from whether the norms and institutions so identified are recognised as such by the official legal order.”<sup>47</sup> Further, Macdonald has provocatively asserted that “[i]t is not communities that are sub-federal as much as it is States that are sub-community.”<sup>48</sup> Sources of non-state law are not bound by the same jurisdictional constraints as state governments. Thus, for example, the Pope’s positions can be said to contribute to the normative/legal lives of Catholics everywhere. And in the European context, the word “community” takes on additional significance as economic norms come to be formed at the transnational level.<sup>49</sup> In both cases, the view that puts state law at the apex of a hierarchy turns out to be unreliable.

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<sup>46</sup> The Right Honourable Beverley T McLachlin, PC, “Freedom of Religion and the Rule of Law: A Canadian Perspective” in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen’s University Press, 2004) 12 at 16 (emphasis added).

<sup>47</sup> Tamanaha, “Understanding,” *supra* note 5 at 398.

<sup>48</sup> Macdonald, “Metaphors,” *supra* note 39 at 86.

<sup>49</sup> See Arnaud, *supra* note 36.



At the same time, the importance of the state's coercive powers cannot be ignored. Violations of state laws can carry the risk of imprisonment and the imposition of fines; regulatory aspects of state law can have important financial consequences, and incentivize certain behaviours through this mechanism. Non-state legal orders tend to rely on social pressures of a different nature than these kinds of official sanction.<sup>50</sup> As Sally Engle Merry notes,

it is essential to see state law as fundamentally different in that it exercises the coercive power of the state and monopolizes the symbolic power associated with state authority.<sup>51</sup>

In addition to this basic difference, many legal pluralist scholars develop more specific taxonomies of various forms of law; according to these, non-state laws of various kinds can be distinguished from each other as well as from state law. Tamanaha summarizes these into six rough categories: “(i) official legal systems; (ii) customary/cultural normative systems; (iii) religious/cultural normative systems; (iv) economic/capitalist normative systems; (v) functional normative systems; (vi) community/cultural normative systems.”<sup>52</sup> For present purposes, “religious/cultural” normative systems are of particular interest. Tamanaha describes these as follows:

religion merits separate mention for the reason that it is often seen by people within a social arena as a special and distinct aspect of their existence. Religions typically are oriented toward the metaphysical realm, and religious precepts usually carry great weight and significance for believers within a social arena. Certain bodies of norms are seen as specifically religious in origin and orientation, often set out in written texts (Bible, Koran, Torah), commentaries, and edicts; formal religious institutions as well as informal mechanisms exist with norm enforcing (as well as other) functions.<sup>53</sup>

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<sup>50</sup> This distinction is one of several factors that makes the interaction between state and non-state legal orders asymmetrical, as will be discussed in the section 2.4. See W Michael Reisman, “Autonomy, Interdependence, and Responsibility” (1993) 103 Yale LJ 401 at 411.

<sup>51</sup> Sally Engle Merry, “Legal Pluralism” (1988) 22 Law & Soc’y Rev 869 at 878-879.

<sup>52</sup> Tamanaha, “Understanding,” *supra* note 5 at 397.

<sup>53</sup> *Ibid* at 398.

Thus, in most of the Western world, religious legal orders can be distinguished from other normative orders in terms of the basis for the authority of their claims, which is usually divine or metaphysical. In this respect, the claims on the legal subject are totalizing in a different way than state law's claims. Though in many liberal democratic countries the "authority claimed by [state] law touches upon all aspects of human life and citizenship,"<sup>54</sup> the normative basis for this authority is thin; it remains, in principle, agnostic about metaphysical questions, and its authority can be justified by a number of philosophical perspectives. Religious law is generally more specific on metaphysical and spiritual issues, requiring the subject's belief in certain basic tenets.

Robert Cover distinguished between religious and state legal orders by identifying two ideal types of normative orders. The first, associated with particularist religious legal orders, are "world creating;" they "*create* the normative worlds in which law is predominantly a system of meaning rather than an imposition of force."<sup>55</sup> He calls this ideal type

"paideic," because the term suggests (1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.<sup>56</sup>

In this kind of normative order, law is "pedagogic... Obedience is correlative to understanding. Discourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic."<sup>57</sup> Cover calls the second ideal-typical pattern of normative ordering "imperial." It is "world maintaining" rather than world creating. "In this model, norms are universal and *enforced* by institutions. They need not be taught at all, as long as they are effective. Discourse is premised on objectivity."<sup>58</sup> Though this second ideal type is associated with law in the modern

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<sup>54</sup> McLachlin CJ, *supra* note 46 at 14, citing Paul Kahn.

<sup>55</sup> Cover, *supra* note 1 at 105 (emphasis in original).

<sup>56</sup> *Ibid* at 105-106.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid* at 106 (emphasis in original).

nation state, Cover points out that “no normative world has ever been created or maintained wholly in either the paideic or imperial mode.”<sup>59</sup>

In addition to providing these tools for distinguishing the characteristics of the different ideal types of normative orders, Cover makes a significant claim about their interaction. Effectively, for Cover, the rules of the imperial normative order take on meaning in people’s lives through the norms of the paideic order. “All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance.”<sup>60</sup> More specifically, Cover argues that Anabaptist communities in the United States have a particular and idiosyncratic understanding of the constitutionally protected right of religious freedom; this significance of this right is acquired by reference to the communities’ historical narratives and religious commitments. In other words, the paideic or particularist normative order serves as a filter for state laws; state laws take on meaning in the life of an individual or community only upon passing through this filter.<sup>61</sup>

## 2.4 The Interaction of Normative Orders

Cover’s claim that state laws are given meaning through the normative orders of particular communities provides a point of departure for asking the question: how do normative orders interact with and influence each other? This is the most crucial question for Chapter 4 of this project, and has been noted by previous writers as a central point of interest.<sup>62</sup>

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<sup>59</sup> *Ibid* at 107.

<sup>60</sup> *Ibid* at 111.

<sup>61</sup> Melissaris interprets Cover similarly: “[in Cover’s view,] communities form their meaning schemes through the intertwining of their shared experiential data. It is within such schemes that the legal is interpreted and determined as a result of being ascribed specific properties. What emerges from processes of this sort is an enriched, thick and particular understanding of law that is meaningful to those in the relevant community”: *Ubiquitous Law*, *supra* note 28 at 53.

<sup>62</sup> As Santos notes, “[m]ore important than the identification of legal orders is the tracing of the complex and changing relations among them.” Santos, *supra* note 14 at 288. In Gunther Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 *Cardozo L Rev* 1443 at 1448, Teubner likewise notes that

[the new view of legal pluralism]... means considerable progress, primarily as against a legalistic view of legal pluralism that defined it as a problem of State law’s “recognition” of subordinate normative orders like regional or corporate regimes... It focuses on the dynamic interaction of a multitude of “legal orders” within one social field.

Sally Falk Moore's concept of "semi-autonomous social fields" is helpful in analyzing the interaction of normative orders. Moore notes that no single normative order exists in isolation from other normative orders.

The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of the persons inside it, sometimes at its own instance.<sup>63</sup>

Drawing on research in both the dress industry in New York and in the Chagga community of Mount Kilimanjaro, Moore's study shows that state legislation does not always regulate behaviour in the way that was intended. Instead, state laws are mediated by the social processes of the smaller group. Thus, state law does not have the completely autonomous rule-making capacity that is sometimes ascribed to it. Similarly, the smaller social fields are also only *semi*-autonomous; while they generate their own norms and rules, they are also affected by other normative orders, most commonly the state's.<sup>64</sup> Macdonald pushes this observation further, noting that, in circumstances where state laws are ignored, it is only a partial truth to call the state's legislative initiative ineffective; "the theory of legal pluralism raises the hypothesis that non-conforming behaviour in any particular regime is not simply a failure of enforcement or civil disobedience. It may be the reflexion of an alternative conception of legal normativity."<sup>65</sup> In other words, the reason why a state law does not achieve its stated goal may be related to the non-state legal norms at play.

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Teubner's reference to the "new legal pluralism" draws on Sally Engle Merry's writings. Merry writes:

According to the new legal pluralism, plural normative orders are found in virtually all societies. This is an extremely powerful move, in that it places at the center of investigation the relationship between the official legal system and other forms of ordering that connect with it but are in some ways separate from and dependent on it... Instead of mutual influences between two separate entities, this perspective sees plural forms of ordering as participating in the same social field: *supra* note 51 at 872-873.

<sup>63</sup> Moore, *supra* note 7 at 56. Reisman similarly notes:

In an interdependent, global industrial and science-based civilization, no group is truly autonomous. Autonomy in the modern world is relative and contingent on choices – choices about the degree to which smaller groups may discharge themselves from the reach of general community norms and apply their own. These choices are made by members of would-be autonomous groups, by the larger groups within which they exist, and the larger groups within which they exist: *supra* note 50 at 415.

<sup>64</sup> See also Shauna Van Praagh, "The *Chutzpah* of Chasidism" (1996) 11 Can JL & Soc 193.

<sup>65</sup> Macdonald, "Metaphors," *supra* note 39 at 79.

Sometimes, a group's claim to greater autonomy manifests itself as a demand for the state's recognition. Such was the case in the recent failed attempt by a Muslim group in Ontario to have Shari'a-based arbitrations of family law disputes recognized as enforceable by state courts.<sup>66</sup> There, a non-state organization sought inclusion into an existing scheme whereby its own norms in family matters would be enforced by the machinery of the state. Inherent in the group's claim was the recognition that its authority, at least in practical terms, was subordinate to the state's; an attempt to enforce its own norms through threats of imprisonment or fines could have been punishable under state law. Ultimately, in that case, due to public outcry at the arguably poorly understood implications of the group's demands, the Ontario government took the position that state courts would not enforce religious arbitrations.<sup>67</sup>

In other cases, proponents of non-state legal orders have been successful in having the state operate as a surrogate enforcement agent. Under New York State law, for example, as a result of lobbying by members of the Jewish community, state courts now have certain powers to encourage the members of a divorcing couple to provide, in addition to the civil divorce, a religious divorce. This measure was aimed principally at Orthodox Jewish men who take

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<sup>66</sup> The affair generated significant debate: see Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ministry of the Attorney General, 2004) at 89–92, online: Government of Ontario (Ministry of the Attorney General) <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>> [*Boyd Report*]; Jean-François Gaudreault-Desbiens, “Constitutional Values, Faith-Based Arbitration, and the Limits of Private Justice in a Multicultural Society” (2005) 19 NJCL 155-191; Ayelet Shachar, “Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies” (2005) 50 McGill LJ 49; Lorraine E. Weinrib, “Ontario’s Sharia Law Debate: Law and Politics under the *Charter*” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 239-263; Veit Bader, “Legal Pluralism and Differentiated Morality: Shari’a in Ontario” in Ralph Grillo *et al*, eds, *Legal Practice and Cultural Diversity* (Surrey: Ashgate Publishing Limited, 2009) 49-72; Sherene Razack, “Between a Rock and Hard Place: Canadian Muslim Women’s Responses to Faith-Based Arbitration” in Rubya Mehdi *et al*, eds, *Law and Religion in Multicultural Societies* (Copenhagen: DJØF Publishing, 2008) 83-94; Faisal Bhabha, “Between Exclusion and Assimilation: Experimentalizing Multiculturalism” (2009) 54 McGill LJ 45; Anver Emon, “Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation” (2009) 87 Can Bar Rev 391; Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press 2008) 87-109; Farah Ahmed & Senwung Luk, “Religious Arbitration: A Study of Legal Safeguards” (2011) 77 Arbitration 290-303.

<sup>67</sup> “Ontario Premier rejects use of Shariah law” *CBC News* (11 September 2005), online: <<http://www.cbc.ca/canada/story/2005/09/09/sharia-protests-20050909.html>>. Notably, however, Bruce Ryder points out that the government’s position was more formal than substantive; “[t]he formal obstacle to binding religious arbitration of family matters is easily evaded, if the parties so desire, by embodying the results of advisory religious arbitration decisions in negotiated separation agreements”: Ryder, *ibid* at 105.

advantage of their power, under Jewish law, to initiate a religious divorce (a *get*). They leverage this power to obtain a more beneficial financial or custodial arrangement. A woman who does not obtain a *get* is called an *agunah*, a chained or anchored woman, because she cannot remarry within her community, and any children that she has can also not marry in the community.

Suzanne Last Stone explains how New York's laws operate:

Among the variety of civil remedies adopted are two noteworthy legislative initiatives enacted in New York... The first, popularly known as the Get Law, denies the benefit of a civil divorce to a petitioner absent a showing that the petitioner for the civil divorce has removed "all barriers to remarriage" of a spouse... The second piece of legislation... provides that the civil court "where appropriate" may take into account the refusal of a party to remove "barriers to remarriage"... in distributing marital property.<sup>68</sup>

Canada has similar legislation that was adopted after lobbying by Jewish community leaders.<sup>69</sup> Under the *Divorce Act*, where a spouse does not satisfy the court that he or she (usually he) has removed all barriers to religious remarriage, the court can "dismiss any application filed by that spouse" and/or "strike out any other pleadings and affidavits filed by that spouse."<sup>70</sup>

Stone explains this particular interaction of state and non-state legal orders as a successful attempt by non-state actors to co-opt the enforcement machinery of the state:

it is precisely the Halakhic system's self-awareness of its limited enforcement powers... that often leads it to view the secular system of a host state, not as a competing authority but, rather, as a potential arm of the Jewish legal system. In an inversion of the liberal state's redefinition of intermediate associations as arms of the state, the Jewish legal system defines itself as the comprehensive polity and the non-Jewish civil state as merely an intermediary arm within it.<sup>71</sup>

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<sup>68</sup> Suzanne Last Stone, "The Intervention of American Law in Jewish Divorce: A Pluralist Analysis" (2000) 34(2) *Isr L Rev* 170 at 177. Stone notes that the second piece of legislation has caused division within the Jewish community, as some members believe that the imposition of financial penalties can invalidate the religious divorce.

<sup>69</sup> See *Bruker v. Marcovitz*, 2007 SCC 54; Rosalie Jukier & Shauna Van Praagh, "Civil Law and Religion in the Supreme Court of Canada: What should we *get* out of *Bruker v. Marcovitz*?" (2008) 43 *Sup Ct L Rev* 281. See also Adrienne Barnett, "Getting a 'Get' – The Limits of Law's Authority?" (2000), 8 *Fem Legal Stud* 241 for an account of the English experience on this issue.

<sup>70</sup> *Divorce Act*, RSC 1985, c.3 (2nd Supp), s 21.1.

<sup>71</sup> Stone, "Intervention," *supra* note 68 at 204. Marc Galanter writes that this phenomenon may in fact be widespread: "The complexity of the interface between external and indigenous controls is demonstrated in the

Ihsan Yilmaz suggests a similar kind of interaction between community and state norms in the case of British Muslims. In his view, many Muslims in Britain take advantage of state legal structures regarding marriage to allow them to follow religious norms.<sup>72</sup>

Angela Campbell notes a fascinating variation on this theme uncovered through her research in Bountiful, British Columbia, the home of a religious community that practices polygamy as a matter of religious faith.<sup>73</sup> There, she found that two sister wives of the same husband had taken advantage of the legalization of same-sex marriage in Canada to marry one another. Though some may have seen the union as the exploitation of a benefit intended to serve another purpose, Campbell argues that painting the marriage as a “sham” is inaccurate. According to Campbell, “the couple’s interview suggested a genuine shared domestic existence that bore the conventional elements of marriage.”<sup>74</sup>

Campbell’s research suggests that there is more to the interaction of legal orders than competition and strategic manipulation, as Yilmaz’s writings may imply. In this vein, Sally Engle Merry underscores the “mutually constitutive relation between state law and other normative orders.” For Merry, legal pluralist thought from the 1980s “reflects a new awareness of the interconnectedness of social orders, of our vulnerability to structures of domination far outside our immediate worlds.”<sup>75</sup> Thus, it is not only the case that normative orders bump up against and influence each other; each can also help constitute the other. This insight echoes Cover’s claim, discussed above, that state law takes on significance in people’s lives as it is

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observation that the official system is frequently used to induce compliance with a decision in an indigenous forum”: Galanter, “Many Rooms,” *supra* note 10 at 24, internal citations omitted.

<sup>72</sup> Ihsan Yilmaz, “The challenge of post-modern legality and Muslim legal pluralism in England” (2002) 28(2) *Journal of Ethnic and Migration Studies* 343 at 343. Yilmaz gives a rather monolithic treatment to Muslims in England, which I do not mean to adopt here.

<sup>73</sup> This community was a focus of the recent decision of the British Columbia Supreme Court that upheld the constitutionality of polygamy’s criminalization in Canada: *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

<sup>74</sup> Angela Campbell, “Bountiful Voices” (2009) 47 *Osgoode Hall LJ* 183 at 199.

<sup>75</sup> Merry, *supra* note 51 at 880.

filtered through their particular normative orders, but it also goes further by positing a bi-directional (or perhaps multi-directional) relationship between various legal orders.

The mutual influence between state and non-state legal orders, however, is conditioned by the unique characteristics that differentiate state law from non-state law, including state law's coercive powers and symbolic dominance. As Tamanaha notes,

One must avoid falling into either of two opposite errors: the first error is to think that state law matters above all else (as legal scholars sometimes assume); the second error is to think that other legal or normative systems are parallel to state law (as sociologists and anthropologists sometimes assume)... Sometimes state law is very powerful, sometimes it is weak, but rarely is it completely irrelevant or lacking in features that distinguish it from other competing official legal or normative systems. State law is in a unique symbolic and institutional position that derives from the fact that it is *state* law - the state holds a unique (domestic and international) position in the contemporary political order. Furthermore, official state legal systems, at least those that function effectively, have a distinctive instrumental capacity that enables them to be utilised to engage in a broad (potentially unlimited) range of possible activities.<sup>76</sup>

Thus, the interaction of state law and non-state law is not a case of similarly situated normative orders interacting in an equal give-and-take of norms and ideas. The unique position of the state will mean that state law has a broader influence across multiple communities, as each community will, on some level, be required to interact with state norms. Further, the state's coercive powers will mean that violations of state norms generally carry practical consequences.

## 2.5 What do I mean by Law?

A persistent critique of legal pluralism is that, in expanding the notion of the legal, it loses analytical precision and becomes less than useful as a way of understanding social life. According to Tamanaha, "definitions of law proffered by legal pluralists suffer from a persistent inability to distinguish law sharply from social life, or legal norms from social norms."<sup>77</sup> For Tamanaha, this is problematic for three reasons. First, it "generates confusion by doing violence

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<sup>76</sup> Tamanaha, "Understanding," *supra* note 5 at 410-411.

<sup>77</sup> Brian Z Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27(2) *JL & Soc'y* 296 at 298.



to common understandings.”<sup>78</sup> In other words, if legal pluralists are concerned with concepts of “folk” and “everyday” law, they should be respectful of common understandings regarding the nature of “law.” Second, in a related point, Tamanaha argues that the expansive definition of law can be seen as a form of academic sleight of hand, raising suspicions that

at base, legal pluralism involves an exercise in theoretical re-labeling, transforming the commonplace sociological observation that social life is filled with a pluralism of normative orders into the supposedly novel observation that it is filled with a pluralism of legal orders.<sup>79</sup>

Third, Tamanaha claims that, because many legal pluralists define law in terms of its functions, the definition ends up becoming simultaneously over- and under-inclusive. Functionalist definitions are too broad because they end up including “phenomena like the normative regulation within a corporation or the family, ultimately expanding to encompass virtually all social regulation within the term ‘law’.”<sup>80</sup> At the same time, functionalist definitions are too narrow because they obscure the potential non-regulatory functions of law. In this respect, Gunther Teubner notes:

Why should it be just the function of ‘social control’ that defines law in legal pluralism and not the function of ‘conflict resolution,’ as theories of private justice suggest? But then we would have to include different social phenomena in legal pluralism and exclude others.<sup>81</sup>

Functionalist definitions also might be too narrow by excluding things that many people ordinarily think of as law, such as natural law or “certain manifestations of religious law,”<sup>82</sup> which do not serve the same social control function. For example, a person who believes in the religious authority of the Hebrew Bible might understand the commandment to worship a single God as having both intrinsic and instrumental aspects. While in part serving as a building block for other biblical commandments about social relations, the injunction that “You shall have no

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<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid* at 312-313.

<sup>81</sup> Teubner, *supra* note at 62 1449-1450.

<sup>82</sup> Tamanaha, “Non-Essentialist,” *supra* note 77 at 312-313.

other gods before me”<sup>83</sup> might be understood by the faithful to entail a freestanding obligation of monotheistic faith apart from its potential social control function. This, however, should not make the commandment any less legal. A purely functionalist definition that focuses on social control might fail to capture this aspect of the commandment.

Responding to these or similar concerns, some legal pluralist scholars have maintained the importance of distinguishing between state and non-state norms. For example, while Carol Weisbrod defines law as “effective regulation emanating from any source,” she adds that “it may still be useful to label the source of law for descriptive purposes, as in ‘state law’ or ‘church law.’”<sup>84</sup> Other scholars prefer to reserve the term “law” for state rules. Sally Engle Merry, for instance, is of the view that “once legal centralism has been vanquished, calling all forms of social ordering that are not state law by the term law confounds the analysis.”<sup>85</sup> Sally Falk Moore takes a stronger view, insisting on the separation of state law from other forms of social norms, and proposes to use the term “law” to refer to “rules potentially enforceable by the government” and the term “reglementation” to refer to rules enforceable by non-governmental actors.<sup>86</sup>

Gunther Teubner has a different response to these challenges. He suggests “follow[ing] the linguistic turn”<sup>87</sup> in separating the legal from the non-legal.<sup>88</sup> Because language reflects the social constructs that it represents, and because law is a social construct, defining law by reference to language allows for a flexible definition of law that nonetheless has demarcated limits. In this view, “[l]egal pluralism is... defined no longer as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe

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<sup>83</sup> Exodus, 20:3 (NRSV).

<sup>84</sup> Carol Weisbrod, “Family, Church and State: An Essay on Constitutionalism and Religious Authority” (1988) 26 J Fam L 741 at 743.

<sup>85</sup> Merry, *supra* note 51 at 878-879.

<sup>86</sup> Moore, *supra* note 7 at 17.

<sup>87</sup> Teubner, *supra* note 62 at 1450.

<sup>88</sup> Teubner’s thinking emerges from his larger work in autopoietic legal theory. See Gunther Teubner, ed, *Autopoietic Law: A New Approach To Law and Society* (Berlin: W. de Gruyter, 1988).

social action under the binary code of legal/illegal.”<sup>89</sup> Social situations are properly thought of as relating to law when people use the language of legal/illegal to describe acts. According to Teubner, when this linguistic coding is used in a new situation that was not previously thought of as being “legal” in nature, “a subtle but decisive shift of meaning occurs.”<sup>90</sup> For example, when a company uses the legal/illegal coding in the context of its disciplinary procedures, “intraorganizational legal discourse misreads intraorganizational self-production as norm production and thus invents a new and rich ‘source’ of law.”<sup>91</sup> Teubner explains the motivation behind this approach as follows:

If we are interested in a theory of law as a self-organizing social practice, then it is not up to the arbitrary research interests to define the boundaries of law. Boundaries of law are one among many structures that law itself produces under the pressures of its social environment. And only a clear delineation of the self-produced boundaries of law can help to clarify the interrelations of law and other social practices.<sup>92</sup>

Following Teubner, Tamanaha puts the definition of law in slightly different terms: “Law is whatever people identify and treat through their social practices as ‘law’ (or recht or droit, and so on).”<sup>93</sup> Emmanuel Melissaris commends this view as being “more consistent with [legal pluralism’s] relativistic basis.”<sup>94</sup>

Other scholars are more direct in their rejection of the criticism that legal pluralism’s definition of law is imprecise. Kleinhans and Macdonald argue that this “purportedly methodological criticism... assumes the priority of State law as the governing standard.”<sup>95</sup> In their view, this particular critique of legal pluralism presupposes that observers know what law

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<sup>89</sup> Teubner, *supra* note 62 at 1451.

<sup>90</sup> *Ibid* at 1453.

<sup>91</sup> *Ibid*. Significantly, at 1455, Teubner points out that “[t]he juridification of social phenomena... happens independently of the ‘recognition’ of this law through the State and the courts.”

<sup>92</sup> *Ibid* at 1452.

<sup>93</sup> Tamanaha, “Non-Essentialist,” *supra* note 77 at 313 (emphasis in original).

<sup>94</sup> Melissaris, *supra* note 5 at 69.

<sup>95</sup> Kleinhans & Macdonald, *supra* note 4 at 33.

looks like, but this is so only because of the observers' experience with state law. Any non-state norm must meet this unarticulated standard in order to be considered sufficiently legal. Moreover, whether adopted consciously or not, a state-centred definition of law may be tautological, as von Benda-Beckman warns: "[r]ules are legal if issued/sanctioned by a legal institution; a legal institution is one which issues or sanctions legal rules."<sup>96</sup> A researcher who unreflectively allows this potential tautology to set the criteria for what counts as legal risks missing out on key features of the social world.

Kleinhans and Macdonald argue that the methodological criticism "merely confirms the political role of definitions as creative of ideological power structures." For them, as discussed above, the intellectual contribution of legal pluralism is to ask the questions that relate to legal analysis across the spectrum of social interactions. This is similar to asking questions emerging from economic thought or political theory in situations not traditionally seen as directly related to those disciplines.<sup>97</sup> Following on this line of argument, Macdonald has elsewhere argued that "[w]henver we find ourselves puzzling through issues of access to justice, fair procedures, problems with authority, and questions of interpretation in their interactions with others we find law."<sup>98</sup> This implies that, even in areas where the subjects do not use the language of law and legality, one can find law in the interactional norms of human behaviour by asking the questions of legal analysis. This broader, more pluralistic definition of law is consistent with Melissaris' view that

[o]nly when the legal commitment of clubbers who queue patiently at a bouncer's orders is treated as seriously as the legal commitment of communities with religious or other moral bonds will the pluralistic study of the law be able to move away from the essentially positivistic external study of groups to the study of legal discourses.<sup>99</sup>

The failure (or refusal) to see law across a wide spectrum of social interactions is linked, in Macdonald's view (in a different article co-authored with David Sandomierski), to the fact that

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<sup>96</sup> Von Benda Beckman, *supra* note 36 at 57.

<sup>97</sup> Kleinhans & Macdonald, *supra* note 4 at 33.

<sup>98</sup> Roderick Alexander Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press, 2002) at 8.

<sup>99</sup> Melissaris, *supra* note 5 at 75.

“contemporary mainstream theoretical accounts, and the principal critiques of these mainstream accounts, conceive law as a set of relatively determinable institutions, practices and rules that are imposed on legal subjects.”<sup>100</sup> For Macdonald and Sandomierski, law is not determinable, but fundamentally interactional.<sup>101</sup> This position flows from Macdonald’s persistent concern to give proper credit to legal subjects’ agency in, and hence responsibility for, norm creation.

At the outset of this project, and consistent with the general orientation of qualitative inquiry, it was not suitable to adopt an *a priori* definition of “law.” My starting point in conducting interviews, following Teubner and Tamanaha, was to treat as legal anything that interview subjects treat as legal. This allowed the participants to explore their own notions of law. I was conscious, however, of Von Benda-Beckman’s warning that

[s]ubject-generated accounts of law whether given by law makers or judges, religious authorities, village elders or farmers however instructive they may be, are the empirical stuff to be described and analysed and compared, but they do not provide the scientific categories through which such scientific work takes place.<sup>102</sup>

Accordingly, once I had completed the interviews and began to analyze the data, I approached the debate over law’s definition more critically, inspired by some of the writings discussed above but also by James Tully’s writings on the production of constitutional law. Drawing on Ludwig Wittgenstein, Tully explains that words are “too multiform to be represented in a theory or

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<sup>100</sup> Roderick A Macdonald & David Sandomierski, “Against Nomopolies” 57 N Ir Legal Q 610 at 611.

<sup>101</sup> *Ibid* at 614.

<sup>102</sup> Von Benda-Beckman, *supra* note 36 at 58. Melissaris has offered a similar criticism of Tamanaha:

What is not clear from Tamanaha’s social theory of law is what the socio-legal theorist may gain from that enquiry. At worst, she will be engaging in a rather unsophisticated exercise in semantics. At best, she will have some more rough information as to what various communities refer to as law, which she will map in an inevitably inconclusive and indeterminate manner: *Ubiquitous Law*, *supra* note 28 at 32.

Further, though Melissaris is critical of Tamanaha, he does ultimately recognize the importance of law’s subjects of law in answering law’s central questions:

precisely because they are the very source of legality, the participants in a legal order cannot be substituted by experts or be treated simply as co-operating agents. The two necessarily linked questions of the law, namely the ones concerning its institutional boundaries and its substantive context, can only be asked and answered by those on whose shared experience depend the possibility of making sense of the world and changing it as a matter of normative rather than causal necessity. The speculative knowledge built into the law does not have a normative content in itself before being vested with the participants’ commitment: at 71.

comprehensive rule that stipulates the essential conditions for the correct application of words in every instance.”<sup>103</sup> Instead,

understanding a general concept consists in being able to give reasons why it should or should not be used in any particular case by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents and drawing attention to intermediate cases.<sup>104</sup>

In this view, general linguistic terms are likened to families. The more specific instantiations of those terms are the members of the family, and, like members of a human family, share family resemblances.<sup>105</sup> Attempting to abstract a comprehensive and general definition of the family by reducing it to its essential traits hinders analysis; the more fruitful endeavour is to work case by case through constant comparison.<sup>106</sup>

Employing this analysis, “law,” like other general terms, is what Tully calls an “aspectival” phenomenon: in the sense that it possesses many aspects, not all of which must be present in all cases in order for a normative system to count as legal.<sup>107</sup> This may help explain the long history of disagreement as to its meaning. If the meanings of law are multiple and overlapping, we should follow Tully’s advice against attempting to reduce law to a set of necessary or sufficient criteria. We should, rather, reason analogically, looking for similarities or dissimilarities to legal systems. Under this view, law could have a number of different,

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<sup>103</sup> James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) at 104.

<sup>104</sup> *Ibid* at 108.

<sup>105</sup> *Ibid* at 112.

<sup>106</sup> *Ibid* at 114.

<sup>107</sup> In contrast, Guy Rocher has developed a sociological conception of law, large enough to include many non-state legal orders, but reducible to set of (apparently necessary and sufficient) criteria, namely: (1) an ensemble of rules and norms accepted as at least theoretically constraining by a social unit; (2) agents or apparatuses recognized within the social unit as capable of (i) elaborating or modifying rules, (ii) interpreting the rules, and (iii) applying them; (3) a recognition by members of the social unit that the intervention of these apparatuses is legitimate; (4) the three sub-functions identified in (2) may be carried out by the same or different agents, but *all* must be carried out; and (5) the rules, agents and/or apparatus must be stable over time: Guy Rocher, “Pour une sociologie des ordres juridiques” (1988) 29 C de D 91 at 104. In Rocher’s estimation, religions can be counted among the legal orders.

complementary (and perhaps even antagonistic) functions or purposes, and it is not necessary to determine once and for all everything that might qualify as law.

Committed legal pluralists might object to this methodology on the basis that it allows state law to be the basis for comparison, assuming that state law is legal and other legal traditions must measure up to it. There is some truth to this hypothesized claim. However, the benefit of this approach is that it can help resolve (or at least postpone) the argument about what counts as law. There is little disagreement that the state's normative order is distinctly legal. The approach advocated by Tully would not require other normative systems to match perfectly with the state's in order to qualify as legal. Further, once a sufficient number of non-state normative systems have been acknowledged as legal, they may share amongst themselves criteria not present in the state's legal system, allowing for the potential expansion of the category. The relevant question is: can one draw enough analogies between recognized legal systems and those that are the subject of debate in order to qualify the latter as legal?

In Chapter 4 (Section 2) I lay out in more detail an argument for why I consider the religious norms at issue in the three cases under review to be “legal” for the purposes of unpacking participants' narratives. Briefly, my argument is that, in all three cases, the religious obligations exhibited a number of aspects that can be analogized to state law: (1) adherents viewed the practices as obligatory in meaningful ways; (2) participants described them as following from higher principles within a larger tradition; (3) the modalities of carrying out the practices are regulated in detail and have practical consequences in the lives of the practitioners; and (4) in all of the cases, there was reasoned disagreement within the relevant religious community as to the import and nature of the obligations. Further, characterizing a religious normative system as legal does not strike me as being terribly controversial; indeed, it may be more controversial to claim that there is no such thing as Jewish law or Canon law. In this sense, the norms at issue for this study are less contentious in terms of their legality than some of the norms advanced by legal pluralists; Melissaris's example cited above of the queue in front of a nightclub stands out in this regard.

## 2.6 Conclusion on Legal Pluralism

This section has surveyed the basic notion and developments in the theory of legal pluralism, and argued that legal pluralism provides a unique vantage point from which to reflect

critically on Canada's legal treatment of religious freedom. Building from the basic position that the state law is not the only legal order that occupies a significant place in social life, legal pluralists have advocated legal theories that take non-state legal orders seriously. Perhaps the most intriguing subject for legal pluralist scholars has been the interaction between these various legal orders. Sometimes, members of minority populations seek to strategically engage with and manipulate the state legal order to accomplish the goals of their own non-state norms. Some scholars, such as Merry, Campbell and Van Praagh, have also pointed to the more subtle influences can be detected in the mutually constitutive nature of state and non-state legal orders. Similarly, whereas some legal pluralist scholarship can be criticized for viewing non-state legal orders as internally monolithic, authors such as Macdonald and Santos have advanced the notion that the individual legal subject is herself a site for the interaction of normative orders. These crucial insights give shape to this dissertation.

In Chapter 4, the interactions between state and religious norms are at the heart of the inquiry. In her analysis of Canadian Supreme Court decisions' bearing on cultural identity, Shauna Van Praagh emphasizes that the court plays a significant, though not determinative, influence on non-state norms:

[the court] does not play the role of engineer and cannot impose structures of individual and community interaction. Neither can the Court try to retreat into the role of simple mirror or reflector of societal norms and expectations; instead, it always recasts those norms and invites their further development... It is always a partner in an ongoing dance.<sup>108</sup>

At the same time, members of "communities can never completely avoid interactions with law and its influence; neither can they dictate unilaterally the terms of their engagement with law."<sup>109</sup> The precise nature of the "dance" between state norms and non-state norms is the main focus of this project. Martha Minow explains that, though the state may be the more powerful partner in this dance, it cannot simply set the choreography and expect non-state players to follow along.

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<sup>108</sup> Shauna Van Praagh, "Identity's Importance: Reflections of – and on – Diversity" (2001) 80 Can Bar Rev 605 at 617-618.

<sup>109</sup> *Ibid* at 609.



State decisions that offend a community's norms in fundamental ways may, instead of changing the community's norms, end up isolating the community and encouraging its exit from the state:

Decisions reached within formal governmental authorities do not end the matter for members of subgroups who are themselves tolerating the secular political arrangement only as long as it remains compatible with their own sense of alternative authorities...

The understanding that exit remains a viable option, and, thus, that governmental authority is not absolute, is one illustration of the insight enabled by taking pluralism seriously.<sup>110</sup>

This insight gives a practical reason for focusing on the details of the relationship between state and non-state legal norms: neglecting these relationships can lead to the undesirable consequence of the alienation or disenfranchisement of community groups. Indeed, Chapter 6 picks up on this theme by exploring the relationship between religious freedom and belonging in the Canadian civic community.

### 3 What is Cross-Cultural Communication?

As noted above, while the legal pluralist literature inspired the design of this project in many ways, data analysis revealed that cross-cultural communication was a significant theme in participant narratives. In some ways, this confirms the intuitions in Benjamin Berger's theoretical work on the Canadian law of religious freedom, in which Berger specifically presents religious freedom litigation as a cross-cultural encounter.<sup>111</sup> In this section, I provide a review of relevant literature in the field of cross-cultural communication, in order to orient the more specific analysis in Chapter 5.

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<sup>110</sup> Martha Minow, "Pluralisms" (1988) 21 Conn L Rev 965 at 971. Minow's claim is substantiated in the legal briefs filed by the Amish litigants in the landmark U.S. case of *Wisconsin v. Yoder* 406 U.S. 205 (1972). Cover cites from their submissions: "[T]he Amish answer to forms of legal harassment, which would force them to violate their religion, has been to sell their farms and to remove... [I]t would, if this Court sustains the prosecution, sound the death knell, in this country, for an old, distinctive and innocent culture": quoted in Cover, *supra* note 1 at 152.

<sup>111</sup> Benjamin L Berger, "The Cultural Limits of Legal Tolerance" (2008) 21 Can. JL & Juris 245. This article is explored in more depth in Chapter 5.

### 3.1 Terminology and Approach

Some initial words on terminology and approaches are necessary. Some scholars distinguish between “multicultural” and “intercultural” communication. Sadri and Flammia, for example, write that “[t]he term *multicultural* refers to nations that have diverse cultural groups, usually as a result of immigration, while the term *intercultural* refers to the diversity among separate nations.”<sup>112</sup> As these terms can be confused with Canada’s official policy of multiculturalism, or what Bouchard and Taylor have identified of Quebec’s preference for interculturalism,<sup>113</sup> I will retain the term “cross-cultural communication” in order to refer to instances in which more than a single culture is involved in communicative activity.<sup>114</sup>

Sadri and Flammia also identify four main approaches to the study of cross-cultural communication: the social science approach, the interpretive approach, the critical approach, and the dialectical approach. Though these are not watertight compartments, there are several distinguishing features of each. The social science approach “is based on the assumptions that human behavior is predictable and that there is a describable external reality.”<sup>115</sup> Scholars employing this approach often use quantitative methods, though not exclusively. In contrast, the interpretive approach understands communication as a subjective experience, and holds that “human beings construct their reality... that culture is both created and perpetuated through the means of communication.”<sup>116</sup> Critical cross-cultural communication scholars are focused on historical context and power relationships, and in this regard share something in common with scholars of critical legal studies. Finally, the dialectical approach “stresses the processual, relational, and contradictory nature of intercultural communication,” generally employing six

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<sup>112</sup> Housman A. Sadri & Madelyn Flammia, *Intercultural Communication: A New Approach to International Relations and Global Challenges* (New York: The Continuum International Publishing Group, 2011) at 8.

<sup>113</sup> Québec, Commission de consultation sur les pratiques d’accommodement reliées aux différences culturelles, *Building the Future: A Time for Reconciliation* (Québec: Gouvernement du Québec, 2008) at 19-20 (Co-Chairs: Gérard Bouchard & Charles Taylor) [*Bouchard-Taylor Report*].

<sup>114</sup> As will be developed below, it is likely not possible to categorize any individual as belonging to a single culture, or to consider cultures as homogeneous or static.

<sup>115</sup> Sadri & Flammia, *supra* note 112 at 25.

<sup>116</sup> *Ibid* at 25.

dialectics to analyze the contradictory aspects of cross-cultural communication: “cultural-individual, personal-contextual, differences-similarities, static-dynamic, history/past-present/future, and privilege-disadvantage.”<sup>117</sup> As Martin and Nakayama explain, “the most challenging aspect of the dialectical perspective is that it requires holding two contradictory ideas simultaneously.”<sup>118</sup>

This study will adopt elements of the interpretive, critical, and dialectical approaches. It assumes that communication is an ongoing process, created by the coming together of subjective experiences. Communicative acts at once bear the hallmarks of the cultures from which they emerge and contribute to the perpetuation and evolution of those cultures. Further, as this study is interested in communication between individuals, communities, and courts, the power relationships between these actors will be critically assessed. The dialogue between a litigant and a judge, mediated by lawyers, can never truly be a conversation among actors equal in power. Finally, Chapter 5 will pay close attention to the contradictions inherent in the communications among litigation participants. This relates to the work in Chapter 4, which will develop the notion that a particular act can have simultaneously opposite meanings in various legal systems.

### 3.1.1 “Culture”

This project will give culture a broad meaning, and does not purport to set out a comprehensive definition. Following Parekh, I view culture as a

historically created system of meaning and significance or, what comes to the same thing, a system of beliefs and practices in terms of which a group of human beings understand, regulate and structure their individual and collective lives. It is a way of both understanding and organizing human life.<sup>119</sup>

Culture pervades communicative activities, and is reflected in a group’s language, artistic expressions, “proverbs, maxims, myths, rituals, symbols, collective memories, jokes, body

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<sup>117</sup> *Ibid* at 25.

<sup>118</sup> Judith N Martin & Thomas K Nakayama, “Intercultural Communication and Dialectics Revisited” in Thomas K Nakayama & Rona Tamiko Halualani, eds, *The Handbook of Critical Intercultural Communication* (Blackwell Publishing, 2010) 59 at 66.

<sup>119</sup> Bhiku Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Houndmills: Macmillan Press Ltd., 2000) at 143.

language, modes of non-linguistic communication, customs, traditions, institutions and manners of greeting.”<sup>120</sup> Likewise, moral concepts (values, ideals, notions of the good life) are also culturally situated. It follows from this that notions of justice and legality are embedded in a particular culture, given shape by their historical context. Likewise, political and economic institutions are embedded in specific cultural milieus.<sup>121</sup>

Cultures are generally associated with identifiable groups.<sup>122</sup> As Lori Beaman notes, however, “[t]he very notion of culture and its use as a boundary setting mechanism or basis for rights is of course contested.”<sup>123</sup> In this vein, though some consider cultural boundaries to be coterminous with national borders, more recent literature has broadened the notion of culture to “include gender, race, ethnicity, sexual orientation, social class, and other identifications.”<sup>124</sup> Diana Eades adds to this list by arguing that professions such as the legal profession can be seen as sub-cultural groups,<sup>125</sup> resonating with Berger’s assertion that Canadian constitutionalism is a

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<sup>120</sup> *Ibid* at 143-144.

<sup>121</sup> *Ibid* at 151.

<sup>122</sup> For example, in their argument for a right to culture, Margalit & Halbertal adopt a concept of culture “as a comprehensive way of life... This concept is a divisive one in the sense that it is used to distinguish one group from another. What we call a way of life is something that can only exist in a group, in contrast to a lifestyle, which may characterize the particular manner in which individuals lead their lives.” Avishai Margalit & Moshe Halbertal, “Liberalism and the Right to Culture” (2004) 71(3) *Social Research* 529 at 535 (originally published (1994) 61(3) *Social Research*).

<sup>123</sup> Lori Beaman, “Is Religious Freedom Impossible in Canada?” (2012) 8(2) *Law, Culture and the Humanities* 266 at 276.

<sup>124</sup> Dreama G Moon, “Critical Reflections on Culture and Critical Intercultural Communication” in Thomas K Nakayama & Rona Tamiko Halualani, eds, *The Handbook of Critical Intercultural Communication* (Blackwell Publishing, 2010) 34 at 38. Much of the literature in cross-cultural communication is influenced by the work of Geert Hofstede and Gert Jan Hofstede, whose studies of IBM employees in more than 50 countries generated a significant amount of quantitative data regarding patterns of cross-cultural communication. Though Hofstede & Hofstede see culture as existing on many levels such as nationality, ethnicity, social class, generation, etc., their data are organized by nation state, reflecting a view of culture that is determined by political boundaries. They argue that though the concept of nationality should be “used with care... it is often the only feasible criterion for classification. Rightly or wrongly, collective properties are ascribed to the citizens of certain countries.” See Geert Hofstede, Gert Jan Hofstede & Michael Minkov, *Cultures and Organizations: Software of the Mind*, 3d ed (New York: McGraw-Hill, 2010) at 21. For an example of legal scholarship influenced by this writing, see John Barkai, “What’s a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem” (2008) 10 *Cardozo J Conflict Resol* 43.

<sup>125</sup> Diana Eades, “Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications” (2008) 20 *Current Issues in Criminal Justice* 209 at 209.

cultural system of its own.<sup>126</sup> This is not to say, however, that communicative acts are culturally determined. Rather, this project assumes a more dynamic relationship between individuals and the multiple cultures in which they are situated. In communicating, individuals are active agents, drawing on the languages, ideas, forms and other aspects of these cultures. Here, I again follow Parekh, who writes:

Although human beings are shaped by their culture, they are not constituted or determined by it in the sense of being unable to take a critical view of it or rise above its constitutive beliefs and practices and reach out to other cultures. Cultural determinism makes sense only if we assume that culture is a cohesive and tightly structured whole that is not itself influenced by anything external to it, and that individuals are a passive and pliant material devoid of independent thought.<sup>127</sup>

Parekh's notion of individuals "reaching out" to other cultures suggests a communication, the term to which I turn next.

### 3.1.2 Communication

Sadri and Flammia provide a concise synthesis of current scholarly definitions of communication: "most definitions agree that communication is a symbolic process by which people create shared meanings."<sup>128</sup> This definition encompasses many different forms of communication, including verbal, written and body languages. This project will focus on written and verbal forms of communication, concerned as it is with interview transcripts,<sup>129</sup> court documents, and the oral representations made to courts. Many have noted that cultural communities have always already begun to communicate with each other at some level. Parekh, for example, writes that

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<sup>126</sup> Berger, *supra* note 111.

<sup>127</sup> Parekh, *supra* note 119 at 157. This is also consistent with the critical legal pluralism of Kleinmans & Macdonald discussed in section 2.1 of this chapter.

<sup>128</sup> Sadri & Flammia, at 10.

<sup>129</sup> Notably, the interviews conducted for this project were often themselves instances of cross-cultural communication. There were, in every case, cultural differences between myself (the interviewer) and the interview participants. For example, I am a male Anglophone from Montreal with a Jewish background, and as such am clearly situated in a culturally different milieu than the Hutterite interview participants. In other cases, I shared some cultural aspects with participants, but differed with respect to language, gender, degree of religious training, or professional situation.

[e]very cultural community exists in the midst of others and is inescapably influenced by them. It might borrow their technology, and the latter is never culturally neutral. It might also be consciously and unconsciously influenced by their beliefs and practices.<sup>130</sup>

This project will be chiefly concerned with the communicative acts that create shared meanings with respect to legal and moral ideas, and the relations between legal subjects and the state.

## 3.2 Building Shared Understandings

Some theorists have focused on cross-cultural communication because they believe that a cross-cultural dialogic process is the best way to build shared understandings in multicultural societies.<sup>131</sup> For Parekh, cross-cultural dialogue is the best way to arrive at universal values. Dialogue counters the tendency to universalize one's own values and "ensures that we appreciate human beings in all their richness and that the values we arrive at are as genuinely universal as is humanly possible."<sup>132</sup> This avoids the shortcomings of both relativist and monist approaches to articulating values.<sup>133</sup> Ken Tsutsumibayashi makes a similar claim, arguing that, instead of attempting to deduce universal values from first principles,

it would be more constructive to pursue a kind of intercivilizational dialogue... by which the interlocutors gradually come to achieve mutual understanding through the transformation or extension of their value criteria.<sup>134</sup>

But how can such dialogues proceed? Charles Taylor writes that, in order to discuss values in a cross-cultural context, "[w]e need... a threefold distinction: norms, legal forms, and

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<sup>130</sup> Parkeh, *supra* note 119 at 163.

<sup>131</sup> See also the discussion of Dallmayr's work below in section 3.3.1 of this chapter.

<sup>132</sup> Parekh, *supra* note 119 at 128.

<sup>133</sup> *Ibid* at 127. Sadri and Flammia describe a similar approach under a different name: contextual relativism. "Such an approach differs from cultural relativism in that communicators do not believe that it is impossible for them to take an ethical stance in relation to the behavior of members of other cultures, but strive to avoid doing so from an ethnocentric perspective." Sadri & Flammia, *supra* note 112 at 264.

<sup>134</sup> Ken Tsutsumibayashi, "Fusion of Horizons or Confusion of Horizons? Intercultural Dialogue and Its Risks" (2005) 11 *Global Governance* 103 at 105. Tsutsumibayashi's work draws heavily on Taylor's.

background justifications.”<sup>135</sup> These analytical distinctions allow for greater clarity in dialogue, and also make it possible for people coming from different cultural contexts to agree on a particular norm without necessarily sharing the same justification for that norm. For example, consider the notion of equality. Many would likely agree with the norm that individuals should be treated equally. But to agree on the norm does not provide a framework for how the norm should be given legal form, nor does it imply agreement on the background justification for the norm. For some, equal treatment is justified on the basis that all are God’s creatures, while others prefer a non-theological justification. For Taylor, the aim of the dialogue is to arrive at a “fusion of horizons,” that is, a series of shared norms, which may be given different legal forms in different jurisdictions and be justified on a number of different bases.<sup>136</sup>

By way of further illustration, Tsutsumibayashi offers a hypothetical (perhaps idealized) scenario:

I begin with the assumption that two individuals, call them A and B, from two starkly different cultures have developed two different types of value criteria - that is, “backgrounds” for perceiving, understanding, and judging human thought and action. At the time of their first contact, it is unlikely that communication and mutual understanding will go smoothly... Now, for A and B to be able to understand or to appreciate each other’s viewpoints - or values or culture- it is necessary for them to engage in a dialogue that would trigger a fusion of horizons, a process by which the value criteria of both A and B become transformed and expanded to incorporate - though not in its original form - a part of each other’s value criteria. However, this does not mean that the two will become identical or that they will lose their distinctive viewpoints or identities. It merely implies that A and B will develop in their own ways extended value criteria that will enable A to understand B’s value criteria, and vice versa. It is emphatically not a process that seeks uniformity or conformity of value criteria.<sup>137</sup>

Building on this analysis, Dwight Newman, who is primarily concerned with moral theory, has offered another analytical framework expanding Taylor’s distinction between norms and background justifications. Newman distinguishes “values” from “concepts.” Value-based

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<sup>135</sup> Charles Taylor, “Conditions of an Unforced Consensus on Human Rights” in Joanne R Bauer & Daniel A Bell, eds, *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 124 at 143.

<sup>136</sup> As Taylor acknowledges, this articulation bears a close similarity to John Rawls’s “overlapping consensus.”

<sup>137</sup> Tsutsumibayashi, *supra* note 134 at 106-107.

differences, for Newman, represent a choice among values that may be incommensurable. Concept-based differences, on the other hand, deal with prior questions of how notions like “law” are conceptualized. For example, “an Aboriginal community operating with a conception of law that emphasizes harmony and natural order rather than positivistic rights may initially have different perceptions about the way in which a court should adjudicate a particular case.”<sup>138</sup> Newman points out, though, that both value-based differences and concept-based differences “might reasonably lead thinkers within one cultural framework to reach different conclusions on a particular matter.”<sup>139</sup> And how should those engaged in the dialogue resolve these different types of differences? According to Newman, concept-based differences do not necessarily call for resolution; concepts operate as “mental placeholders for elements of physical, moral, or other reality,” leaving room for dialoguers to reach agreements on norms expressed as propositions.<sup>140</sup> When it comes to value-based disagreements,

one would attempt to carefully understand the values of the other culture and seek ways of reconciling these values with one’s own, if possible... In some cases, it might be possible to understand another culture’s values but not to bridge the differences, leaving the cultures in question with the sole option of agreeing to disagree. So, a Western secular state might recognize certain indigenous peoples within it as having jurisdiction to promote the traditional spiritual values of their communities even while pursuing a state that is neutral vis-à-vis religion.<sup>141</sup>

Newman’s prescriptions lead the discussion a more detailed consideration of what constitutes *good* cross-cultural communication, to which I turn in the next section.

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<sup>138</sup> Dwight G Newman, “You Still Know Nothin’ ’Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights” (2007) 52 McGill LJ 725 at 738-739. As can be seen in this example, Newman is focused on cross-cultural dialogue between Aboriginal peoples and the Canadian state. His concern is motivated, in part, by decisions from the Supreme Court of Canada stressing the importance of Aboriginal perspectives. Arguably, there is a stronger imperative for Canadian courts to engage in cross-cultural dialogue with Aboriginal peoples than with other cultural minority groups, given Aboriginal peoples’ prior occupation of the territory that now forms the Canadian state. That said, at foundational moments in its history, Canada has shown that it is constitutionally committed to recognizing and addressing religious diversity, though admittedly at first only at the for Catholics and Protestants. Arguably this longstanding constitutional recognition that Canada has always been conceived as country in which members of different religions came together, provides a constitutional bedrock on which to build a theory of cross-cultural communication in the area of religious freedom. See Berger, *supra* note 111 at 248-249; see also Beaman, *supra* note 123.

<sup>139</sup> Newman, *ibid* at 739.

<sup>140</sup> *Ibid* at 740.

<sup>141</sup> *Ibid* at 743.



### 3.3 What is *Good* Cross-Cultural Communication?

#### 3.3.1 Dallmayr's Typology

Fred Dallmayr provides a good starting point for thinking about the various shapes that cross-cultural encounter can take. Dallmayr posits six modes of cross-cultural encounter: conquest, conversion, assimilation, acculturation, relative indifference, and dialogical engagement.<sup>142</sup> Dallmayr notes that these various modes can overlap in some cases. For example, efforts at conquest have historically been linked to conversionary policies, though the two “are not always or necessarily connected. History teaches that there have been conquests without any overt efforts of assimilation... conversely, there have been conversions in the absence of conquest or forced subjugation.”<sup>143</sup> Indeed, unlike conquest, conversion has been used in opposition to colonial rule or as a force of resistance to dominant groups. Dallmayr notes that Ghandi was able to draw on Hindu notions

as guideposts in his struggle against British colonial oppression. On the other hand... various groups in Indian society disenfranchised by the prevailing caste system became willing targets of conversion to Islam and Buddhism (occasionally to Christianity), sometimes on a large scale.<sup>144</sup>

Notably, though, conquest and conversion “share one prominent feature: the denial of meaningful human difference.”<sup>145</sup> In other words, these modes of encounter share a similar assumption: human beings are essentially the same, and thus can be ruled by a common power or share a common faith. This logic helps to justify various forms of hegemony.

In domestic settings, according to Dallmayr, cultural hegemony is exercised under the terms “assimilation” or “enculturation”; the former is associated with “Western or Westernizing

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<sup>142</sup> Fred R Dallmayr, *Beyond Orientalism: Essays on Cross-Cultural Encounter* (Albany: State University of New York Press, 1996) at Chapter 1. Benjamin Berger's work on cross-cultural encounter in the Canadian religious freedom case law draws on Dallmayr's typology and is discussed below in Chapter 5.

<sup>143</sup> *Ibid* at 9.

<sup>144</sup> *Ibid* at 13-14.

<sup>145</sup> *Ibid* at 9.

nations,” while the latter has a “broader and more indefinite application.”<sup>146</sup> The notion of national unity or cohesiveness serves to justify policies aimed at disseminating a hegemonic culture to marginalized groups.<sup>147</sup> Moreover, assimilation’s pull can also be seen as a bottom-up phenomenon, as “the hegemonic culture holds a powerful attraction for subordinate groups eager to gain social acceptance or recognition.”<sup>148</sup> The result is an attempted merger or fusion of cultures.<sup>149</sup>

Sometimes, the processes of assimilation and acculturation can be seen in partial and less hegemonic form, where “the respective cultures must face each other on a more nearly equal or roughly comparable basis.”<sup>150</sup> In such cases, Dallmayr distinguishes varying forms of cultural borrowing and lending. In some cases, “foreign ingredients” may be incorporated into the “prevailing cultural mix.”<sup>151</sup> In others, the encounter may be marked by “a pattern of mutual adjustment or reciprocal give-and-take which, in turn, can engender an ambivalent syncretism or a precarious type of cultural juxtaposition or coexistence.”<sup>152</sup>

Falling into this last pattern is a mode of cross-cultural engagement Dallmayr associates with modern liberalism and terms “relative indifference.” Dallmayr is particularly concerned with the “proceduralist” accounts of liberalism, associated with thinkers such as John Rawls, which “support only a limited procedural rule system or a government that ‘governs least,’ while relegating concrete life-forms to the status of privatized folklore.”<sup>153</sup> In Dallmayr’s view, this

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<sup>146</sup> *Ibid* at 14.

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid* at 17.

<sup>149</sup> There is a meaningful distinction between this fusion of cultures and the “fusion of horizons” in the work of Taylor and Tsutsumibayashi discussed above; the latter refers to dialogical bridges between cultural perspectives, while the former expresses the conglomeration of cultures.

<sup>150</sup> Dallmayr, *supra* note 142 at 18.

<sup>151</sup> *Ibid*.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid* at 24.

approach rests on some troubling assumptions. First, it maintains a curious dichotomy in its view about human nature. On one level, human sameness (as opposed to difference) is presumed “on the level of general principle (stylized as ‘reason’ or ‘human nature’).”<sup>154</sup> At the same time, proceduralism does admit of human difference, but in such a way that “historical cultures and beliefs are abandoned to rampant heterogeneity (tending toward segregation or ghettoization).”

Second, and significantly for the discussion of cross-cultural communication in the realm of litigation, Dallmayr claims that the liberal notion of justice pays scant attention to the realities of cross-cultural encounter that permeate social life. Indeed, liberalism tends to believe that justice can operate above or apart from culture.<sup>155</sup> In Dallmayr’s view,

the dilemma of proceduralism can be stated succinctly as follows: either justice is truly neutral and universal, in which case it is abstract, devoid of content, and collapses into tautology; or else it is endowed with some content, in which case it is embued [sic] with cultural distinctness.<sup>156</sup>

These theoretical problems are echoed in practice; cultural lives are hived off into the realm of the private, segregated or subordinated to the public liberal culture. This has the effect of stifling cross-cultural engagement, as so-called private matters are no longer appropriate subjects for public discussion.<sup>157</sup>

For Dallmayr, there is an ideal type of cross-cultural encounter that represents a higher form of engagement, in which “exposure to alien cultural strands may initiate a movement of genuine self-transformation... a reassessment of prevailing patterns in light of newly experienced insights or modes of life.”<sup>158</sup> In Dallmayr’s estimation, this final form most nearly approximates the dialogical engagement and interaction “which appears most genuine and normatively most

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<sup>154</sup> *Ibid.*

<sup>155</sup> See also Berger, *supra* note 111 at 246-247.

<sup>156</sup> Dallmayr, *supra* note 142 at 25-26.

<sup>157</sup> *Ibid* at 26.

<sup>158</sup> *Ibid* at 18.

commendable.”<sup>159</sup> Other scholars have written in more specific terms about how such a dialogic mode of encounter can be maintained. The rest of this section will concentrate on the values and skills that support this more fruitful kind cross-cultural of encounter.

### 3.3.2 Respect

Authors from various disciplines all emphasize the important role that mutual respect plays in facilitating cross-cultural communication. As Tsutsumibayashi succinctly states: “[m]utual trust and respect are the key to achieving a meaningful intercultural dialogue.”<sup>160</sup> For Parekh, the duty to respect other cultures is an extension of the duty to respect other individuals:

We can hardly be said to respect a person if we treat with contempt or abstract away all that gives meaning to his life and makes him the kind of person he is. Respect for a person therefore involves locating him against his cultural background, sympathetically entering into his world of thought, and interpreting his conduct in terms of its system of meaning.<sup>161</sup>

In a similar vein, Charles Taylor has argued that there is something valid, though not unproblematic, in a presumption that all cultures are entitled to equal respect. This presumption stems from the claim “that all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings.”<sup>162</sup> For Taylor, maintaining this presumption at the outset of dialogue allows for deeper and broader exchanges:

We learn to move in a broader horizon, within which what we have formerly taken for granted as the background to valuation can be situated as one possibility alongside the different background of the formerly unfamiliar culture... So that if and when we ultimately find substantive support for our initial presumption, it is on

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<sup>159</sup> *Ibid* at 31.

<sup>160</sup> Tsutsumibayashi, *supra* note 134 at 111.

<sup>161</sup> Parekh, *supra* note 119 at 240-241. Perhaps at odds with Dallmayr’s more agonistic reading of politics in multicultural societies, Parekh argues, in addition, that a beneficial effect of respecting other cultures is that it generates loyalty on the part of minority groups towards political institutions, at 196.

<sup>162</sup> Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992) at 66. See also Parekh’s claim that, “[h]owever rich it might be, no culture embodies all that is valuable in human life and develops the full range of human possibilities. Different cultures thus correct and complement each other’s horizon of thought and alert each other to new forms of human fulfillment”: Parekh, *ibid* at 167.

the basis of an understanding of what constitutes worth that we couldn't possibly have had at the beginning. We have reached the judgment partly through transforming our standards.<sup>163</sup>

Writing in a different context, James Boyd White also emphasizes the importance of maintaining respect for diverging perspectives and recognizing their value. He describes the act of translation as “the art of facing the impossible, of confronting unbridgeable discontinuities between texts, between languages, and between people.”<sup>164</sup> Though White's words are aimed to capture legal discourses in general, they are all the more apt as a description of cross-cultural communication. For White, the act of translation

recognizes the other... as a center of meaning apart from oneself. It requires one to discover both the value of the other's language and the limits of one's own. Good translation thus proceeds not by the motives of dominance or acquisition, but by respect. It is a word for a set of practices by which we learn to live with difference, with the fluidity of culture and with the instability of the self.<sup>165</sup>

This notion of translation has much to offer in analyzing moments of cross-cultural encounter, where participants may speak different languages and draw on a different set of concepts, values, and norms.

In keeping with the rejection of relativism discussed above in relation to the writings of Parekh and Newman, respect does not imply that all those engaged in dialogue must refrain from all criticism of other cultures' norms. Rather, it requires those engaged in cross-cultural communication to attempt to understand other cultural perspectives. Then,

if after careful consideration and listening to their defence we find their choices perverse, outrageous or unacceptable, we have no duty to respect and even a duty not to respect these choices.<sup>166</sup>

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<sup>163</sup> Taylor, “Politics of Recognition”, *ibid* at 67. Framing the requirement of equal respect as a presumption means that it can be defeated, allowing Taylor an escape from claims that his theory is relativist and lacks normative bite.

<sup>164</sup> James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) at 257. White's book takes an aesthetic approach to judgments of the U.S. Supreme Court, arguing that all justice is a form of translation.

<sup>165</sup> *Ibid.*

<sup>166</sup> Parekh, *supra* note 119 at 176-177.

Jeremy Webber makes a similar point in developing the ethics of judicial decision-making in multicultural societies. He writes that judges must

be open to alternative normative visions. A judge must be willing to have persons of different views tell him something...

This openness does not mean that the judge should approach all questions as a blank slate, free from all predispositions (if that were possible). Indeed, the quality of openness is fully compatible with passionate moral commitment. But ultimately that commitment has to be to the object of justice itself – to the pursuit of a conception of justice that comprehends human experience in its entire range and diversity and for that very reason is never fully attainable – not to a particular theory of that object.<sup>167</sup>

Admittedly, the line between openness to other perspectives and moral relativism is sometimes difficult to trace in the abstract. Parekh helps focus this distinction by contrasting respectful criticism with the attempt to mold another in one's own image. For example, Parekh argues that it is consistent with the value of respect to require other cultures to safeguard human dignity. However, requiring that human dignity be maintained through the particular framework of liberal individualism is to hold a different culture to an unjust standard.<sup>168</sup> Maintaining the balance between legitimate criticism and a culturally specific standard requires those engaged in cross-cultural communication to maintain self-awareness. I turn to this particular skill next.

### 3.3.3 Self-Awareness

Related to the maintenance of respect for other cultures is the recognition that there is no individual who operates without culture. Though this is something of a truism in contemporary discussions of multiculturalism, Wendy Brown argues liberal discourses often deploy the notion of culture asymmetrically. “[T]hough ‘culture’ is what nonliberal peoples are imagined to be ruled and ordered by, liberal peoples are considered to *have* culture or cultures.”<sup>169</sup> This uneven understanding of culture impedes cross-cultural communication. As Charles Taylor notes,

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<sup>167</sup> Jeremy Webber, “A Judicial Ethic for a Pluralistic Age” in Omid Payrow Shabani, ed, *Multiculturalism and Law: A Critical Debate* (Cardiff: University of Wales Press, 2007).

<sup>168</sup> Parekh, *supra* note 119 at 176-177.

<sup>169</sup> Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006) at 150.

[a]n obstacle in the path of... mutual understanding comes from the inability of many Westerners to see their culture as one among many... To an extent, Westerners see their human rights doctrine as arising simply out of the falling away of previous countervailing ideas... that have now been discredited to leave the field free for the preoccupations with human life, freedom, the avoidance of suffering.<sup>170</sup>

A significant aspect of maintaining awareness of one's own culture is to shed the notion that any single culture has developed in isolation from others. "[C]ultures have always been in contact,"<sup>171</sup> and levels of cultural hybridity are multiplied in immigrant countries like Canada. As Melissa Curtin notes,

whenever newcomers arrive at a new "place," they are entering a highly complex arena in which individuals from multiple social and cultural groups are already engaged in negotiating (perceived) boundaries of identities. Of course, newcomers are coming from their own complex arenas of social identifications. Thus, while newcomers do have particular experiences and insights, everyone in the locale is involved in ongoing processes of cultural adjustment, or, coculturation.<sup>172</sup>

Imagining cultures as pure tends to distort them. With respect to one's own culture, it can reinforce the tendency to see culturally based values as natural or neutral. With respect to other cultures, the notion of a pure culture can essentialize and oversimplify them; this exaggerates the distances between cultures and makes barriers to communication seem more insurmountable. Thus, though the entire field of cross-cultural communication studies owes its existence to cultural differences, a crucial aspect of maintaining awareness is being conscious of overstating those differences to the point of reification or essentialization. As Martin and Nakayama provocatively note, "the notion of cultural difference hides and masks the very ways that cultures have already influenced each other."<sup>173</sup>

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<sup>170</sup> Taylor, "Unforced Consensus," *supra* note 135 at 143. Martin and Nakayama argue that such biases even distort studies of cross-cultural communication. They note that some scholars have critiqued "positivistic communication research on self-related variables (e.g., communication styles, self disclosure, conflict styles) and called for a shift from an Anglo-centered field to one that questions the pervasive European-American belief in the autonomous individual." Martin & Nakayama, *supra* note 118 at 64, citing Min-Sun Kim, *Non-western Perspectives on Human Communication: Implications for Theory and Practice* (Thousand Oaks, Calif: Sage Publications, 2002).

<sup>171</sup> Martin & Nakayama, *ibid* at 59

<sup>172</sup> Melissa L Curtin, "Coculturation: Toward A Critical Theoretical Framework of Cultural Adjustment" in Thomas K Nakayama and Rona Tamiko Halualani, eds, *The Handbook of Critical Intercultural Communication* (Blackwell Publishing, 2010) 270 at 280.

<sup>173</sup> Martin & Nakayama, *supra* note 135 at 59.

In their text on cross-cultural communication training, Richard Brislin and Tomok Yoshida set out four awareness competencies to be developed in response to concerns about maintaining self-awareness. Their work is designed as a resource for those developing cross-cultural training courses (e.g. a business sending employees abroad), but provides important insights for the purposes of this project. First, developing the competency of self-awareness involves “becoming aware of the ways [one’s] own [life] have been shaped by the culture into which [one was] born.”<sup>174</sup> Second, those engaging in cross-cultural encounters should be trained to become conscious of their values and biases, and the effects of these on the way that they interact with others. Third, developing self-awareness requires comfort with differences; those engaging in cross-cultural communication must learn to become at ease with ongoing disagreement and multiple ways of seeing a similar issue.<sup>175</sup> Indeed, Brislin and Yoshida note, “[t]olerance for ambiguity has... been cited in numerous cross-cultural studies as one of the most important characteristics for overseas success.”<sup>176</sup> Finally, awareness also encompasses being sensitive to the possibility that some individuals may have a harder time interacting in a particularly unfamiliar cultural setting.<sup>177</sup>

Brislin & Yoshida also add a further dimension to their discussion of awareness that is not often considered in legal discourses: the emotional aspects of cross-cultural communication. They note that “cross-cultural encounters have a tendency to evoke intense feelings,” including “(a) anxiety, (b) disconfirmed expectancies, (c) belonging, (d) ambiguity, and (e) confrontation.”<sup>178</sup> When reading the detached, rationalized prose that characterizes many judicial decisions, it is sometimes hard to bear in mind that the judges who write them can experience these disquieting emotional responses when confronted with an unfamiliar cultural perspective.

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<sup>174</sup> Richard Brislin & Tomok Yoshida, *Intercultural Communication Training: An Introduction* (Thousand Oaks: Sage Publications, 1994) at 30.

<sup>175</sup> *Ibid* at 31.

<sup>176</sup> *Ibid* at 40.

<sup>177</sup> *Ibid* at 31.

<sup>178</sup> *Ibid* at 37.



### 3.4 Conclusion on Cross-Cultural Communication

The literature reviewed in this section is concerned with building shared understandings across differing cultural perspectives. The scholarship highlighted here focuses on building shared moral understandings in multicultural environments. Dallmayr's typology provides a framework that helps to characterize and evaluate cross-cultural encounters. It highlights the more troubling moments of dominance, the benefits and drawbacks of indifference, and the hopeful moments of dialogical engagement. Other scholars have focused more particularly on how to achieve this more promising mode of encounter, and have emphasized values of respect and self-awareness that recur in the literature on cross-cultural communication. If, as has been argued, religious freedom claims in Canada are cross-cultural encounters,<sup>179</sup> these values can serve as useful heuristics for examining religious freedom litigation. In light of participant experiences, do the judgments under examination in this study live up to the standards of cross-cultural communication? In Chapter 5, I will argue that the cases under review contain multiple failures of cross-cultural communication, in which the courts did not appear to have fully appreciated the claimants' perspectives. However, at other points, Canadian courts have shown themselves to be capable of successfully communicating across cultural divides, providing some hope for greater cross-cultural understanding in legal contexts.

## 4 Conclusion

The literature on legal pluralism served to inspire this project's design, as it raises questions about the multi-layered lives of individuals who see themselves as bound by more than one legal system. Once the interviews were conducted, the literature on cross-cultural communication proved useful in orienting the analysis of participant narratives and judicial decisions. There are many points of contact for these separate bodies of literature. One shared interest relates to moments of interaction. Legal pluralists are, at present, chiefly interested in how various legal systems interface with and influence each other. Scholars of cross-cultural communication would likely analyze such encounters as moments of cross-cultural encounter. In addition, each body of literature contributes something unique to enrich understandings of social

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<sup>179</sup> Berger, *supra* note 111.

normativity. Legal pluralism helps fill in the descriptive puzzle by shining a light on the distinctly legal nature of some non-state normative orders. The literature in cross-cultural communication provides helpful analytical tools for the normative assessment of judgments in religious freedom, where more than a single legal culture is at play. In order to develop these different perspectives, each body of literature surveyed in this chapter will provide the foundation for a later chapter in this dissertation.

## Chapter 3 Case Backgrounds

### 1 Introduction

Chapter 1 established the justification for the selection of *Amselem*, *Multani*, and *Wilson Colony* as valuable case studies in Canadian religious freedom litigation. This chapter will give a thorough accounting of the various judicial responses to each of these cases. It will provide a foundation for later chapters, in which the interaction between the judicial decisions and the experiences of participants in the process will be more closely examined. While this project is concerned with the experiences of litigants, lawyers, intervener organizations, and expert witnesses, the holdings of the various levels of court are crucial aspects of the narrative of each case. Accordingly, Sections 2, 3 and 4 of this chapter will aim to present those holdings faithfully. Section 5 will draw out themes present in the judicial decisions that resonate most closely with the experiences of participants: overlapping legal systems, cross-cultural communication, and the connections between religious freedom and Canadian citizenship. These themes will be explored in more detail in the chapters that follow.

### 2 *Amselem*

#### 2.1 Overview

In *Amselem*, a dispute arose in a group of buildings governed by the rules of divided co-ownership<sup>1</sup> – a condominium complex, in more familiar terminology. The by-laws at the heart of the controversy prohibited “decorations, alterations and constructions” on the buildings’ balconies. The conflict arose when co-owners of three units in the buildings erected *succhoth* (singular: *succah*) on their balconies or terraces. *Succhoth* are huts constructed by some Jews during the annual holiday of *Succhoth*; according to tradition, the Israelites used temporary dwellings of this type as they wandered the desert between Egypt and Canaan. The holiday falls

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<sup>1</sup> Arts 1038-1109 CCQ.

in the autumn and lasts nine days. The condominium syndicate sought an injunction requiring these co-owners to dismantle their *succoth* on the basis of the condominium by-laws.<sup>2</sup>

The lower courts favoured the position of the syndicate of co-owners. The restrictions on the ordinary rights of ownership were justified, in the lower courts' and dissenting Supreme Court judges' view, by aesthetic and safety-related concerns. Ultimately, however, a 5-4 majority of the Supreme Court held that the religious freedom interests of the Orthodox Jewish co-owners outweighed the concerns of the other co-owners, especially given the short span of the holiday and the dearth of evidence that other co-owners were materially affected by the installation of *succoth* either in terms of safety or property value. What follows is a closer examination of the reasoning of the various courts.

## 2.2 Superior Court of Québec

At the beginning of his reasons, Justice Rochon provided some background on the religious issue at stake, noting that all of the respondents<sup>3</sup> in the case were “of the Jewish confession and practice[d] their religion in the Orthodox fashion.”<sup>4</sup> The trial judge quoted the expert witness called by the respondents to explain the “goal” of the *Succoth* holiday:

This commandment aims to revive, in the flesh, the time when the Hebrews, at their liberation from Egypt and during the 40 years of their wanderings in the desert, began, under the inspiration and protection of God, to learn how to live in freedom, preparing them for their life in the land of Israel – where they would become a people at once free and subject to the law of the Torah. One of the essential messages of the Succah is to remind us of the fragility of our being, and how it would be emotionally and physically vulnerable without attachment to God.<sup>5</sup>

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<sup>2</sup> For an analysis of *Amselem* through the lens of the common law of nuisance and the Québec civil law concept of “voisinage,” see Shauna Van Praagh, “View from the *Succah*: Religion and Neighbourly Relations” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 21.

<sup>3</sup> The syndicate of co-owners initiated the lawsuit, meaning that the parties arguing that their religious freedom was infringed were respondents in the first instance.

<sup>4</sup> *Syndicat Northcrest c Amselem*, [1998] RJQ 1892, at para 6 [*Amselem SC*] [author’s translation].

<sup>5</sup> *Ibid* at para 9 [author’s translation].

Justice Rochon then moved on to consider in some detail the complex’s declaration of co-ownership (a founding document for all condominiums in Québec), noting that even though none of the respondents had read the declaration, it nonetheless bound them once they signed it.<sup>6</sup> In particular, Justice Rochon noted the characterization of the balconies and terraces of the buildings as “common portions reserved for the exclusive use of the adjoining unit.”<sup>7</sup> Two significant consequences flow from this characterization: first, the costs of maintaining the balconies and terraces are paid by all the co-owners, and second, these portions are treated as common for the purpose of usage restrictions.<sup>8</sup>

Based on the by-laws of the building, Justice Rochon easily determined that the installation of *succoth* was prohibited. It was clear to the Court that the by-laws contained “an unequivocal intent towards uniformity and the maintenance of the building’s original appearance and condition.”<sup>9</sup> Further, the Court held that the limitations on the use of balconies and terraces were justified. In Justice Rochon’s view, the act that constituted the co-ownership had envisaged an “up market” complex;<sup>10</sup> potential purchasers were presented not only with a luxurious and prestigious building, but also a particular lifestyle.<sup>11</sup> Further, the act showed a concern for the “exterior harmony” of the building, prohibiting the use of exterior antennae, signs or advertisements, and even prohibiting the placement of objects on windowsills.<sup>12</sup> Accordingly, the Court could find no problem with the restrictions based on the law of divided co-ownership.

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<sup>6</sup> *Ibid* at para 22.

<sup>7</sup> *Ibid* para 23 [author’s translation].

<sup>8</sup> *Ibid* at paras 23, 28, 41.

<sup>9</sup> *Ibid* at para 24 [author’s translation].

<sup>10</sup> *Ibid* at para 35 [author’s translation]. Justice Rochon also referred to the quality of building materials, the arrangement of the units, the neatness of the architecture, and the concern for a harmonious exterior as elements which conferred upon the complex a character of luxury and comfort: *ibid* at para 36.

<sup>11</sup> *Ibid* at para 37 [author’s translation].

<sup>12</sup> *Ibid* at para 35 [author’s translation].

Justice Rochon then moved on to consider the claim that the restrictions on the use of balconies and terraces had been applied unevenly. The respondents argued that the syndicate occasionally tolerated the breach of these provisions with respect to Christmas trees on balconies, Christmas wreaths on the exteriors of doors, and Christmas lights on balconies, among other things.<sup>13</sup> The Court rejected this claim, finding that the syndicate had adopted a consistent policy of tolerating exceptions to the rule only if there were no complaints from other co-owners.<sup>14</sup>

Next, Justice Rochon turned his attention to the most contentious elements of the case: whether the rules restricting the placement of objects on balconies and terraces infringed the rights of religious freedom and equality of the co-owners who wished to install *succhoth*. For Justice Rochon, the contractual clause that the respondents sought to invalidate was neutral in appearance and, if it discriminated at all, did so only indirectly. Accordingly, he framed the issue in this manner:

Can one, in accordance with the requirements of good faith, purchase an apartment in a co-ownership and seek to invalidate certain clauses of the act of co-ownership, which appear neutral but infringe the religious freedom of the purchaser? Can one act in this manner if the vendor acts in good faith and knows nothing about the prejudicial effect of the clause on the rights and freedoms of the purchaser?<sup>15</sup>

To answer these questions, Justice Rochon reasoned that the respondents had to first establish that their religious freedom had been infringed. He then set forth the standard by which this claim would be tested:

To infringe religious freedom, the impugned contractual clause must, either directly or by prejudicial effect, compel a person to act contrary to his or her religious

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<sup>13</sup> *Ibid* at paras 42-43.

<sup>14</sup> *Ibid* at para 45.

<sup>15</sup> *Ibid* at para 61 [author's translation]. The Civil Code of Québec provides that "every person is bound to exercise his civil rights in good faith" and that "no right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith" (arts 6, 7 CCQ).

conviction, or prohibit the person from doing something deemed obligatory by his or her religion.<sup>16</sup>

From there, following precedent established by the Supreme Court,<sup>17</sup> Justice Rochon moved to consider the sincerity of the religious belief put forward by the respondents. However, while noting that it was not the court's task to assess the validity of a religious practice,<sup>18</sup> Justice Rochon held that the court's role in examining sincerity was to determine the content of the religious obligation.<sup>19</sup> For Justice Rochon, the respondents had to show a "rational, reasonable, and direct" connection between the religious practice and the obligational content of the religious teaching.<sup>20</sup>

Justice Rochon went on to consider the actual practices of the respondents, finding that the respondents did not consistently install *succhoth* on their own property. This fact, according to Justice Rochon, supported the conclusion that the installation of a *succah* on one's own property is an optional practice in Judaism.<sup>21</sup> In reaching this conclusion, Justice Rochon also relied heavily on the testimony proffered by Rabbi Barry Levy, an expert witness put forward by the syndicate. Justice Rochon found the testimony of the expert witness put forward by the respondents, Rabbi Moïse Ohana, less convincing. According to Rabbi Ohana, if the use of the *succah* became a chore (original: "corvée"), the spirit of the holiday would be lost and the celebrant would not have fulfilled his or her religious obligation.<sup>22</sup> Justice Rochon found this

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<sup>16</sup> *Amselem SC, ibid* at para 71 [author's translation]. This move is crucial in Justice Rochon's reasoning. Arguably without support in the case law that he cites, Justice Rochon limits religious freedom to those practices viewed as obligatory; this later formed a significant point of disagreement between Rochon J. and the majority of the Supreme Court of Canada.

<sup>17</sup> See *R v Big M Drug Mart*, [1985] 1 SCR 29 at 295.

<sup>18</sup> *Amselem SC, supra* note 4 at para 75.

<sup>19</sup> *Ibid.* See also Robert E Charney, "How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief" (2010), 51 SCLR (2d) 47.

<sup>20</sup> *Amselem SC, ibid* at para 82 [author's translation].

<sup>21</sup> *Ibid* at para 94.

<sup>22</sup> *Ibid* at para 92.

approach overly subjective, depending too much on the mental state of the individual practitioner; in his view, this would lead to a total loss of control and allow any individual to do whatever he or she wanted in the name of religion.<sup>23</sup>

At the final stage in his analysis, Justice Rochon applied the test of reasonable accommodation, borrowed from human rights law in the employment context.<sup>24</sup> Justice Rochon held that the restrictions on the use of balconies and terraces were rationally connected to the constituting act of the co-ownership, as they formed an integral part of the architectural concept for the building,<sup>25</sup> and that were valid safety concerns that justified the restrictions.<sup>26</sup> Justice Rochon went on to hold that the syndicate of co-owners had adopted a respectful attitude towards the respondents, and sought to find a reasonable accommodation from the time that the conflict arose.<sup>27</sup> Indeed, the syndicate had proposed the installation of a common *succah* in an area adjacent to the building, at the expense of all the co-owners.<sup>28</sup> For their part, the respondents failed both to adopt a flexible attitude and to convince the Court that they had truly intended to contribute to a mutually acceptable solution.<sup>29</sup> Ultimately, Justice Rochon held that the religious freedom claims of the respondents could not outweigh the contractual rights of the rest of the co-owners, which were also protected by Québec's *Charter of Human Rights and Freedoms*.<sup>30</sup> The only way for these rights to coexist was through a reasonable accommodation, which the respondents had rejected.

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<sup>23</sup> *Ibid* at para 101.

<sup>24</sup> As noted below, the Supreme Court of Canada applied this approach in *Multani*, but the application of this test was the subject of some controversy in *Wilson Colony*.

<sup>25</sup> *Amselem SC*, *supra* note 4 at para 121.

<sup>26</sup> *Ibid* at para 140.

<sup>27</sup> *Ibid* at para 123.

<sup>28</sup> *Ibid* at para 124.

<sup>29</sup> *Ibid* at para 128.

<sup>30</sup> *Ibid* at para 138.



## 2.3 Québec Court of Appeal

Three judges of the Québec Court of Appeal affirmed the result reached by the Superior Court. The Court of Appeal was not unanimous, however, in its reasons. Justice Dalphond wrote an opinion with which Justice Baudouin concurred. Justice Dalphond emphasized at the outset that the appellants (*i.e.* the Orthodox Jewish co-owners who wished to install their *sucloth*) had rejected the common *succah* proposed by the syndicate, noting that Canadian Jewish Congress had accepted this offer.<sup>31</sup>

In his legal analysis, Justice Dalphond upheld the decision of the trial judge “that the impugned clauses were adopted essentially to preserve the style and external appearance of the immovable as an upscale residential building and, alternatively, for security reasons.”<sup>32</sup> Turning to the more contentious issue of whether the appellants’ religious freedom rights were infringed, Justice Dalphond found that the appellants had “incorrectly presented the problem.”<sup>33</sup> In his view,

We should not lose sight of the fact that the impugned clauses are not found in a normative text adopted by the legislator, the government or any other power upon which the law has conferred the authority to impose norms . . . Rather, these clauses are found in a contract the appellants freely entered into upon purchasing their dwelling unit in co-ownership... With great respect for the appellants, their factum and pleadings obscure this crucial point.<sup>34</sup>

From this premise, Justice Dalphond reasoned that by agreeing to abide by the building’s by-laws, the appellants had waived their rights to religious freedom, at least with regard to the installation of items on their balconies or terraces. Such waiver could only be invalidated if the

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<sup>31</sup> *Amselem v Syndicat Northcrest*, [2002] JQ no 705 (Qc CA) (QL), at paras 92-93 [*Amselem CA*]. See Section 5.3 below for a discussion of the participation of Canadian Jewish Congress.

<sup>32</sup> *Ibid* at para 116 (unofficial translation by QL).

<sup>33</sup> *Ibid* at para 119 (unofficial translation by QL).

<sup>34</sup> *Ibid*.

contractual clauses were discriminatory within the meaning of s. 13 of Québec's *Charter of Human Rights and Freedoms*.<sup>35</sup>

Accordingly, Justice Dalphond embarked on a discrimination analysis by comparing the situation of the appellants to that of the other co-owners in the complex.<sup>36</sup> He rejected the contention that the appellants were affected differently than other co-owners. In Justice Dalphond's view,

[i]t cannot be maintained that persons of another faith do not wish just as sincerely as the Orthodox Jews to express their beliefs and perform their rites by constructing on their balconies or patios. As the appellants rightly submit, it does not fall to the courts to rule on the correct interpretation of religious precepts. Nor, I would add, is it their place to rank the beliefs held by different persons.<sup>37</sup>

Justice Dalphond concluded from this that all co-owners were similarly affected by the impugned provisions, and that the provisions were thus not discriminatory.<sup>38</sup>

Justice Dalphond went on to reason in the alternative that, even if there was differential treatment on the basis of religion,

there is discrimination and a duty to accommodate only when the rite is more than simply an act that the believer would like to practise or that would give him or her pleasure. Rather, it must be a precept that the person sincerely believes must be fulfilled in order to remain true to his or her beliefs.<sup>39</sup>

Justice Dalphond noted that the trial judge should not have preferred one expert rabbi's testimony over another, as this is not the proper role for a court. Nevertheless, he held that there was sufficient evidence to conclude, without reference to the debate between the rabbis, that the

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<sup>35</sup> *Ibid* at paras 121-122.

<sup>36</sup> *Ibid* at para 134.

<sup>37</sup> *Ibid* at para 138 (unofficial translation by QL).

<sup>38</sup> *Ibid* at para 143.

<sup>39</sup> *Ibid* at para 150 (unofficial translation by QL).

appellants wished to carry out a “moral obligation,”<sup>40</sup> and were not forced to choose “between respecting the impugned clauses and respecting a religious precept.”<sup>41</sup> Therefore, in his view, they suffered no prejudice.<sup>42</sup>

Justice Morin arrived at the same conclusion for different reasons. Like Justice Dalphond and the trial judge, Justice Morin came easily to the conclusion that the building’s declaration and by-laws prohibited the installation of *succoth* on balconies or terraces,<sup>43</sup> and that these restrictions were justified by the aesthetic concerns of an upscale complex.<sup>44</sup>

Unlike the other appellate judges, however, Justice Morin found the trial judge’s “interpretation of the notion of freedom of religion too restrictive.”<sup>45</sup> In his view, by inquiring into the correctness of the appellants’ interpretation of their religious obligation on the pretense of assessing the sincerity of their beliefs, the trial judge had departed from the prior holdings of the Supreme Court of Canada. In Justice Morin’s view,

The evidence shows that the appellants have a sincere belief, based specifically on chapter 8, verses 13 to 18 of the Book of Nehemiah in the Bible, that they must erect their own succahs and dwell in them for several days during the festival of Succot. In theory, the principle of freedom of religion should protect their right to do so.<sup>46</sup>

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<sup>40</sup> Québec Civil Law distinguishes between obligations of three intensities: moral obligations, natural obligations, and civil obligations. Moral obligations attract no legal remedies, while civil obligations have the full force of law. Natural obligations constitute an intermediary class; while legal action cannot be instituted to enforce them, if an action is performed pursuant to a natural obligation, no claim in restitution can be made by the performer of that action. See Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Les Obligations*, 5th ed (Cowansville: Les Éditions Yvon Blais Inc, 1998) at 24-26.

<sup>41</sup> *Amselem CA*, *supra* note 31 at paras 152-153 (unofficial translation by QL).

<sup>42</sup> *Ibid* at para 154.

<sup>43</sup> *Ibid* at paras 14-15.

<sup>44</sup> *Ibid* at paras 18-21.

<sup>45</sup> *Ibid* at para 26 (unofficial translation by QL).

<sup>46</sup> *Ibid* at para 33 (unofficial translation by QL).

Accordingly, in Justice Morin’s view, the restrictions on installing *succhoth* infringed the appellants’ freedom of religion.<sup>47</sup>

Justice Morin then turned to assess whether the infringements on religious freedom were justified. In so doing, he carried out an analysis of the adverse effect discrimination alleged by the appellants on the basis of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*,<sup>48</sup> a decision of the Supreme Court rendered after the trial decision in *Amselem*. Applying this analysis, he determined (1) that the syndicate had easily shown that the restrictions were rationally connected to the administration of the building; (2) that the impugned provisions “were adopted in good faith and with an honest belief that they were necessary to accomplish the legitimate purpose” of managing the building, “with no intention of discriminating against the appellants”<sup>49</sup>; and (3) that the syndicate had compromised to the point of undue hardship, as “it was the intransigent attitude adopted by the appellants who systematically refused every proposal that did not correspond precisely to their demands that made accommodation practically impossible.”<sup>50</sup> He further noted that the syndicate’s refusal to accept the appellants’ demands was based on its desire to prevent a diminution in value of the complex.<sup>51</sup>

On the basis of his determination that the appellants’ religious freedom was justifiably infringed, Justice Morin held that the appellants had not suffered discrimination, reasoning that a “clause in a contract stipulating an acceptable limit to this freedom” could not be considered

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<sup>47</sup> *Ibid* at para 35.

<sup>48</sup> [1999] 3 SCR 3 [*Meiorin*]. This case emerged in the field of labour law, and focused on the issue of *bona fide* occupational requirements. The issue was whether the aerobic requirements set for forest firefighters unfairly excluded women. The Supreme Court found adverse effect discrimination in this case and restored an arbitrator’s initial decision to reinstate the claimant.

<sup>49</sup> *Amselem CA*, *supra* note 31 at para 58 (unofficial translation by QL).

<sup>50</sup> *Ibid* at para 64 (unofficial translation by QL).

<sup>51</sup> *Ibid* at para 65 (unofficial translation by QL).

discriminatory.<sup>52</sup> Thus, despite parting ways from the other judges in their approach to religious freedom, Justice Morin arrived at the same result as the trial judge and the other appellate judges.

## 2.4 Supreme Court of Canada

The final appeal in *Amselem* divided the Supreme Court of Canada and yielded three separate opinions; five judges held that the holdings of the lower courts should be reversed while four would have upheld the result. Justice Iacobucci wrote the majority opinion. In contrast to the prior judgments, he began his opinion by noting that “[a]n important feature of our constitutional democracy is respect for minorities, which includes, of course, religious minorities.” He then neatly summed up the central aspect of his reasoning: “I find that the impairment of the appellants’ religious freedom is serious whereas I conclude that the intrusion on the respondent’s rights is minimal.”<sup>53</sup>

Justice Iacobucci also adopted a different version of case’s factual narrative. While the lower courts characterized the appellants as intransigent, Justice Iacobucci emphasized that

Mr. Amselem, of his own accord and in his personal capacity, contacted the Canadian Jewish Congress (which incidentally represented that it is not an organization that claims to be expert in matters of Jewish law) to intervene with the Syndicat in order to help facilitate a temporary solution for the upcoming holiday.<sup>54</sup>

Justice Iacobucci’s narrative of the failed compromise continues in similar fashion, noting that the appellants “explained why a communal succah would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs.”<sup>55</sup>

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<sup>52</sup> *Ibid* at para 83.

<sup>53</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47, at paras 1, 3 (Iacobucci J) [*Amselem SCC*].

<sup>54</sup> *Ibid* at para 12 (Iacobucci J).

<sup>55</sup> *Ibid* at para 14 (Iacobucci J). Iacobucci J continued, at para 15, to paint a more sympathetic picture of the appellants, noting that they undertook to set up their *Succoth* “in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way” and that the “Syndicat refused their request.” For more discussion of the Canadian Jewish Congress’s role, see section 5.3 below.

Justice Iacobucci also framed the legal issues differently than the lower court judges; in his view, the issues were (1) whether the by-laws infringed the appellants' freedom of religion; (2) if so, whether the restrictions were justified by the other co-owners' property rights; and (3) whether the appellants had waived their rights to religious freedom by signing the declaration of co-ownership.<sup>56</sup>

In order to address the issue of religious freedom, Justice Iacobucci held that it was necessary to define religion. He proffered this definition:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In 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.<sup>57</sup>

In accordance with this definition, Justice Iacobucci adopted "a personal or subjective conception of freedom of religion . . . [which is] a function of personal autonomy and choice."<sup>58</sup> This emphasis on subjectivity and choice led to the holding that "claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are

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<sup>56</sup> *Ibid* at para 35 (Iacobucci J).

<sup>57</sup> *Ibid* at para 39 (Iacobucci J). The subjective definition of religion parallels the definition of religious freedom proffered by B'Nai Brith Canada, a Jewish community organization that intervened in the case. In oral argument, counsel for B'nai Brith said: "The *Canadian Charter*, as well as the *Quebec Charter*, protects freedom of religion. It does not protect freedom of mainstream views of religion, nor does it protect freedom of established religion, it protects one's belief, one's personally held beliefs, the rules that one uses to guide one's own conscience and one's life": Transcript of Oral Argument at 22 (Steven Slimovitch for B'Nai Brith Canada). Notably, in response to this line of argument, Justice Iacobucci asked a number of questions exploring the limits of this subjective definition: Transcript of Oral Argument at 24-25.

<sup>58</sup> *Ibid* at para 42. Interestingly, despite the use of the language of autonomy and choice here, Sébastien Grammond has argued that the Supreme Court sees the act of adhering to a religion as not purely voluntary, but as deeply connected to an individual's identity. This logic, he claims, explains the majority's decision in *Amselem* and makes it possible for the Court to redistribute the economic burdens that flow from religious obligations: Sébastien Grammond, "Conceptions canadienne et québécoise des droits fondamentaux et de la religion : convergence ou conflit?" (2009) 43 RJT 83 at para 23. For an account of religious freedom in the American context that deals with religious traditions that challenge the notion of individual choice by ascribing spiritual consequences to actions beyond the control of adherents, see David C Williams & Susan H Williams, "Volitionalism and Religious Liberty" (1991) 76 Cornell L Rev 769.

objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.”<sup>59</sup> Moreover, Justice Iacobucci held that religious freedom included obligatory *and* voluntary religious practices; for him, “[i]t is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection.”<sup>60</sup> This view was further justified by the claim that the determination of whether a religious practice was mandatory would, in itself, “require courts to interfere with profoundly personal beliefs . . . courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, ‘obligation’, precept, ‘commandment’, custom or ritual.”<sup>61</sup> In sum, in order to engage the protection of religious freedom, all that religious freedom claimants need to prove is the sincerity of their beliefs.<sup>62</sup>

However, this did not end the religious freedom analysis. A court faced with a religious freedom claim, according to Justice Iacobucci, must then “ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*.”<sup>63</sup> The right of religious freedom is not absolute; a claimant must show that the interference is “non-trivial.”<sup>64</sup>

Applying this analytical framework to the facts, Justice Iacobucci found two major flaws in the analyses of the courts below. First, Justice Iacobucci held that the Superior Court ought not to have chosen between the competing interpretations of Jewish law presented at trial. Second,

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<sup>59</sup> *Amselem SCC*, *ibid* at para 43.

<sup>60</sup> *Ibid* at para 47.

<sup>61</sup> *Ibid* at paras 49-50.

<sup>62</sup> *Ibid* at para 44.

<sup>63</sup> *Ibid* at para 57.

<sup>64</sup> *Ibid* at para 58.

neither the Superior Court nor the Court of Appeal should have based their findings on the perceived “objective obligatory requirements of Judaism.”<sup>65</sup>

Justice Iacobucci held that the appellant’s had shown a subjective belief that the installation of a *succah* on their balconies had a nexus with religion.<sup>66</sup> Justice Iacobucci then assessed the severity of the by-laws’ interference with the appellants’ religious freedom rights. For Mr. Amselem, who had in fact shown a sincere belief in the obligation to build a *succah* on his own property, “a prohibition against setting up his own *succah* obliterates the substance of his right.”<sup>67</sup> The other appellants had testified to the distress that would have been caused by the proposed communal *succah*, namely: imposing upon others, carrying food and dishes at every meal for nine days (and on some of these, being unable to use the elevator because of other religious obligations), and the inability to have an intimate celebration with one’s own family.<sup>68</sup> Justice Iacobucci held that the appellants had successfully proven that the interference with religious practice was non-trivial.

Next, Justice Iacobucci rejected the syndicate’s claim that the other co-owners’ property and personal security rights justified the infringement of the appellants’ right to freedom of religion. In Justice Iacobucci’s view, the syndicate had not adduced enough evidence to justify its claim that the installation of *succhoth* for nine days per year would decrease the property

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<sup>65</sup> *Ibid* at para 66. Indeed, at para 77, Justice Iacobucci pressed this point, holding that

any incorporation of distinctions between “obligation” and “custom” or, as made by the respondent and the courts below, between “objective obligation” and “subjective obligation or belief” within the framework of a religious freedom analysis is dubious, unwarranted and unduly restrictive... It is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine.

At para 68, he went on to cite a list of religious practices which, though not strictly obligatory, should nonetheless be covered by the religious freedom guarantee: women dwelling in a *succah*, Jews wearing a *yarmulke* (head covering), and Sikhs wearing a turban.

<sup>66</sup> *Ibid* at paras 71-73.

<sup>67</sup> *Ibid* at para 74.

<sup>68</sup> *Ibid* at paras 76-77. Justice Iacobucci also supported his holding by reliance on the alternative argument that the appellants had an acknowledged religious obligation to dwell in “a *succah*,” and “the impugned clauses constrain their rights to dwell in a *succah* in a manner that is non-trivial or not insubstantial (at para 78).”



value.<sup>69</sup> With respect to the aesthetic concerns of the syndicate, Justice Iacobucci took the view that, “the potential annoyance caused by a few succahs being set up for a period of nine days each year would undoubtedly be quite trivial.”<sup>70</sup> Further, Justice Iacobucci held that the appellants had answered the security concerns of the syndicate by offering to set up their *sucloth* so as not to obstruct fire lanes or exit doors.<sup>71</sup> Justice Iacobucci supported this analysis by relying on the values of “respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities”; in a country where such principles are advertised, he wrote, “the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants’ religious freedom is unacceptable.”<sup>72</sup>

Finally, Justice Iacobucci examined the claim that the appellants had waived their right to religious freedom. He found the waiver ineffective, relying on an ambiguity in the by-laws and, perhaps more directly, the view that the waiver was not truly voluntary because the appellants “had no choice but to sign the declaration of co-ownership in order to live” at the complex.<sup>73</sup> Moreover, in his view, a waiver of a fundamental right would have had to be articulated in more explicit terms.<sup>74</sup> In accordance with this analysis, Justice Iacobucci ruled for the appellants, overturning the lower courts’ decisions.

Justice Bastarache wrote a dissenting view with which Justices LeBel and Deschamps concurred. The crux of Justice Bastarache’s disagreement with the majority was his definition of the scope of religious freedom. For him, “a religion is a system of beliefs and practices based on certain religious precepts. A nexus between personal beliefs and the religion’s precepts must

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<sup>69</sup> *Ibid* at para 85.

<sup>70</sup> *Ibid* at para 86.

<sup>71</sup> *Ibid* at para 89.

<sup>72</sup> *Ibid* at para 87.

<sup>73</sup> *Ibid* at para 98.

<sup>74</sup> *Ibid* at para 100.

therefore be established.”<sup>75</sup> Eschewing Justice Iacobucci’s purely subjective approach, Justice Bastarache held that religious precepts are objectively identifiable, and that a religious practice must be “genuinely connected” to these precepts in order to receive protection under religious freedom.<sup>76</sup> Among other things, this test adds a communal element to the threshold test of religious freedom, as claimants must establish that at least some co-religionists share their beliefs.<sup>77</sup>

On the basis of this position, Justice Bastarache laid out a four-step analysis for religious freedom claims. First, the person seeking the protection of religious freedom must establish a “reasonable belief in the existence of a religious precept,”<sup>78</sup> and show that the practice dependent on the precept is mandatory in nature.<sup>79</sup> Second, the court adds a subjective element to the test by assessing the sincerity of the claimant’s belief.<sup>80</sup> Third, the claimant must show that his or her religious practice conflicts with some other legal obligation;<sup>81</sup> in this respect, like the majority, Justice Bastarache held that the infringement on the claimant’s freedom of religion must be more than trivial in order to merit *Charter* protection.<sup>82</sup> Finally, Justice Bastarache noted that, even if a practice meets these three criteria, it may still be limited by other concerns such as “the

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<sup>75</sup> *Ibid* at para 135.

<sup>76</sup> *Ibid* at para 135.

<sup>77</sup> Justice Bastarache went on to note that “although private beliefs have a purely personal aspect, the [manifestation of beliefs] has genuine social significance and involves a relationship with others”: *ibid* at para 137.

<sup>78</sup> *Ibid* at para 140. The term “reasonable” imports an objective element into the analysis, and means that the claimant must rely on an objectively identifiable religious precept.

<sup>79</sup> *Ibid* at paras 138, 144.

<sup>80</sup> *Ibid* at para 141.

<sup>81</sup> *Ibid* at para 144.

<sup>82</sup> *Ibid* at para 145.

requirements of security, public order and the general well-being of citizens,”<sup>83</sup> or, in an alternative articulation, “democratic values, public order, and the general well-being.”<sup>84</sup>

Applying the framework to this case, Justice Bastarache came to the same conclusion as the courts below. Like them, he found that the building’s by-laws prohibited the installation of *sucloth*. Also like the courts below, he concluded “that the appellants sincerely believe that, whenever possible, it would be preferable for them to erect their own succahs; however, it would not be a divergence from their religious precept to accept another solution, so long as the fundamental obligation of eating their meals in a succah was discharged.”<sup>85</sup> Accordingly, he found that the installation of *sucloth* on balconies and terraces was a non-mandatory matter of convenience, and did not satisfy the first criterion of his test.

With respect to one of the appellants (Mr. Amselem), however, Justice Bastarache was prepared to assume a sincere belief in an obligation to install a *succah* on his own property, based on a religious precept arising from biblical verses.<sup>86</sup> On the basis of this assumption, Justice Bastarache proceeded to analyze whether the limitation on this practice was justified.<sup>87</sup> He began this analysis by setting out the competing rights at issue which would require reconciliation: “Mr. Amselem’s freedom of religion is in conflict with the right of each of the other co-owners to the peaceful enjoyment and free disposition of their property under s. 6 of the Quebec *Charter* and their right to life and to personal security under s. 1 thereof.”<sup>88</sup> Justice Bastarache further held that the parties’ contractual rights, the application of the *Civil Code of*

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<sup>83</sup> *Ibid* at para 146. Justice Bastarache then gave a lengthy review of the case law on the balancing provision of the Québec *Charter of Human Rights and Freedoms*, RSQ, c C-12, s 9.1 (at paras 147-157).

<sup>84</sup> *Ibid* at para 155.

<sup>85</sup> *Ibid* at para 162.

<sup>86</sup> *Ibid* at para 163.

<sup>87</sup> Notably, Bastarache J later held that the concept of reasonable accommodation was not applicable in carrying out the justificatory analysis under s 9.1 of Quebec’s *Charter*, *ibid* at para 170.

<sup>88</sup> *Ibid* at para 165.

*Québec*, and the negotiations that took place between the parties also had to be taken into account.

In reconciling the competing rights, Justice Bastarache first held that the total ban on erecting anything on balconies and terraces was necessary to meet the goal of “preserving the building’s style and its aesthetic appearance of a luxury building, not to mention the use of the balconies to evacuate the building in a dangerous situation.”<sup>89</sup> As such, when the appellants installed *succoth* on their balconies, they were infringing all of the other co-owners’ property and contractual rights, as well as their right to personal security protected by s. 1 of the *Québec Charter*.<sup>90</sup> Moreover, Justice Bastarache noted that Mr. Amselem had at one point accepted the communal *succah* compromise, which was also seen as reasonable by the Canadian Jewish Congress.<sup>91</sup> The appellants eventually rejected the compromise. For Justice Bastarache, this showed that they were unwilling to meet their own obligations to contribute to a solution.<sup>92</sup> Ultimately, Justice Bastarache concluded that the infringement of Mr. Amselem’s religious freedom was justified.

Justice Binnie dissented on different grounds, with the contractual relationship between the co-owners of the building complex as the focus of his analysis.<sup>93</sup> In his view, the appellants were in the best position to know the requirements of their religious beliefs, and had a choice of buildings in which to purchase units. Even if they did not read the by-laws of the building, they had agreed to abide by them.<sup>94</sup> For Justice Binnie, the approach adopted by the majority went

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<sup>89</sup> *Ibid* at para 166.

<sup>90</sup> In the case of security rights, Bastarache J also noted the syndicate’s interest in maintaining its insurance coverage, *ibid* at para 171.

<sup>91</sup> *Ibid* at para 176.

<sup>92</sup> Justice Bastarache found that the obligation to compromise is imposed by the preambles of the *Québec Charter* and *Civil Code*, which state that the rights of individuals must be exercised in harmony with the rights of others: *ibid* at para 177.

<sup>93</sup> *Ibid* at para 184.

<sup>94</sup> *Ibid* at para 185.

“too far in relieving private citizens of the responsibility for ordering their own affairs under contracts which they choose to enter into and upon which other people rely.”<sup>95</sup>

Although Justice Binnie accepted that the appellants’ beliefs were based on religious precepts and that there was a conflict between these beliefs and the building’s rules, none of these rules were aimed at discriminating against observant Jews. They “simply express[ed] a certain style of architectural austerity or collective anonymity which the co-owners wanted to present to the world in a building shorn of any external display of individual personality.”<sup>96</sup> Justice Binnie found that the appellants’ objections to the application of these rules were unreasonable<sup>97</sup> because, according to Mr. Amselem’s testimony (whose views were the strictest on the use of a personal *succah*), it was indeed possible to celebrate the holiday in a communal *succah* where a personal *succah* was unavailable.<sup>98</sup> Accordingly, Justice Binnie would have dismissed the appeal.

### 3 *Multani*

#### 3.1 Overview

The dispute in *Multani* centred on whether a student in a public secondary school would be allowed to carry a *kirpan*, a ritual object carried by some Orthodox, baptized Sikhs that resembles a dagger. The student, Gurbaj Singh Multani, was 11 years old and a recent immigrant to Canada when he accidentally dropped his *kirpan* on school grounds.<sup>99</sup> A dizzying array of administrative actors became involved as the issue escalated. At first, the school principal told Gurbaj Singh that he would have to leave the *kirpan* with her during school hours, or he would

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<sup>95</sup> *Ibid* at para 207.

<sup>96</sup> *Ibid* at para 195.

<sup>97</sup> As assessed “from the perspective of a reasonable person in the position of the appellants with full knowledge of the relevant facts,” *ibid* at para 198.

<sup>98</sup> *Ibid* at paras 199-205.

<sup>99</sup> Litigant 1 Interview; *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256 at para 3 [*Multani SCC*].

have to go home.<sup>100</sup> Then, after negotiations, the local school board and the Multani family eventually agreed that Gurbaj Singh would wear the *kirpan* secured in a particular way under his clothing.<sup>101</sup>

The school's governing board, however, refused to ratify the agreement, on the basis that the *kirpan* violated the "no weapons" policy outlined in the school's *Code de Vie* (code of conduct); the school's council of commissioners affirmed the governing board's decision.<sup>102</sup> The council offered instead that Gurbaj Singh could wear a symbolic *kirpan* in the form of a pendant.<sup>103</sup> The Multani family took the matter to the Québec Superior Court, where they obtained a judgment authorizing Gurbaj Singh to wear his *kirpan* in school under certain conditions. The Québec Court of Appeal overturned, reinstating the decision of the council of commissioners. The Supreme Court reversed again, ruling that Gurbaj Singh Multani's right to religious freedom included the right to wear a *kirpan* in school. Notably, however, by the time that the Supreme Court rendered its judgment, Gurbaj Singh Multani was in his final year of secondary education at the private high school he had been attending since the issue arose; he opted to stay in that school until he graduated.<sup>104</sup>

While the *Multani* case may have raised more sensitive issues and led to greater public debate than *Amselem*, lawyers involved in *Multani* saw the legal issues as less complex than

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<sup>100</sup> Litigant 1 Interview.

<sup>101</sup> *Multani SCC*, *supra* note 99 at para 3.

<sup>102</sup> *Ibid* at paras 4-5. José Woehrling and Robert Charney have both expressed sympathy for administrative actors such as school officials, who are confronted with religious freedom claims and have neither the authority nor the means to conduct a profound examination of a claimant's sincerity. In Charney's view, the state should in some cases be permitted "to test for membership in a bona fide religious community": Charney, *supra* note 19 at 70. For Woehrling, the best solution for them is to craft policies in consultation with religious leaders and other experts in order to take into account the religious practices considered to truly and objectively exist by the relevant faith communities: José Woehrling, "Quelle place pour la religion dans les institutions publiques?" in Jean-François-Gaudreault-Desbiens, ed, *Le Droit, La Religion et le « Raisonnable » : Le fait religieux entre monisme étatique et pluralisme juridique* (Montréal: Éditions Thémis, 2009) 115 at 163.

<sup>103</sup> *Multani SCC*, *supra* note 99 at para 5.

<sup>104</sup> Litigant 1 Interview. As discussed more fully below in Section 5.2, though the Multani family was successful at the Superior Court, Gurbaj never re-enrolled in the public school due to protests led by other parents of students in the school.

*Amselem*. For them, the issues in *Multani* were essentially evidentiary, coming down to whether the school board could prove that the *kirpan* was dangerous.<sup>105</sup> The *Amselem* decision had already taken the larger jurisprudential steps of establishing that religious freedom would be treated entirely subjectively and extending the protection of religious freedom to non-obligatory religious practices. Given this, and the well-established place of the *kirpan* in the *Sikh* tradition, there was no serious argument made in *Multani* regarding the religious nature of the *kirpan* once the case came before the courts. Among other things, then, *Multani* demonstrates the various layers of meaning inherent in a single dispute: for the players in *Multani*, the significance of the issues was enormous; for the law of religious freedom, less so. In the rest of this section, I will give a detailed treatment of each of the decisions in the *Multani* litigation, as I did above for *Amselem*.

### 3.2 Superior Court of Québec

The *Multani* litigants appeared twice before the Superior Court of Québec, once in interlocutory proceedings designed to give a temporary ruling, and the second time in trial proceedings designed to resolve the dispute. In the interlocutory proceedings,<sup>106</sup> Justice Tellier described the *kirpan* as a “knife with a curved blade which can be several centimetres long” and which “all members of the Sikh religion must wear at all times, even while sleeping.”<sup>107</sup> The judge noted that Gurbaj Singh Multani was in his first year of secondary education (Grade 7) and was in a class designed to facilitate his learning of the French language.<sup>108</sup>

Justice Tellier granted the Multanis interlocutory relief. The Court was convinced that Gurbaj Singh would suffer a prejudice if the injunction were not granted, as his school year would be interrupted and potentially compromised, as would his ability to acquire French

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<sup>105</sup> Lawyer 2 Interview; Lawyer 3 Interview.

<sup>106</sup> *Multani (tuteur de) c Commission scolaire Marguerite-Bourgeois*, [2002] JQ No 619 (Qc SC) (QL) [*Multani Interlocutory*].

<sup>107</sup> *Ibid* at para 4 (author’s translation).

<sup>108</sup> *Ibid* at para 5 (author’s translation).

language skills.<sup>109</sup> Without the injunction, Gurbaj Singh would suffer the loss of a school year, and the family would have an adolescent confined to the house while still too young to work.<sup>110</sup> The school commission, on the other hand, would not suffer a major inconvenience if the Court ordered that Gurbaj Singh be reinstated into his class, as the conditions agreed to between the principal and the family would address the commission's security concerns.<sup>111</sup> Finally, the Court considered whether the best remedy would be to order that Gurbaj Singh be reinstated in his school, or alternatively, to order the school to provide home schooling. Justice Tellier decided that the right to attend school included more than just the right to private lessons; it also included the right to “go to school, attend classes with other students, find friends, and participate in the all the school's activities.”<sup>112</sup> In accordance with this analysis, the Court ordered that Gurbaj Singh be reinstated until the Superior Court reached a more final decision.

When the matter came to trial before Justice Grenier of the Superior Court, she encouraged the parties to come to a compromise.<sup>113</sup> From her reasons, it appears that the Multanis and the Commission were indeed able to find common ground: counsel for the Commission suggested a wooden sheath for the *kirpan*, and counsel for the Multanis accepted.<sup>114</sup> Counsel for the Attorney General of Québec, however, did not approve of this compromise, stating that the Attorney General had a zero tolerance policy for edged weapons (“armes blanches”) in schools.<sup>115</sup> Ultimately, Justice Grenier made an order permitting Gurbaj Singh to attend his school under the following conditions:

- The *kirpan* would be worn underneath the clothing;

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<sup>109</sup> *Ibid* at para 25.

<sup>110</sup> *Ibid* at para 27.

<sup>111</sup> *Ibid* at para 28.

<sup>112</sup> *Ibid* at para 33.

<sup>113</sup> Lawyer 2 Interview.

<sup>114</sup> *Multani (tuteur de) c Commission scolaire Marguerite-Bourgeois*, [2002] JQ No 1131 (Qc SC) (QL) at para 4 [*Multani SC*].

<sup>115</sup> *Ibid* at para 5.



- The *kirpan* would be contained in a wooden sheath;
- The *kirpan* would be placed in its sheath, enveloped and sewn in a secure fashion in a solid piece of fabric which would be sewn to the *guthra* (shoulder strap);
- School personnel would be able to verify that the conditions were respected;
- Gurbaj Singh would not be allowed to leave his *kirpan* and its disappearance would be reported to authorities; and
- If Gurbaj Singh did not respect these conditions, he would lose the right to wear his *kirpan* to school.<sup>116</sup>

### 3.3 Québec Court of Appeal

Justice Lemelin wrote the opinion overturning the Québec Superior Court’s judgment for a unanimous Québec Court of Appeal.<sup>117</sup> In addition, in this instance, the World Sikh Organization (WSO) participated as an intervener. Unlike the Superior Court, Justice Lemelin pointed out that, before the case went to court, the Commission had proposed that Gurbaj Singh Multani be allowed to wear a symbolic *kirpan* in the form of a pendant “or in any other form and of a material that would make it harmless.”<sup>118</sup> She also noted that the interlocutory injunction “did not please some of the parents and caused a controversy that was picked up on by the press.”<sup>119</sup>

Justice Lemelin found that the Commission’s actions had infringed Gurbaj Singh Multani’s freedom of religion. She found that his religious belief was sincere,<sup>120</sup> and held that

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<sup>116</sup> *Ibid* at para 7.

<sup>117</sup> *Commission Scolaire Marguerite-Bourgeoys v Singh Multani*, 2004 CanLII 31405, 241 DLR (4<sup>th</sup>) 336 (unofficial translation) (Qc CA) [*Multani CA*]. The Commission appealed the judgment of Justice Grenier, arguing that it had not in fact agreed to the accommodation in Justice Grenier’s order, and the Attorney General of Québec also appealed the decision (at para 21). Justice Lemelin accepted the Commission’s position that it had not acceded to the accommodation described in the Superior Court’s judgment (at para 31).

<sup>118</sup> *Ibid* at para 12.

<sup>119</sup> *Ibid* at para 14.

<sup>120</sup> *Ibid* at para 70.

“by uniformly applying the rule prohibiting the carrying of a weapon or dangerous object to school and by refusing to make an exception for Gurbaj Singh, [the Commission] has prevented him from following a tenet of his religion.”<sup>121</sup>

However, Justice Lemelin found that the Commission had fulfilled its duty to accommodate. The Commission had an urgent objective in prohibiting Gurbaj Singh from wearing his *kirpan*: ensuring the safety of students and staff.<sup>122</sup> Citing previous cases where the *kirpan* was excluded from a courtroom and from airplanes,<sup>123</sup> Justice Lemelin was “unable to convince [her]self that the safety imperatives should be less stringent at school than in courts of justice or in airplanes.”<sup>124</sup> Furthermore, in her view, the Commission was justified in excluding an “inherently dangerous”<sup>125</sup> object such as the *kirpan* which, “[s]tripped of its symbolic religious significance... has all of the physical characteristics of an edged weapon.”<sup>126</sup> She also relied on the evidence of a psychoeducator, who had testified that when other students know that a student wears a *kirpan*, they may “believe it is necessary to bring a knife to school to defend

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<sup>121</sup> *Ibid* at para 64. A central thrust of the Multanis’ argument was that the policy was not applied uniformly, as potentially dangerous objects like baseball bats, geometry compasses, and scissors were not excluded from the school.

<sup>122</sup> *Ibid* at para 77. Justice Lemelin also noted the “undisputed evidence” before the Court that violent incidents involving dangerous objects were on the rise (at para 84).

<sup>123</sup> See *R v Hothi et al* (1985), 33 Man R (2d) 180 (QB), aff’d (1985), 35 Man.R. (2d) 159 and *Nijjar v Canada 3000 Airlines Ltd.* (1999), 36 CHRR 0/76 (CHRT).

<sup>124</sup> *Multani CA*, *supra* note 117 at para 84. Justice Lemelin held that by proposing measures that would impede access to the *kirpan*, the Multanis had effectively acknowledged its dangerousness (at para 90). This logic puts the Multanis in an unenviable position. If they had not offered a compromise, they risked being seen as intransigent, as had the *Amselem* litigants (the Québec Court of Appeal ruling in *Amselem* still stood when *Multani* reached the Court of Appeal); by offering a compromise, in Justice Lemelin’s view, they admitted that the *kirpan* was dangerous. In oral argument, counsel for the Multani family described this as a “catch-22”: *Multani SCC*, *supra* note 99, Transcript of Oral Argument at 13 (Julius Grey for Balvir Singh Multani *et al.*).

<sup>125</sup> *Multani CA*, *ibid* at para 87.

<sup>126</sup> *Ibid* at para 89.

[themselves] ... in case of a fight.”<sup>127</sup> Ultimately, Justice Lemelin held that the risks posed by the *kirpan* made the Commission’s position reasonable.<sup>128</sup>

### 3.4 Supreme Court of Canada

Eight judges<sup>129</sup> of the Supreme Court of Canada agreed that the Court of Appeal’s decision should be overturned, but they divided on the reasons why. Justice Charron wrote the majority opinion. The main difference between her views and those of the minority judges was whether the appropriate approach to the case was through administrative law or constitutional law principles. In Justice Charron’s view, relying entirely on administrative law principles to decide a claim based on the *Charter* “could well reduce the fundamental rights and freedoms guaranteed by the *Canadian Charter* to mere administrative law principles or, at the very least, cause confusion between the two.”<sup>130</sup> It followed, in Justice Charron’s view, that the Court of Appeal had erred in reviewing the Commission’s decision only on the standard of reasonableness; it should instead have held the Commission to the standard of correctness.<sup>131</sup> Justice Charron also differed from Justices Deschamps and Abella in holding that the justificatory framework of s. 1 of the *Canadian Charter* applied regardless of whether a claimant was challenging a rule or, as in this case, the application of a rule.<sup>132</sup> In Justice Charron’s view,

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<sup>127</sup> *Ibid* at para 97.

<sup>128</sup> *Ibid* at para 100.

<sup>129</sup> Though Justice Major was present at the hearing, he took no part in the judgment.

<sup>130</sup> *Multani SCC*, *supra* note 99 at para 16.

<sup>131</sup> *Ibid* at para 20.

<sup>132</sup> *Ibid* at para 21. At para 28, Charron J explained the difference between this case and religious freedom cases in which the s 1 framework was not applied as follows:

It is important to distinguish these decisions from the ones in which the Court did not conduct a s. 1 analysis because there was no conflict of fundamental rights. For example, in *Trinity Western University*, the Court, asked to resolve a potential conflict between religious freedoms and equality rights, concluded that a proper delineation of the rights involved would make it possible to avoid any conflict in that case. Likewise, in *Amselem*, a case concerning the *Quebec Charter*, the Court refused to pit freedom of religion against the right to peaceful enjoyment and free disposition of property, because the impact on the latter was considered “at best, minimal” (para. 64). Logically, where there is not an apparent infringement of more than one fundamental right, no reconciliation is necessary at the initial stage.

“a contextual analysis under s. 1 will enable us to balance the relevant competing values in a more comprehensive manner.”<sup>133</sup>

Justice Charron went on to analyze the nature of the infringement on religious freedom in this case.<sup>134</sup> In addressing the nature of the practice, Justice Charron took issue with the Commission’s characterization of the *kirpan* as a weapon. In her view,

while the kirpan undeniably has characteristics of a bladed weapon capable of wounding or killing a person, this submission disregards the fact that, for orthodox Sikhs, the kirpan is above all a religious symbol. Chaplain Manjit Singh mentions in his affidavit that the word “kirpan” comes from “kirpa”, meaning “mercy” and “kindness”, and “aan”, meaning “honour”. There is no denying that this religious object could be used wrongly to wound or even kill someone, but the question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan.<sup>135</sup>

She held that consideration of the potential dangerousness of the *kirpan* was best reserved for the s. 1 analysis, in which she would reconcile competing values.

Justice Charron then held that Gurbaj Singh had established a sincere belief in wearing the *kirpan*. Furthermore, she held that infringement on religious freedom was not trivial; this was evidenced by the fact that, when “[f]orced to choose between leaving his kirpan at home and leaving the public school system, Gurbaj Singh decided to follow his religious convictions” and began to attend a private school where he could wear his *kirpan*.<sup>136</sup>

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<sup>133</sup> *Ibid* at para 29.

<sup>134</sup> Interestingly, despite the majority view in *Amselem* that constitutional protection extended to mandatory and non-mandatory religious practices, Justice Charron held that a claimant must “show that he or she sincerely believes that a certain belief or practice is *required* by his or her religion”: *ibid* at para 35 (emphasis added). This variation did not impact the result in *Multani*, as the mandatory nature of the *kirpan* practice in Sikhism was uncontested (at para 36).

<sup>135</sup> *Ibid* at para 37.

<sup>136</sup> *Ibid* at paras 39-40.

Having found a clear infringement of religious freedom, Justice Charron applied s. 1 of the *Charter*, employing the well-known *Oakes* test.<sup>137</sup> In so doing, she found that the objective of securing school safety was “sufficiently important to warrant overriding a constitutionally protected right or freedom.”<sup>138</sup> However, Justice Charron found that the standard applied in schools was one of reasonable safety, not absolute safety. The school did not, for example, install metal detectors or prohibit all potentially dangerous objects “such as scissors, compasses, baseball bats and table knives in the cafeteria,” nor did it permanently expel students who exhibited violent behaviour.<sup>139</sup>

In determining whether the government action minimally impaired Gurbaj Singh’s right to religious freedom, Justice Charron drew on the test for “reasonable accommodation” that the Court of Appeal had applied.<sup>140</sup> She noted that Gurbaj Singh had adopted a flexible attitude towards wearing the *kirpan* and had agreed to the restrictions incorporated into the Superior Court’s judgment; she thus determined that the Commission had to prove that an absolute prohibition was necessary to ensure a reasonable level of safety.<sup>141</sup>

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<sup>137</sup> See *R v Oakes*, [1986] 1 SCR 103. This case is foundational in outlining the analytical framework for s. 1 of the Canadian *Charter*. Once a *Charter* claimant has established an infringement of a right, the relevant level of government must show (1) that it had a pressing and substantial objective motivating its action; and (2) that the measure is reasonable and demonstrably justified. In establishing (2), the government must show (a) that the measure is rationally connected to the objective; (b) that the infringed rights are impaired as minimally as possible to allow for the achievement of the objective; and (c) that the salutary effects of the law outweigh its deleterious effects, see also *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835.

<sup>138</sup> *Multani SCC*, *supra* note 99 at para 45.

<sup>139</sup> *Ibid* at para 46.

<sup>140</sup> *Ibid* at paras 52-53. The application of the “reasonable accommodation” test in the context of religious freedom became a significant issue in the *Wilson Colony* decision discussed below. The words took on particular significance in Québec, where controversies surrounding “reasonable accommodation” led to the government’s creation of the Bouchard-Taylor Commission and its Report: Québec, Commission de consultation sur les pratiques d’accommodement reliées aux différences culturelles, *Building the Future: A Time for Reconciliation* (Québec: Gouvernement du Québec, 2008) at 19-20 (Co-Chairs: Gérard Bouchard & Charles Taylor).

<sup>141</sup> *Multani SCC*, *ibid* at para 54.

Justice Charron then held that the evidence showed that Gurbaj Singh did not have behavioural problems and had never used violence in school.<sup>142</sup> Further, she evaluated the risk that another student would take the *kirpan* away from Gurbaj Singh as “quite low,” especially given the restrictions that Justice Grenier had imposed.<sup>143</sup> More importantly, Justice Charron underlined that “over the 100 years since Sikhs have been attending schools in Canada, not a single violent incident related to the presence of kirpans in schools has been reported.”<sup>144</sup> Justice Charron then distinguished the cases cited by the Commission in which *kirpans* were banned from airplanes and a courtroom; in the former case, the claimant’s sincerity of belief was not established, and in the latter, the wearer of the *kirpan* had been accused of assault, implying at least reasonable grounds to believe that he had committed a violent act.<sup>145</sup> Moreover, in the case of a school, the *kirpan*-wearer has an ongoing relationship with the administrators. On the basis of these considerations, Justice Charron held that the Commission had failed to provide unequivocal evidence for its safety concerns, and could thus not justify the absolute prohibition on *kirpans*.

Justice Charron also rejected the Commission’s claim that the *kirpan* was a symbol of violence that would poison the school environment. Instead, Justice Charron held that allowing the *kirpan* in school would symbolize religious tolerance, a “very important value in Canadian society”; indeed, according to Justice Charron, schools are obligated to instill this value in their students.<sup>146</sup> The absolute prohibition adopted by the school would, in Justice Charron’s view,

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<sup>142</sup> *Ibid* at para 57.

<sup>143</sup> *Ibid* at para 58.

<sup>144</sup> *Ibid* at para 59.

<sup>145</sup> *Ibid* at paras 63-64.

<sup>146</sup> *Ibid* at para 76. Benjamin Berger has argued that the emphasis on tolerance “exhausts itself juridically at the -- now capacious and, hence, largely analytically vacant -- s. 2(a) stage of the analysis.” For Berger, tolerance collapses once courts begin their “means-end proportionality analysis.” See Benjamin L Berger, “The Cultural Limits of Legal Tolerance” (2008) 21 Can JL & Juris 245 at 257. On the notion of tolerance in the liberal state more generally, Joseph Raz has written that “[t]here is no room for talk of a majority tolerating the minorities. A political society, a state, consists - if it is multicultural - of diverse communities and belongs to none of them”: Joseph Raz, “Multiculturalism: A Liberal Perspective” (1994) Dissent 67 at 69. See also Wendy Brown, *Regulating Aversion:*

“stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others”<sup>147</sup> and send “students the message that some religious practices do not merit the same protection as others.”<sup>148</sup>

When it came to issuing a remedy, Justice Charron noted that Gurbaj Singh no longer attended the public school.<sup>149</sup> Accordingly, she simply declared the Commission’s decision to prohibit the *kirpan* to be null.

Justices Deschamps and Abella reached the same conclusion as Justice Charron, but, as noted above, preferred to decide the case on the basis of administrative rather than constitutional legal principles. The main difference in approaches is the degree of scrutiny that the different judgments used; Justice Charron held that the Commission’s decision had to be correct in order to stand. Justices Deschamps and Abella held that, due mainly to the Commission’s expertise a standard of reasonableness should apply, meaning that more deference was appropriate.<sup>150</sup>

After explaining this difference in approach,<sup>151</sup> Justices Deschamps and Abella determined that the Commission’s decision was unreasonable. The basis for this determination

*Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006), for a provocative and extended argument on the troubling aspects of the discourse of tolerance.

<sup>147</sup> *Multani SCC*, *ibid* at para 78. Luc Tremblay argues that the version of multiculturalism adopted by the Supreme Court in *Multani* is more ideological and post-modern than the *Charter*’s framers had intended when they enshrined multiculturalism as an interpretive provision, see Luc B Tremblay, “Religion, Tolérance, et Laïcité : Le Tournant Multiculturel de la Cour Suprême” in Jean-François-Gaudreault-Desbiens, ed, *Le Droit, La Religion et le « Raisonnable » : Le fait religieux entre monisme étatique et pluralisme juridique* (Montréal: Éditions Thémis, 2009) 213 at 247-250.

<sup>148</sup> *Multani SCC*, *ibid* at para 79.

<sup>149</sup> *Ibid* at para 82. The fact that the Supreme Court’s verdict came too late to be of assistance to Gurbaj Singh will be discussed in Chapter 6, Section 3.2.

<sup>150</sup> *Ibid* at para 96.

<sup>151</sup> The main thrust of this approach is that constitutional principles of justification (such as minimal impairment) should be applied to rules of general application, such as those contained in the school’s *Code de vie*, while principles of administrative law (such as reasonable accommodation) are more appropriate in assessing the application of a particular rule. In the view of Justices Deschamps and Abella, these different approaches were designed with the specific needs of constitutional law and administrative law in mind, and the types of evidence and argument required for each are different; this difference should be maintained for the sake of clarity. For the full justification, see *ibid* at paras 100-136.

was that the Commission did not adequately consider all the relevant factors, which included freedom of religion, the right to equality, and the accommodation negotiated by the Multanis and the school officials.<sup>152</sup> For Justices Deschamps and Abella, the Court of Appeal's

categorical approach to the kirpan and to safety in the schools disregards the risks inherent in the use of other objects that are part of the everyday school environment, such as compasses. Risks can — and should — be limited in the school environment, but they cannot realistically ever be completely eliminated.<sup>153</sup>

Like Justice Charron, Justices Deschamps and Abella had a fundamentally different approach to the *kirpan* than did the Commission or the Court of Appeal. For them, the “kirpan, which, while a kind of ‘knife’, is above all a religious object whose dangerous nature is neutralized by the many coverings required by the Superior Court.”<sup>154</sup>

Justice LeBel wrote a separate concurring opinion. He preferred to avoid the strict separation of problems into constitutional and administrative forms of reasoning. For him, administrative law principles should be applied as a first step, and constitutional principles should be applied when an administrative decision-maker has acted within the scope of its authority but made a decision that impacts constitutional rights. Justice LeBel also held concerned that constitutional reasoning need not be carried out under the rubric of s. 1. He preferred to begin by analyzing how the various constitutional rights at play relate to each other before applying s.1. In this case, Justice LeBel held that while the right to security of the person (protected by s. 7 of the *Charter*) could theoretically have been in issue, the evidence submitted by the Commission did not rise to the level of establishing even a *prima facie* case for infringement of this right. For him, “[w]rapped as it would be, the kirpan does not seem to be a threat to anyone.”<sup>155</sup> He then turned to the s. 1 analysis, holding that the only apposite aspect of

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<sup>152</sup> *Ibid* at para 99.

<sup>153</sup> *Ibid* at para 97.

<sup>154</sup> *Ibid* at para 98.

<sup>155</sup> *Ibid* at para 153.



the analytical framework was proportionality; he held that the Commission did not meet its burden of showing that its decision minimally impaired the rights of Gurbaj Singh.<sup>156</sup>

## 4 *Wilson Colony*

### 4.1 Overview

In *Wilson Colony*,<sup>157</sup> a dispute arose between a small group of Hutterian Brethren and the Alberta government, centred on the photographs that appear on driver's licences. The Hutterite faith stems from the Anabaptist tradition, which also includes the Amish and the Mennonites.<sup>158</sup> However, there are significant differences between these three forms of Anabaptist Christianity, as well as important differences among the various Hutterite colonies. The pertinent difference to the *Wilson Colony* litigation is that some Hutterites believe that the Bible's Second Commandment prohibits them from having their photos taken.<sup>159</sup> Though the Alberta government had allowed religious exemptions from the driver's licence photo requirement since 1974, in 2003 the province abolished this exemption through an amendment to a regulation under the *Traffic Safety Act*.<sup>160</sup> The province aimed to create a digital databank of all driver's licence photographs that, with the aid facial recognition software, would be used to combat identity fraud. The system was designed to ensure that the person obtaining the licence is actually the person named in the licence, and to prevent the issuance of multiple licences in the same name.

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<sup>156</sup> *Ibid* at para 155.

<sup>157</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Wilson Colony SCC*].

<sup>158</sup> For a more thorough account of the Hutterite faith, see Alvin J Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004).

<sup>159</sup> The text of the biblical commandment that the *Wilson Colony* members submitted to the Court provides: "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4), see *Wilson Colony SCC*, *supra* note 157 at para 29.

<sup>160</sup> RSA 2000, c T-6.

When the case was brought before the courts, the Alberta government conceded that the universal photo requirement infringed the religious freedom of the Wilson Colony Hutterites.<sup>161</sup> The legal dispute centred on whether the denial of the exemption was justifiable under section 1 of the *Charter*. At trial and on appeal, the Alberta courts ruled that the Alberta government had not minimally impaired the rights of the Wilson Colony members. However, in a 4-3 decision, the Supreme Court of Canada held that the universal photo requirement satisfied the requirements of s. 1 of the *Charter*. The Court held that governments are owed a measure of deference by the courts in determining how best to meet their objectives, and that the solution proposed by the Wilson Colony members would have compromised the province's goal of minimizing the risk of identity fraud.<sup>162</sup> The majority held that the salutary effects of the photo requirement outweighed the deleterious effects on the members of the Wilson Colony. For the Wilson Colony members, the requirement meant "not being able to drive on the highway."<sup>163</sup> In the majority's view, this negative effect was outweighed by The universal photo requirement's benefits: "(1) enhancing the security of the driver's licensing scheme; (2) assisting in roadside safety and identification; and (3) eventually harmonizing Alberta's licensing scheme with those in other jurisdictions."<sup>164</sup> In the rest of this section, I provide a more detailed account of the reasons of the various levels of court.

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<sup>161</sup> *Wilson Colony SCC*, *supra* note 157 at paras 33-34.

<sup>162</sup> Notably, the court made extended use of the cost-benefit analysis stage of the s. 1 framework, which some commentators had previously described as redundant: Peter W Hogg, *Constitutional Law of Canada*, vol 2, looseleaf (Toronto: ThomsonCarswell, 2007), at 38-44. See also Howard Kislowicz, Richard Haigh & Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom" (2011) 48 *Alta L Rev* 679; Charney, *supra* note 19 at 65. See *supra* note 137 for an overview of the s 1 analytical framework established in *Oakes*.

<sup>163</sup> *Wilson Colony SCC*, *supra* note 157 at para 96.

<sup>164</sup> *Ibid* at para 79.

## 4.2 Alberta Court of Queen’s Bench

Justice Sal LoVecchio presided at the initial application made by the Wilson Colony.<sup>165</sup> In providing an overview to his decision, Justice LoVecchio noted, first, that the possibility of obtaining a licence without a photograph had existed since photographic licences were first introduced in 1974.<sup>166</sup> Second, he noted that the members of the Wilson Colony have a sincere religious belief that the Second Commandment prohibits them “from having their photograph willingly taken,”<sup>167</sup> and that “it is essential to their continued existence as a community that some members operate motor vehicles.”<sup>168</sup>

The Alberta government conceded that Colony members had a sincere religious belief that conflicted with the legislation, and that this created a distinctive burden for the Colony members.<sup>169</sup> Thus, the sole issue to be determined was whether the legislation could be justified pursuant to s. 1 of the *Canadian Charter*.

In carrying out this analysis, Justice LoVecchio first turned his attention to the importance of the government’s objectives. The government had articulated its objectives as the prevention of identity theft or fraud as well as “the harmonization of international and interprovincial standards for photo identification.”<sup>170</sup> According to the government, given the importance of driver’s licences as a generally accepted identity document, controlling fraud with respect to driver’s licences improves security against identity fraud in general.<sup>171</sup> Justice

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<sup>165</sup> Notably, whereas the litigation in *Amselem* and *Multani* was initiated in the names of individuals, here, the application was commenced in the name of the Hutterian Brethren of Wilson Colony and the Hutterian Brethren Church of Wilson.

<sup>166</sup> *Hutterian Brethern of Wilson Colony v Alberta*, 2006 ABQB 338 at para 1 [*Wilson Colony QB*].

<sup>167</sup> *Ibid* at para 2.

<sup>168</sup> *Ibid*.

<sup>169</sup> *Ibid* at para 6.

<sup>170</sup> *Ibid* at para 10.

<sup>171</sup> *Ibid* at para 12.

LoVecchio preferred a narrower characterization of the legislation’s objective. Because the legislation “does not create a photographic identity card for all Albertans,” he reasoned, “[i]t is aimed no further than ensuring that the system of issuing operator’s licences is safeguarded from fraud.”<sup>172</sup> Justice LoVecchio was apparently willing to at least assume the importance of this goal, as he turned to analyze whether the measure was proportional to its objective. In this respect, he held that there was a rational connection between the photo requirement on driver’s licences, safeguarding the driver’s licence system from identity theft, and of preventing identity theft more generally.<sup>173</sup>

In determining whether the legislation minimally impaired the religious freedom rights of the Wilson Colony members, Justice LoVecchio adopted the reasonable accommodation analysis employed by the majority of the Supreme Court of Canada in *Multani*.<sup>174</sup> He noted that the government had proposed two accommodations. The first proposal was that photos would continue to be taken, stored in the electronic database, and included on a driver’s licence, but the licence would be issued in an enclosure identifying it as the property of the Province of Alberta, which would only need to be offered to a peace officer as necessary. The second proposal was that the photo be taken and stored in the electronic database, but not included on the individual’s licence.<sup>175</sup> In response, Colony members had proposed that licences under a religious exemption continue to be issued without the taking of a photograph, but that the licences be marked “not to be used for identification purposes.”<sup>176</sup>

Justice LoVecchio noted that under either of the province’s proposed accommodations colony members “who wish to drive will have to submit to having their photograph taken which

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<sup>172</sup> *Ibid* at para 14.

<sup>173</sup> *Ibid* at para 16.

<sup>174</sup> *Ibid* at para 18. This approach is discussed above in Section 3.4.

<sup>175</sup> *Ibid* at paras 21-22.

<sup>176</sup> *Ibid* at para 27.

is precisely their problem.”<sup>177</sup> In his view, the Wilson Colony’s proposal would have satisfied the government’s objectives because “non-photographic driver’s licences would bear a warning to all who might rely upon them as identity documentation not to do so.”<sup>178</sup> Accordingly, he held that the government had failed to establish that its legislation minimally impaired the rights of the Wilson Colony members.<sup>179</sup> He went on to hold that, in the alternative, the deleterious effects on the Wilson Colony members outweighed the salutary effects of the legislation. Justice LoVecchio emphasized that the legislation’s benefits were limited because it did not “safeguard the identity of the thousands of other individuals to whom operators’ licences are never issued because they do not qualify to drive.”<sup>180</sup>

On the basis of this reasoning, Justice LoVecchio ordered that the government restore the exemption previously available to religious objectors.<sup>181</sup> He specifically left open, however, the possibility that the government could decide to issue identity cards for all Albertans, in which case the proportionality analysis might differ.<sup>182</sup> In such circumstances, religious freedom claims would likely be considered alongside competing *Charter* claims to security of the person.

### 4.3 Alberta Court of Appeal

A divided Court of Appeal upheld Justice LoVecchio’s decision. The majority decision, penned by Justice Conrad, agreed with Justice LoVecchio that the infringement failed to meet the s. 1 standard because it did not minimally impair the rights of the Colony members.<sup>183</sup> Like

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<sup>177</sup> *Ibid* at para 23.

<sup>178</sup> He noted further that, “in the unlikely event that an individual sought to obtain a non-photographic driver’s licence by impersonating a person who claimed a religious objection to the capture of their image,” the potential usefulness of the licence would be extremely limited: *Ibid* at para 28.

<sup>179</sup> *Ibid* at para 29.

<sup>180</sup> *Ibid* at para 31.

<sup>181</sup> *Ibid* at para 39.

<sup>182</sup> *Ibid* at para 40.

<sup>183</sup> *Hutterian Brethren of Wilson Colony v Alberta*, 2007 ABCA 160 at para 3 [*Wilson Colony CA*].

Justice LoVecchio, Justice Conrad recognized two aspects of Hutterian religious belief impacted by the universal photo requirement: the belief that having their photograph willingly taken is a sin, and the belief in communal property.<sup>184</sup> She also added some detail to the reason driver's licences were important to the Colony:

although the colonies attempt to be self-sufficient, certain members must drive regularly on Alberta highways in order to, *inter alia*, facilitate the sale of agricultural products, purchase raw materials from suppliers, transport colony members (including children) to medical appointments, and conduct the community's financial affairs. The respondents say that if they are unable to drive it will be impossible for them to continue this communal way of life, and that they are therefore being forced to choose between two of their religious beliefs: adhere to not having their photo taken or adhere to living a communal life and performing their assigned duties within the colony.<sup>185</sup>

In carrying out her analysis under s. 1 of the *Charter*, Justice Conrad accepted that preventing identity theft, facilitating harmonization with other jurisdictions, and reducing terrorism were important objectives.<sup>186</sup> However, she also found it significant that the regulation at issue was introduced under the *Traffic Safety Act*,<sup>187</sup> which addresses none of these issues.<sup>188</sup> The purpose of that act, she held, was “the regulation of highways and the increase of safety on them.”<sup>189</sup> In Justice Conrad's view, when the Alberta legislature delegated authority to the

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<sup>184</sup> *Ibid* at para 6.

<sup>185</sup> *Ibid* at para 6.

<sup>186</sup> *Ibid* at para 23.

<sup>187</sup> *Supra* note 160.

<sup>188</sup> *Wilson Colony CA*, *supra* note 183 at para 24.

<sup>189</sup> *Ibid* at para 24, citing *Thomson v Alberta (Transportation and Safety Board)*, 2003 ABCA 256. Justice Conrad went on to note that the Alberta legislature could introduce legislation aimed at preventing identity theft or terrorism, or even amend the *Traffic Safety Act* to make reference to these purposes; it was important to Justice Conrad, however, that these changes be debated by the elected representatives of Albertans rather than used to justify regulations created by the executive branch: *Wilson Colony CA*, *ibid* at para 28. For her, the link between highway safety and the universal photo requirement was that “a photo-bearing licence allows for quick and efficient driver identification at the side of the road” (at para 27). The province did not rely on this argument, presumably because the *Traffic Safety Act* had been administered for nearly 30 years with exemptions to the photo requirement. To argue that the act had become suddenly more difficult to administer during roadside stops would not likely have been credible.

executive branch of government to draft regulations under the *Traffic Safety Act*, it did so in service of the Act's objective of highway safety.

Accordingly, Justice Conrad held that the true objective of the amendments (insofar as they could be linked to the act) could best be described as ensuring that “that only qualified motorists are driving vehicles, that demerits and suspensions are properly allocated, and that other details of an individual's driving record are accurate.”<sup>190</sup> She viewed this as substantial enough an objective to justify the infringement of a *Charter* right.<sup>191</sup>

In assessing the rational connection between this objective and the legislation, Justice Conrad found that there was a clear connection between the mandatory photo requirement and the goals of preventing one person from acquiring two different licences.<sup>192</sup> However, she noted that the universal photo requirement would not prevent a person from acquiring a licence in the name of one of the 700,000 Albertans who do not hold driver's licences.<sup>193</sup> Accordingly, she held that the measure did “not seem to be well-tailored to address the problem of seeking licences in the name of another, and rational connection to this objective is therefore questionable.”<sup>194</sup>

Though Justice Conrad did not state a definitive conclusion on the rational connection point, she found that, in any event, the legislation failed because it did not minimally impair the rights of Colony members. In this portion of her analysis, Justice Conrad relied on the

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<sup>190</sup> *Wilson Colony CA*, *ibid* at para 30.

<sup>191</sup> Justice Conrad also acknowledged the importance of Alberta's ability to enter inter-jurisdictional harmonization agreements with respect to driver's licences. However, she held that allowing an exemption to the photo requirement would not interfere with Alberta's ability to enter into such agreements, and that the only burdens created would fall on those who sought an exemption from the photo requirement; moreover, four other Canadian jurisdictions offered exemptions from the photo requirement, indicating that it is possible to negotiate harmonization agreements while still maintaining an exemption: *ibid* at paras 31-34.

<sup>192</sup> *Ibid* at paras 38-39.

<sup>193</sup> *Ibid* at para 40.

<sup>194</sup> *Ibid* at para 42.

“reasonable accommodation” test that the Supreme Court had adopted in *Multani*.<sup>195</sup> In this respect, the government’s proposed accommodations were lacking because none of them addressed the need for Colony members not to be photographed.<sup>196</sup> Justice Conrad held that the benefits derived from the universal photo requirement did not justify the “absolute nature of the requirement,”<sup>197</sup> nor had the government sufficiently established the extent of the risk that it had alleged.<sup>198</sup> Justice Conrad also dismissed the province’s argument that a large number of people would seek the photo exemption and that, because of the subjective definition of religion adopted by the Supreme Court in *Amselem*, the government would not be able to truly test the sincerity of each claimant. She held that, in the years when a religious exemption was allowed from the photo requirement, only “a tiny fraction of licence applicants” had sought to benefit from it, and there was no evidence to support the notion that the continued existence of the exemption would open the “flood gates.”<sup>199</sup> In accordance with these reasons, Justice Conrad upheld the judgment of the Court of Queen’s Bench.

Justice Slatter dissented. A first difference between his view and the majority’s was his attention to the uncontradicted evidence presented by the Alberta government on the prevalence of identity theft, the importance of driver’s licences as “breeder documents” used to generate other fraudulent documents, and the increased security measures adopted with respect to driver’s licences after September 11, 2001.<sup>200</sup> He thus laid the foundation for a more sympathetic reading of the Alberta government’s argument.<sup>201</sup>

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<sup>195</sup> *Ibid* at para 43. As noted above, this test was borrowed from discrimination law in the employment context.

<sup>196</sup> *Ibid* at para 44.

<sup>197</sup> *Ibid* at paras 45-46. As noted above, Justice Conrad held that these benefits were limited because they did not prevent fraudsters from obtaining a licence in the name of one of the tens of thousands of Albertans who do not hold a licence.

<sup>198</sup> *Ibid* at para 48.

<sup>199</sup> *Ibid* at para 51.

<sup>200</sup> *Ibid* at paras 65-68.

<sup>201</sup> Justice Slatter spent some time disposing of an argument he attributed to the Wilson Colony members, namely that they were concerned of the effects that the photograph would have on the souls of the registry clerks who look



A second significant difference in Justice Slatter’s opinion was the importance he placed on the existence of other jurisdictions where photos are required on driver’s licences and no exemption exists; in his view, this supported the argument that the measure was proportional.<sup>202</sup> More importantly, Justice Slatter also took a different view on the purpose of the impugned legislation. In his view, while the words of the statute that set out its purpose are significant, so are the “practical realities of the situation.”<sup>203</sup> One relevant “practical reality” here was that driver’s licences are used as a universal form of identification. Accordingly, it was open to the Alberta government to create legislation to deal with potential misuses of driver’s licences. Indeed, in Justice Slatter’s view, this fell within the *Traffic Safety Act*, which contains several provisions controlling the misuse of licences.<sup>204</sup>

Justice Slatter went on to identify six objectives of the legislation that he took to be pressing and substantial:

- (a) To enhance highway safety and the enforcement of highway traffic regulations by enabling the ready identification of licensed drivers;
- (b) To minimize the number of disqualified persons operating motor vehicles, and the number of people misrepresenting their identity to peace officers enforcing traffic safety rules, by misuse of driver’s licences;
- (c) To maintain the reliability and integrity of driver’s licences as a widely used and respected method of personal identification;

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at them; in Slatter J.A.’s view, accepting this argument would amount to imposing the Hutterian religion on third parties, which would have been inappropriate: *ibid* at para 78. This argument does not appear in the factum submitted by the Wilson Colony to the Supreme Court of Canada.

<sup>202</sup> *Ibid* at para 80. Justice Slatter also departed from the other judges of the Court of Appeal in holding that there was no requirement of legislative debate on the amended regulation (at para 82).

<sup>203</sup> *Ibid* at para 90.

<sup>204</sup> *Ibid* at para 92. At para 94, Justice Slatter also pointed to the uncontradicted evidence of the government that “foreign jurisdictions rely on the integrity of the Alberta driver’s licence” as a reason why the Alberta government could legislate to enhance the security of licences.

- (d) To prevent the misuse of driver’s licences as a means of enabling identity theft, fraud, and other misconduct, including the misuse of driver’s licences by those who are a threat to the safety of the public;<sup>205</sup>
- (e) To prevent “identity theft, and fraud arising from the increasing amounts of business that is done by electronic means”,<sup>206</sup> and
- (f) To maintain the integrity of the driver’s licence regime because of the “importance of the motor vehicle in our society and economy.”<sup>207</sup>

This much wider set of objectives guided the rest of Justice Slatter’s analysis. In his view, even if the mandatory photo requirement on driver’s licences would not completely satisfy the objectives that he identified, “[m]aking forgery or unauthorized driving more difficult is a rational objective.”<sup>208</sup> He thus easily determined that the legislation passed the rational connection test set out in *Oakes*.

To assess whether the impugned legislation minimally impaired the rights of Colony members, Justice Slatter adopted the test of reasonable accommodation.<sup>209</sup> He found that the vulnerability introduced into the licensing system by an exemption to the photo requirement was an undue hardship that the government need not bear.<sup>210</sup> In addition, he accepted the government’s argument that if “licences without photographs are allowed to exist, it would be open to malicious third parties to forge driver’s licences, or obtain multiple licences, and use them for improper purposes.”<sup>211</sup> Justice Slatter then dismissed the Colony’s argument that, as

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<sup>205</sup> *Ibid* at para 96. Justice Slatter did note, however, that harmonization with other jurisdictions was not an appropriate objective to ground a *Charter* infringement. In his words: “[m]erely because a number of other jurisdictions adopt a standard that violates freedom of religion cannot be a justification for that violation (*ibid.*).”

<sup>206</sup> *Ibid* at para 97.

<sup>207</sup> *Ibid* at para 97.

<sup>208</sup> *Ibid* at para 99.

<sup>209</sup> *Ibid* at para 101.

<sup>210</sup> *Ibid* at para 108. Justice Slatter also relied on the importance of the universal photo requirement in facilitating identity verification at roadside stops by police officers, though, as noted above, the government did not rely on this argument (at paras 29, 110).

<sup>211</sup> *Ibid* at para 112.

driver's licences are not compulsory, the prevention of identity theft associated with driver's licences would not prevent all identity theft. In Justice Slatter's view, there was evidence that "driver's licences and the related identity cards are nearly universal, and are the primary identification document used by Albertans on a day-to-day basis."<sup>212</sup>

In the course of his reasons, Justice Slatter also highlighted the accommodations offered by the government, noting that these distinguished the *Wilson Colony* case from both *Multani* and *Amselem*, "where no accommodation was offered."<sup>213</sup> Justice Slatter found that the accommodations offered by the government were reasonable, based on his assessment of the Hutterites' religious obligations:

The central prohibition of the second commandment is the creation of idols, and in that respect the second commandment reinforces the first: "You shall have no other gods before Me." The proposed accommodations would preclude the respondents ever having to look at their photographs themselves. While obviously not ideal from the perspective of the respondents, the accommodations proposed by the appellant do have the effect of significantly minimizing the impact of the regulations on the respondents' observance of the second commandment.<sup>214</sup>

Justice Slatter also held that the religious belief of the Colony members prohibited them from *voluntarily* having their photos taken. He reasoned that, if it were truly the case that the lack of driver's licences would end the communal lifestyle adopted by the Colony, having their photos taken for driver's licences could not be considered voluntary. In Justice Slatter's view, a mandatory photo is less grave in this context. In any event, Justice Slatter held that there was no evidence supporting the Colony's claim that, without driver's licences, they would be forced to abandon their communal lifestyle. In his view, the effect would be monetary, and generally not

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<sup>212</sup> *Ibid* at para 114.

<sup>213</sup> *Ibid* at para 116. As discussed above, the syndicate of co-owners in *Amselem* had offered the accommodation of a communal *succah*; in *Multani*, the local school had agreed to an accommodation which would have allowed the wearing of a *kirpan* under certain conditions, but the school's governing board and school commission were prepared only to accept a symbolic *kirpan* in the form of a pendant.

<sup>214</sup> *Ibid* at para 116.

related to the Colony's spiritual activities.<sup>215</sup> Accordingly, Justice Slatter held that the government had minimally impaired the religious freedom rights of the Colony members.<sup>216</sup>

In the final stage of his analysis, Justice Slatter briefly explained why the salutary effects of the legislation outweighed its deleterious effects. The deleterious effects, in his view, included the necessity for colonies to hire drivers from time to time, or have a subset of members submit to photographs. On the other hand, driver's licences are an important element in regulating traffic safety, and have become nearly universal as a form of identification. According to Justice Slatter, the universal photo requirement, though not eliminating misuse, would likely be significant in this regard.<sup>217</sup> On the basis of this and the rest of his analysis, Justice Slatter would have allowed the appeal by the Alberta government.

#### 4.4 Supreme Court of Canada

Like the Alberta Court of Appeal, the Supreme Court of Canada delivered a narrowly divided verdict, with three substantive opinions. In a decision written by Chief Justice McLachlin, the majority of the Court found in favour of the government of Alberta, reversing the decisions of the lower courts. For Chief Justice McLachlin, there was an important distinction between the Colony members' belief that they are prohibited from being photographed and the communal lifestyle adopted by the Colony. The former was a claim made by the individual members of the Colony, and could properly be considered the subject of a religious freedom claim under the *Charter*. The impact on the community, while an appropriate consideration in assessing the context and proportionality of the impugned regulation, was not a proper claim under the right to religious freedom. While the Chief Justice accepted that religious freedom has

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<sup>215</sup> *Ibid* at para 117.

<sup>216</sup> *Ibid* at paras 118-120.

<sup>217</sup> *Ibid* at para 127.

collective aspects, she did not accept that the religious freedom claim (at least in this case) could be articulated as a group right.<sup>218</sup>

In her section 1 analysis, Chief Justice McLachlin began by noting the Supreme Court’s recognition of the “leeway” that must be granted to governments in regulating social and commercial interactions.<sup>219</sup> She then noted that much government regulation could be challenged by individuals claiming that their religious beliefs were affected, but “[g]iving effect to each of their religious claims could seriously undermine the universality of many regulatory programs... to the overall detriment of the community.”<sup>220</sup> As such, courts performing *Charter* review should not be so stringent that “responsible, creative solutions to difficult problems would be threatened.”<sup>221</sup>

Chief Justice McLachlin then turned her attention to the concern expressed by the majority of the Court of Appeal that the Alberta government had adopted the impugned legislation by regulation, and thus without any legislative debate.<sup>222</sup> The Chief Justice recognized that governments should not use “delegated authority to transform a limited-purpose licensing scheme into a *de facto* universal identification system beyond the reach of legislative oversight.”<sup>223</sup> However, in her view, that had not happened in this case, as a photo requirement had been an accepted part of the driver’s licence system for many years. Further, she held that

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<sup>218</sup> *Wilson Colony SCC*, *supra* note 157 at para 31. Given the centrality of communal ownership to their religious tenets, it is difficult to imagine a religious community with stronger or clearer emphasis on the collective dimensions of religious practice than the Hutterian Brethren. If they could not make out a proper claim to a group right under religious freedom, it would seem that the right to religious freedom could only ever be an individual right. For a comprehensive philosophical justification for the existence of collective rights, see Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011).

<sup>219</sup> *Ibid* at para 35.

<sup>220</sup> *Ibid* at para 36.

<sup>221</sup> *Ibid* at para 37.

<sup>222</sup> Counsel for the Wilson Colony had advanced the more general proposition that *Charter*-infringing measures could only be adopted after legislative debate: *ibid* at para 40; *Wilson Colony Factum* at paras 49-52. This argument will be discussed at greater length in Chapter 5, Section 3.3 in the discussion of cross-cultural communication.

<sup>223</sup> *Ibid* at para 40.

regulations created by the executive branches of government “do not imperil the rule of law,” because they are subject to challenge on both constitutional and administrative law grounds.<sup>224</sup>

The Chief Justice then moved on to the crucial step of defining the purpose of the universal photo requirement. Echoing the views of Justice Slatter, she defined the objectives of the requirement as “[m]aintaining the integrity of the driver’s licensing system in a way that minimizes the risk of identity theft,” and accepted this as pressing and substantial.<sup>225</sup> She also found relevant the Alberta government’s claim that the measure was aimed at harmonization with other jurisdictions.<sup>226</sup> In making these determinations, Chief Justice McLachlin rejected the view of the majority of the Court of Appeal that the purpose of a regulation must be limited to the purposes of its enabling statute; in her view, regulations can validly be aimed at supporting the primary goals of enabling laws as well as “collateral concerns”.<sup>227</sup> In this case, the primary goal was traffic safety, and the government had developed a driver’s licensing system in furtherance of that goal. These licences, in turn, had come to be used as identification documents, which raised concerns related to identity theft and fraud; the government was entitled to adopt legislation to address these concerns.<sup>228</sup>

Chief Justice McLachlin next considered and accepted the evidence of the Alberta government that the existence of exemptions to the photo requirement would make the licensing system more vulnerable to identity fraud.<sup>229</sup> Accordingly, she found that the universal photo requirement was rationally connected to the government’s legitimate goals.

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<sup>224</sup> *Ibid* at para 40.

<sup>225</sup> *Ibid* at para 42.

<sup>226</sup> *Ibid* at para 43

<sup>227</sup> *Ibid* at para 44

<sup>228</sup> *Ibid* at para 45.

<sup>229</sup> *Ibid* at paras 50, 52.

In assessing whether the universal photo requirement minimally impaired the rights of the Colony members, the Chief Justice noted the accommodations proposed by the Alberta government, which “would permit the Province to achieve its goal of a maximally efficient photo recognition system to combat fraud associated with driver’s licences, while reducing the impact on the members’ [religious freedom] rights.”<sup>230</sup> She further noted that the Colony members had rejected these proposals, and would only have accepted a measure “that entirely removes the limit on their... rights.”<sup>231</sup> The alternative that they put forward would make the data bank less secure and compromise the province’s goal of minimizing the risk of identity fraud.<sup>232</sup> Chief Justice McLachlin rejected the argument that the existence of 700,000 Albertans without driver’s licences was relevant to this analysis; the province’s goal was to minimize risk that driver’s licences be used for identity-related fraud. It did not follow, in the Chief Justice’s view, that the province was required to attempt to eliminate all identity-related fraud before it could implement a universal photo requirement for driver’s licences.<sup>233</sup>

Also in the context of her “minimal impairment” analysis, the Chief Justice rejected the lower courts’ use of the “reasonable accommodation” analysis applied in *Multani* and by the lower courts in *Wilson Colony*.<sup>234</sup> For the Chief Justice, that analysis may be helpful in resolving disputes over government action or administrative practice (*i.e.* the application of a law), but where question is the validity of a law, the *Oakes* test of justification is the more appropriate

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<sup>230</sup> *Ibid* at para 57.

<sup>231</sup> *Ibid* at para 58.

<sup>232</sup> *Ibid* at para 59.

<sup>233</sup> *Ibid* at paras 63-64.

<sup>234</sup> Richard Moon has argued that, while this maneuver represents a shift in the law of religious freedom, the divergence from past cases may not be dramatic because “in very few cases have the Canadian courts held that the law should accommodate a religious practice” and “in practice, courts have been unwilling to require the state to compromise its policy in any significant way”: Richard Moon, “Accommodation Without Compromise: Comment on *Alberta v. Hutterian Brethren of Wilson Colony*” (2010) 51 SCLR (2d) 95 at 98, 129.

analytical framework.<sup>235</sup> This is because a legislature drafts laws of general application, and is under no duty to engage in individualized treatment of its subjects.<sup>236</sup>

The Chief Justice then considered whether the universal photo requirement was proportionate in its effect. Though some question the significance of this stage of the analysis,<sup>237</sup> Chief Justice McLachlin explained that it “allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation.”<sup>238</sup> In carrying out her analysis, Chief Justice McLachlin held that three benefits of the universal photo requirement were established by the evidence: “(1) enhancing the security of the driver’s licensing scheme; (2) assisting in roadside safety and identification; and (3) eventually harmonizing Alberta’s licensing scheme with those in other jurisdictions.”<sup>239</sup> The first of these benefits was most important.<sup>240</sup>

The Chief Justice then turned her attention to the negative effects the measure would impose on the Colony members. The Chief Justice held that these effects “must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs.”<sup>241</sup> In this case, while the Chief Justice accepted that the universal photo requirement imposed a cost on the Wilson Colony members (*i.e.* not being able to drive), “that cost does not rise to the level of depriving the Hutterian claimants of a meaningful choice as to their religious practice.”<sup>242</sup> She

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<sup>235</sup> *Wilson Colony SCC*, *supra* note 157 at paras 66-68. See footnote 137 for a summary of the *Oakes* test.

<sup>236</sup> *Wilson Colony SCC*, *ibid* at para 69.

<sup>237</sup> See Peter W Hogg, *Constitutional Law of Canada*, 2012 Student ed (Toronto: Carswell, 2012) at s 38.12.

<sup>238</sup> *Wilson Colony SCC*, *supra* note 157 at para 77.

<sup>239</sup> *Ibid* at para 79.

<sup>240</sup> *Ibid* at para 81.

<sup>241</sup> *Ibid* at para 90. Perhaps counter-intuitively, the social fact of multiculturalism is here used to justify legislation that is less sensitive to the needs of minority groups. A similar logic is present in Justice Bastarache’s dissent in *Amselem*, see *Amselem SCC*, *supra* note 53 at para 177.

<sup>242</sup> *Wilson Colony SCC*, *ibid* at para 96.



rejected the claim that the photo requirement would “end the Colony’s rural way of life”; rather, the Wilson Colony would likely hire drivers who were not Colony members.<sup>243</sup> Further, in the Chief Justice’s view, driving on public highways is a privilege, not a right.<sup>244</sup> On the basis of these considerations, Chief Justice McLachlin held that the benefits of the law outweighed its costs, and that the Alberta government had succeeded in justifying its limitation of the Colony members’ rights to religious freedom.

Justices Abella, LeBel and Fish dissented. Justice Abella wrote one opinion; Justices LeBel and Fish substantially agreed, but had some additional considerations. Justice Abella accepted that the province’s objective was important and that the legislation was rationally connected to the goal.<sup>245</sup> However, she diverged from the majority in finding that the province had not minimally impaired the rights of the Colony members, as required under the *Oakes* test. This was connected to her view that the harms of the universal photo requirement to the Colony members were “dramatic,” and the benefits to the province of eliminating the religious exemption “marginal.”<sup>246</sup>

In supporting her conclusion that the harms to the Colony members were significant, Justice Abella held that the “choice between having their picture taken or not having a driver’s licence ... is not a meaningful choice for the Hutterites.”<sup>247</sup> She found that two religious beliefs of the Colony members were significant: their belief that the prohibition on idolatry forbids them from being photographed, and their belief in communal property and self-sufficiency.<sup>248</sup> Justice Abella devoted some time to explaining the importance of self-sufficiency to the Colony, and held that the majority did not appreciate the significance of this value to the Colony, which had

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<sup>243</sup> *Ibid* at para 97.

<sup>244</sup> *Ibid* at para 98.

<sup>245</sup> *Ibid* at paras 140, 142.

<sup>246</sup> *Ibid* at paras 114-115.

<sup>247</sup> *Ibid* at para 163.

<sup>248</sup> *Ibid* at para 118.

“historically preserved its religious autonomy through its communal independence.”<sup>249</sup> She was also uncomfortable with the majority’s view that a driver’s licence is a privilege; Justice Abella held that the state must provide benefits without discrimination.

Explaining her view that the benefits to the province were “slight and largely hypothetical,”<sup>250</sup> Justice Abella highlighted that there was “no evidence that in the context of several hundred thousand unphotographed Albertans, the photos of approximately 250 Hutterites will have any discernable impact on the province’s ability to reduce identity theft.”<sup>251</sup> She further noted that the software used for facial recognition still required a person to visually examine the photos, that there was no evidence of any damage to the integrity of the driver’s licensing system done in the 29 years of the photo exemption, and that Alberta had not found it necessary to include photos on other identity documents such as birth certificates or social insurance cards.<sup>252</sup> Moreover, she found that there was no reason to anticipate that a harmonized licensing scheme with other jurisdictions would exclude the possibility of a photo exemption, and that, as for the goal of assisting in roadside identification, Alberta had conceded that this was not the purpose of the photo requirement.<sup>253</sup>

Ultimately, Justice Abella concluded that the Wilson Colony’s constitutional religious freedom rights “were significantly impaired” and that the costs to the public were slight, if anything.<sup>254</sup> Accordingly, she would have upheld the decisions of the Alberta Court of Appeal and Court of Queen’s Bench.

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<sup>249</sup> *Ibid* at paras 164-167, 170.

<sup>250</sup> *Ibid* at para 162.

<sup>251</sup> *Ibid* at para 115.

<sup>252</sup> *Ibid* at paras 155-159.

<sup>253</sup> *Ibid* at paras 161.

<sup>254</sup> *Ibid* at paras 175.

Justice LeBel was particularly concerned about the collective dimensions of religious freedom. He noted that “[r]eligion is about religious beliefs, but also about religious relationships,” and found that the *Wilson Colony* litigation raised issues “about the maintenance of communities of faith.”<sup>255</sup> Though he agreed with most of the substance of Justice Abella’s analysis,<sup>256</sup> Justice LeBel’s took a different approach s. 1 of the *Charter*. Whereas the majority (and Justice Abella, to a lesser extent) thought it important to distinguish the consideration of whether a government has minimally impaired a right from the consideration of whether the positive effects of government action outweigh its negative effects, Justice LeBel saw a “close connection” between these two stages of analysis.<sup>257</sup> In his view, governments should have flexibility to choose from a range of reasonable alternatives in order to achieve legitimate aims, but courts should also be granted flexibility “in determining how far the goal ought to be attained in order to achieve the proper balance between the objective of the state and the rights at stake.”<sup>258</sup> In other words, both the objective and the means to achieve it should be the subject of judicial scrutiny to some degree. In this case, Justice LeBel held that the majority had adopted too deferential an approach to the government’s objective.<sup>259</sup> In Justice LeBel’s view, “[o]ther approaches to identity fraud might be devised that would fall within a reasonable range of options and that could establish a proper balance between the social and constitutional interests at stake.”<sup>260</sup>

## 5 Reflections

Having considered in detail the judicial reasons in each of the three cases examined in this project, I now begin to draw out the themes that will structure the remaining chapters. As

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<sup>255</sup> *Ibid* at para 182.

<sup>256</sup> *Ibid* at para 200.

<sup>257</sup> *Ibid* at paras 191-192.

<sup>258</sup> *Ibid* at para 196.

<sup>259</sup> *Ibid* at para 197.

<sup>260</sup> *Ibid* at para 201.

discussed above in Chapter 1, these themes emerged from the coding of the interviews and textual data. Here, I use them as lenses through which to examine the judicial reasons. The themes in this section will each be developed into a full chapter below, in which these considerations will be considered alongside the interview data and critical literature.

## 5.1 Overlapping Legal Systems

In *Amselem*, Justice Rochon of the Superior Court noted at the outset of his reasons the multiple sources of law that regulate contractual disputes: the Civil Code of Québec, Québec’s *Charter of Human Rights and Freedoms*, and “general principles of law.”<sup>261</sup> Notably and predictably, the religious laws that surround the *succah* do not figure in this list. After all, for a judge of a state court to purport to apply religious law to a dispute would likely raise serious and justifiable concern. However, the religious laws of *Succhoth* formed an integral part of the decision in *Amselem* at all levels of court. At first instance, Justice Rochon was of the view that the claimants had misinterpreted their religious obligations, and he preferred the expert evidence provided by the syndicate. At the Court of Appeal, though Justice Dalphond held that it was not the courts’ role to choose between competing expert interpretations of a religion,<sup>262</sup> the Court nonetheless refused to accept the appellants’ characterization of their particular religious obligations. Indeed, Justice Dalphond held that the appellants’ obligation to build *succhoth* was a moral one, and not mandatory according to a religious precept. It is difficult to conceive of how the Court came to the characterization of the obligation as “moral” without drawing a conclusion of Jewish law; to opine on the intensity of the obligation *is* to opine on its content.<sup>263</sup> At the very least, one can safely conclude that the Court’s understanding of the religious obligation was significant in guiding its conclusions. At the Supreme Court of Canada, the role played by the religious law differed. There, the subjective approach to religion adopted by the majority effectively allowed the appellants to fill in the content of the religious freedom guarantee by

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<sup>261</sup> *Amselem SC*, *supra* note 4 at para 1.

<sup>262</sup> *Amselem CA*, *supra* note 31 at paras 152-153 (unofficial translation by QL).

<sup>263</sup> See *Amselem SCC*, *supra* note 53 at paras 49-50.

reference to their sincerely held beliefs.<sup>264</sup> Again, the religious norm and the state norm are both foundational to the Court's conclusion.

In addition, it was of critical significance to several judges that the terms of the buildings' by-laws had been agreed to by the religious freedom claimants. Indeed, Justice Dalphond highlighted the distinction between this contractual arrangement and a law or regulation emanating from a government institution,<sup>265</sup> similar concerns motivated Justice Binnie's dissenting opinion at the Supreme Court of Canada.<sup>266</sup> On at least some level, then, judges are prepared to accept the role of legal subjects in crafting their own laws.<sup>267</sup> Of course, here the obligation takes the familiar form of a contract recognized in both the civil and common law traditions. My point here is limited to the observation that, even within those traditions, the sources of normativity can be almost as varied as the number of legal subjects.<sup>268</sup> Accordingly, the disagreement can be seen as not necessarily about the contested legality of the various norms (contractual or religious), but about their relative priority.

After the Supreme Court of Canada's holding in *Amsalem*, it was unlikely that the substance of the *kirpan* obligation would be a matter of serious dispute in *Multani*. Indeed, the Court focused the sincerity of Gurbaj Singh's belief in the religious nature of the *kirpan*. Accordingly, none of the judges who presided set out to determine the "authentic" obligation as the Superior Court did in *Amsalem*. Thus, as in *Amsalem*, the subjective religious perspective of

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<sup>264</sup> In a discussion during a presentation of this work, Dr. Ken Cooper-Stephenson analogized this aspect of the court's reasoning to the practice of incorporation by reference, whereby a legal document will incorporate the substance of an external document through a single provision.

<sup>265</sup> *Amsalem CA*, *supra* note 31 at para 119 (unofficial translation by QL).

<sup>266</sup> *Amsalem SCC*, *supra* note 53 at para 185.

<sup>267</sup> See the above discussion of Kleinmans and Macdonald's critical legal pluralism in Chapter 2, Section 2.1.

<sup>268</sup> Indeed, there is much scholarship in legal pluralism that emerges from the context of labour law, where non-state actors are seen increasingly as creators of norms, see *eg* Harry W Arthurs, "Labour Law Without the State" (1996) 46 UTLJ 1; Adelle Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8 Ind J Global Leg Stud 401. Of course, there are significant limits that the state imposes on the kinds of norms that will be enforceable in state courts. For a case where religious and state norms became particularly interwoven in the case of a divorce contract, see *Bruker v Marcovitz*, [2007] 3 SCR 607.

the *Multani* litigants filled out the substance of the religious freedom guarantee enshrined in the *Charter*.

In *Wilson Colony*, the overlapping legal systems at play emerge first through the language of “commandment” that is used to describe the source of the Hutterian practice. While this may be dismissed as happenstance (the source of the obligation just happens to be called the “Second Commandment” in common parlance), I believe there is more at stake here. For the members of Wilson Colony, biblical commandments are binding, and disobedience bears consequences. Indeed, in some of the materials submitted by the Wilson Colony, a Hutterite author states: “The communal way of life is not an invention or social system designed by the Hutterians, nor is it to their liking to live this life. But herein they have no choice. If Christ is their saviour, they must obey his teachings and follow in his footsteps.”<sup>269</sup> Moreover, as will be explored in more detail in Chapter 4, Hutterite participants specifically described the *Wilson Colony* case as a conflict between “God’s law” and “man’s law.”<sup>270</sup>

Justice Slatter’s dissenting opinion at the Court of Appeal contains a curious moment of the interaction of legal orders. As described above, Justice Slatter interprets the Biblical ordinance to determine that, perhaps paradoxically, the fact of state coercion serves to decrease the gravity of the infringement on Hutterite religious freedom. Recall that, in Justice Slatter’s view, the Hutterite prohibition was against having one’s photo taken *voluntarily*; accordingly, if the Hutterites are truly compelled to have their photos taken, they do not do so voluntarily, mitigating the severity of the sin.<sup>271</sup> This logic is troubling in part because Justice Slatter does not possess the right kind of authority to expect his interpretation of the Hutterite tradition to be

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<sup>269</sup> Peter Hofer, *The Hutterian Brethren and Their Beliefs* (Starbuck, Man: Hutterian Brethren of Manitoba, 1973), cited in *Wilson Colony SCC*, *supra* note 157, Exhibit B to Affidavit of Samuel Wurz, Affirmed 10 August 2005, Appellant’s Record, Vol 2 at 205. This passage also challenges the voluntarist definition of religion adopted in *Amselem*.

<sup>270</sup> Litigant 4 Interview.

<sup>271</sup> This view runs counter to a stream in the earlier case law on religious freedom that was particularly concerned with that the state should not act coercively with respect to religious beliefs. See *R v Big M Drug Mart*, [1985] 1 SCR 295 at paras 95-97; *Freitag v Penetanguishene (Town)* (1999), 47 OR (3d) 301 at paras 18, 25 (CA); *Zylberberg v Sudbury Board of Education* (1988), 65 OR (2d) 641 at 648 (CA); *Canadian Civil Liberties Assn v Ontario (Minister of Education)* (1990), 71 OR (2d) 341 at 363 (CA).

treated as legitimate by the Hutterites. In any event, his opinion presents an example of a judge with authority in one legal system basing his decision in part on his own interpretation of the law in another legal system.

## 5.2 Cross-Cultural Communication

In *Amselem*, the various levels of court adopted differing approaches to cross-cultural communication. As noted above, the Superior Court's preferred approach was to have competing expert witnesses present the cultural context of the *succah* practice, and select the more compelling testimony. This approach encouraged the parties to put the practice in terms that the Court would understand: those of rationalized obligation. Arguably, this approach placed the burden on the litigants to make their culture intelligible to the court. In the end, Justice Rochon preferred the more fully rationalized account presented by Rabbi Levy. As noted above, the Court of Appeal rejected this approach, although still came to understand the religious obligation in its own terms, as a "moral obligation."<sup>272</sup> Arguably, the subjective approach taken by the majority of the Supreme Court has some strengths in terms of cross-cultural communication, as it allows claimants to articulate their practices from their own perspective, without requiring them to fit the claim into a pre-existing category. That said, the individualistic focus of the majority's definition raises some cause for concern, especially when considered in light of the communitarian religious ethos of the Hutterian Brethren, taken up later in this section.

The central issue of cross-cultural communication in *Multani* was the characterization of the *kirpan*: was it a weapon, a religious object, or both? To the school commission, the *kirpan* was above all a weapon; accordingly, it proposed that Gurbaj Singh wear a symbolic *kirpan* in the form of a pendant.<sup>273</sup> It is difficult to ignore the similarity between this proposal and the style in which crosses are often worn in contemporary Western cultures.<sup>274</sup> As such, the

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<sup>272</sup> See *supra* note 40.

<sup>273</sup> *Multani CA*, *supra* note 117 at para 12.

<sup>274</sup> In this respect, the Commission's proposed accommodation resonates with legislation passed in France in 2004 which banned "conspicuous" religious symbols in public schools; while banning headscarves and *yarmulkes*, the law allowed students to wear religious symbols in the form of small pendants: *Loi n° 2004-228 du 15 mars 2004*

Commission's insistence that Gurbaj Singh accept its proposal can be seen as a failure of cross-cultural communication. The *kirpan* practice did not fit neatly into the Commission's existing cultural expectations, and was thus seen as foreign and threatening. It attempted to remold the practice into something more familiar. The Court of Appeal also stressed the weapon-like nature of the *kirpan*, considering it inherently dangerous.<sup>275</sup> In contrast, the majority of the Supreme Court was careful to elevate the religious nature of the *kirpan* above its potential use as a weapon.<sup>276</sup> This latter was, in my view, a significant moment of successful cross-cultural communication in Canadian religious freedom case law; I develop this view more fully in Chapter 5.

In *Wilson Colony*, the greatest challenge of cross-cultural communication was for the Colony members to communicate the importance of communal living and self-sufficiency to their religious worldview. The Court of Queen's Bench, majority of the Court of Appeal, and the dissenting judges of the Supreme Court, were all prepared to accept that these were elements of their religious belief system. Indeed, nearly all descriptions of Hutterite life begin from the premise of communal ownership as a religious principle. However, the majority of the Supreme Court removed communal concerns from the first step of the religious freedom analysis, examining them only in the proportionality stage. In my view, this diminished the importance of the communal aspect of Hutterite life. Perhaps for this reason, the majority did not foresee the impact of its decision; whereas they expected that the Wilson Colony would hire outside drivers,

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*encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*, JO, 17 March 2004. See Elisa T Beller, "The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society" (2004) 39(4) *Tex Int'l LJ* 581; Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship & Governance in Diverse Societies" (2005) 50 *McGill LJ* 49 at 80-82; Pascale Fournier and Gökçe Yurdakul, "Unveiling Distribution: Muslim Women with Headscarves in France and Germany" in *Migration, Citizenship, Ethnos*, Y. Michal Bodemann and Gökçe Yurdakul, eds, (New York: Palgrave Macmillan, 2006) 167.

<sup>275</sup> *Multani CA*, *supra* note 117 at paras 87-89.

<sup>276</sup> *Multani SCC*, *supra* note 99 at para 37.



in fact the Hutterites have either submitted to photos or continued to drive with expired licences.<sup>277</sup>

A final theme related to cross-cultural communication that emerges in many of the judicial decisions in the three cases under examination is the notion of intransigence of religious freedom claimants. Indeed, the flexibility of the parties is a specifically mandated consideration in the “reasonable accommodation” analysis. The difficulty is that what appears to be intransigence to some is seen as devotion to core principles by others. Thus, the *succah*-builders in *Amselem* were seen by the lower courts and dissenting judges of the Supreme Court as intransigent, but the majority of the Supreme Court saw them as simply unable to compromise their religious beliefs any further. Likewise, whereas Justice Slatter of the Court of Appeal found fault with the Wilson Colony members for their unwillingness to accept the compromises put forward by the Alberta government, many other judges in the case saw those compromises as deficient because they did not address the central issue of having a photo taken. Perhaps the Multani family’s willingness to adhere to strict conditions surrounding the *kirpan* was one of the important strengths of their case, eliciting the approval of the Superior and Supreme courts.

### 5.3 Religious Freedom, Immigration, and Civic Belonging

As discussed above, Justice Iacobucci noted in *Amselem* that Canada “accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities.”<sup>278</sup> The judicial decisions reviewed in this chapter contain many moments where practices that affect the integration of religious minority

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<sup>277</sup> Litigant 3 Interview; Litigant 4 Interview . John Von Heyking has argued that “the language of ‘individual autonomy’ is itself a secular and individualistic construction because, among other reasons, it ignores the communal and social dimension of religion while reducing it to an arbitrary choice”: John Von Heyking, “The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada” (2000) 33 UBCL Rev 663 at 668; Benjamin Berger has similarly argued that Canadian courts strip religions of their context by conceiving of religion as essentially individual, focusing on autonomy and choice, and restricting religious activities to the private sphere: Benjamin L. Berger, “Law’s Religion: Rendering Culture” (2007) 45 Osgoode Hall LJ 277. Notably, however, the Supreme Court judges who emphasized the communal aspects of religious practice wound up finding against the religious freedom claimants, whereas the judges who took an individualistic approach found in their favour. The opposite occurred in *Wilson Colony*, signalling that individualism’s impact on a particular case is contingent on context.

<sup>278</sup> *Amselem SCC*, *supra* note 53 at para 87.

immigrants. Indeed, though *Amselem* was set in the private context of a condominium complex, it can serve as one microcosmic instantiation of the integration experience of religious minority immigrants. Of interest in this regard is the Superior Court's holding that the syndicate's policy towards violations of the by-laws was consistent, as it tolerated violations so long as there were no complaints from other co-owners.<sup>279</sup> From the syndicate's perspective, this is a reasonable policy: why should the syndicate spend its resources on violations that do not disturb any of the co-owners? On the other hand, this policy also highlights the disadvantaged position of members of minority groups. Cultural practices of dominant groups can be so pervasive and accepted as to go unnoticed, such that the presence of Christmas decorations is merely an expected part of the scenery in an Outremont winter.<sup>280</sup> It stands to reason that co-owners would be more likely to complain with respect to unfamiliar cultural practices, because they would be more likely to notice them. Moreover, members of immigrant or minority groups may feel that if they were to complain about dominant practices, they would draw the consternation of their neighbours. Accordingly, while a complaint-based procedure may have some practical advantages, it certainly raises concerns from the perspective of integration.

The events in *Multani* were intimately connected with Gurbaj Singh's recent arrival in Québec and desire to attend a public, French-language school. Québec is committed to educating newcomers in French;<sup>281</sup> indeed, the constitutional right to receive minority language education

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<sup>279</sup> *Amselem SC*, *supra* note 4 at para 45.

<sup>280</sup> Indeed, there is often controversy over whether a cultural symbol has religious import; despite the recommendation of the Bouchard-Taylor Commission that the crucifix in Québec's National Assembly be removed (Bouchard-Taylor Report, *supra* note 140 at 260), the National Assembly voted unanimously to keep the crucifix, with Premier Jean Charest saying that "the religious icon reflects Quebec's cultural and institutional heritage and should stay where it is": "Let's move on, says Quebec accommodation commission" *CBC News* (22 May 2008), online: <<http://www.cbc.ca/news/canada/montreal/story/2008/05/22/qc-accommodation.html>>. See also Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) at 43, where Minow argues that the "[a]ccommodation of religious practices may look nonneutral, but failure to accommodate may also seem nonneutral by burdening the religious minority whose needs were not built into the structure of mainstream institutions."

<sup>281</sup> A Québec government website states: "children of immigrants, regardless of their mother tongue, are usually required to attend a local establishment of the French school board until the end of secondary studies": Québec, Immigration et Communautés Culturelles, online: <<http://www.immigration-quebec.gouv.qc.ca/en/education/finding-education/index.html>>.

is crucially dependent on citizenship.<sup>282</sup> In this context, it is surprising that only the judge who presided over the interlocutory hearings at the Superior Court commented on the importance of Gurbaj Singh receiving his education in French.<sup>283</sup> The Supreme Court was also concerned with integration, though perhaps at a more conceptual level, emphasizing schools' role in disseminating the value of religious tolerance. Through the reasons at the various levels of court, then, the reader is given a sense of one of the issues at stake for the Multanis: the ability for immigrants to be a part of a public institution while still maintaining their religious practices and identity.<sup>284</sup>

The Hutterite claim in *Wilson Colony* presents a challenge to the values of integration and inclusion that underlie the judicial decisions in *Multani* and *Amselem*. The *Wilson Colony*, in contrast, insists on as much isolation as it can maintain while still surviving. In this respect, *Wilson Colony* also raises significant questions about integration. If *Amselem* and *Multani* justify the protection of religious freedom as contributing to harmonious relations in an integrated society, how should the state respond to isolationist religious groups? Political scientist Jeff Spinner-Halev argues that when groups like the Hutterites “try to ignore the state... and simply live among themselves, they do not harm citizenship.”<sup>285</sup> Spinner-Halev would accordingly support accommodation for isolationist groups like the Hutterites where there is no harm to other citizens.<sup>286</sup> Spinner-Halev's writing does not address the particular dispute in *Wilson Colony*, so it is difficult to know how he would resolve the question. However, the lower court judges and

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<sup>282</sup> *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 23. Minority language education rights have been much litigated and commented upon, see: *AG Quebec v Quebec Association of Protestant School Boards et al*, [1984] 2 SCR 66; *Mahé v Alberta*, [1990] 1 SCR 342; *Solski (Guardian of) v Quebec (Attorney General)*, 2005 SCC 14; *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15; Michel Bastarache, *Language Rights in Canada* (Montréal: Éditions Yvon Blais, 1987); Joseph E Magnet, *Official Languages of Canada: New Essays* (Markham, Ont: LexisNexis Canada, 2008).

<sup>283</sup> *Multani Interlocutory*, *supra* note 106 at paras 5, 25.

<sup>284</sup> On the courts' role in shaping the identities of participants and legal subjects, see Shauna Van Praagh, “Identity's Importance: Reflections of – and on – Diversity” (2001) 80 Can Bar Rev 605.

<sup>285</sup> Jeff Spinner-Halev, “Cultural Pluralism and Partial Citizenship” in Christian Joppke & Steven Lukes, eds, *Multicultural Questions* (Oxford: Oxford University Press, 1999) 65 at 71.

<sup>286</sup> Spinner-Halev, at 71-72.

dissenting judges of the Supreme Court of Canada echo some of Spinner-Halev's thoughts. Ultimately, these judges believed that the harm posed by an exemption to the driver's licence photo requirement was outweighed by the Wilson Colony's religious freedom interests. The majority of the Supreme Court of Canada, however, saw a larger threat in the exemption sought. Not only would it compromise the province's goal of building a secure photo database, the majority was also concerned that minority groups could derail government initiatives. The governments elected by Canada's citizens should, in the majority's view, be given wider latitude to pursue their regulatory projects. While still recognizing the constitutional status of the religious freedom rights, this view narrows their ambit in deference to majoritarian politics. This makes the ability of Hutterite communities to practice their religion particularly precarious, as they do not vote in civic elections as a matter of religious principle.<sup>287</sup>

## 6 Conclusion

In this chapter, I have provided a detailed examination of the judicial reasons given at the various stages of the three cases under examination in this dissertation. Each has made a significant contribution to the law of religious freedom in Canada. *Amselem*'s addition is arguably the most widely felt, as it established the threshold test for religious freedom claims and is cited in all subsequent religious freedom claims. This test was reaffirmed in both *Multani* and *Wilson Colony*. *Multani*, for its part, established that the reasonable accommodation analysis is a useful tool in some contexts. *Wilson Colony* placed limits, however, on the use of this notion, restricting its deployment to cases in which government action (rather than legislation) is impugned. *Multani* also established that security concerns must be clearly supported by evidence in order to justify infringements on religious freedom. On the other hand, *Wilson Colony* established that a wider measure of deference will be granted to governments on this issue in the crafting of statutes and regulations than in government agents' implementation of those instruments. Further, *Wilson Colony* established that the proportionality analysis under s. 1 of the *Charter* extends beyond the question of the minimal impairment of rights; it must include a separate consideration of the benefits and costs of the legislation or action under review.

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<sup>287</sup> Litigant 4 Interview.

Having laid out the most significant legal aspects of the decisions, this chapter went on to conduct an initial examination of the judicial decisions in terms of the three major themes of this dissertation: overlapping legal systems, cross-cultural communication, and religious freedom as a citizenship right. This has opened the door to the remaining chapters, in which I will use these themes as lenses through which to examine the lived experiences of participants in these cases.

# Chapter 4 Overlapping Legal Systems

## 1 Introduction

The cases under review in this study did much to advance the jurisprudence of religious freedom in Canada, as shown in Chapter 3. The *Amselem* ruling articulated new legal tests; the *Multani* ruling stressed values of tolerance and imported the notion of reasonable accommodation; and the *Wilson Colony* decision expanded cost-benefit analysis in religious freedom adjudication while constraining the application of the reasonable accommodation analysis employed in *Multani*. More crucially for the current chapter, the litigation processes in these three cases brought to light the subtly layered normative lives of participants. A small but poignant example of the overlapping authoritative claims on the lives of participants can be seen in the timing of the first court process that occurred in the *Amselem* litigation. Participants explained that an application for an emergency injunction was brought by the condominium syndicate on the eve of the *Succoth* holiday;<sup>1</sup> the litigants were thus put to the choice of attending at the injunction proceedings or observing the holiday according to their custom, which prohibits driving and work, and requires that meals be taken in the *succah*. In the event, one of the three co-owners stayed in court as a representative on behalf of the others.<sup>2</sup>

A close reading of the documents submitted in the litigation and interviews with participants in the litigation reveal some of the complex ways in which legal systems and sources of normativity can interact. The placement of the *Amselem* dispute in the condominium setting can serve as a point of departure for considering the multiple sources of normativity that govern the behaviour of the relevant parties. The Quebec laws that regulate condominium-type properties allow a significant amount of latitude for private actors to craft a building's rules, which can be enforced by state courts. In Québec, properties governed by the rules of divided co-ownership must have a "declaration of co-ownership," which includes "the act constituting

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<sup>1</sup> Lawyer 1 Interview; Litigant 2 Interview.

<sup>2</sup> Litigant 2 Interview.

the co-ownership, the by-laws of the immovable and a description of the fractions.”<sup>3</sup> The declaration functions as the building’s “charter,” and, among other things, describes the “destination”<sup>4</sup> or purpose of the building. This bears important consequences on co-owners’ property rights, which may be restricted by the building’s by-laws if the restrictions are justified by the “the destination, characteristics or location” of the building.<sup>5</sup> The term “destination,” however, is not defined in the Civil Code, leaving private actors the autonomy to generate the normative basis upon which disputes between the co-owners will be decided.<sup>6</sup> Moreover, the by-laws that restrict the rights of co-owners are also drafted (and possibly amended) through private action, meaning that even in the state’s account, the sources of normativity that regulate life in a condominium can be as multiple and varied as the individuals who draft and vote on the rules.<sup>7</sup>

Religious freedom claims in Canada open a more particular window on the interaction of normative systems, as they can involve individuals who have declared themselves to be subjects of at least two legal systems that make comprehensive claims of authority over their lives. Moreover, through the jurisprudence of religious freedom, the Canadian state legal order has taken an interest in religious norms, and made those relevant to the state legal order in particular ways. Likewise, the religious freedom claimants had both an immediate and symbolic interest in state laws, and their understanding of these laws was coloured by their religious perspectives.

Through the lived experiences of individuals who consider themselves to be subjects of both Canadian and religious laws, this chapter offers a glimpse into the ways in which these

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<sup>3</sup> Art 1052 CCQ.

<sup>4</sup> Art 1053 CCQ.

<sup>5</sup> Art 1056 CCQ; Serge Binette, “De la copropriété indivise et divis suivant le nouveau code civil du Québec” in Andrée Laprise and Denis Vaugeois, eds, *La Réforme du Code Civil: Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec* (Sainte-Foy: Les Presses de l’Université Laval, 1993) 589 at 628.

<sup>6</sup> Once adopted, a building’s destination can only be amended through a majority vote of “3/4 of the co-owners representing 90% of the voting rights of all the co-owners”: Art 1098 CCQ.

<sup>7</sup> There is, however, a distinction to be drawn between the privatization of norm generation and the strong multiculturalist model which allocates jurisdiction over norm generation to cultural communities, see Talia Fisher, “*Nomos Without Narrative*” (2008) 9 *Theor Inq Law* 473.

legal systems influence each other and the complexities of living as a subject of multiple legal orders. Section 2 of this chapter explores how, in participant narratives, religion operated as a legal system distinct, though not isolated, from the state legal system. Section 3 examines the claims to supremacy of each legal system, and how this hierarchy plays out in practice. Section 4 analyzes how participants at times viewed state norms through the particular lens of their religious norms and their community's historical narrative. Section 5 looks at the inverse phenomenon, where participants viewed religious norms through the lens of state norms. Section 6 shows instances in which the boundaries of these normative systems were blurred. Section 7 concludes.

## 2 Religion as Law

As discussed in Chapter 2, legal pluralism's central claim advanced is that state law is not the only form of law that orders and gives meaning to social life.<sup>8</sup> Often, however, in the discussion of legal disputes, the state is given a monopoly on the legitimate deployment of legal terminology, rules and sanctions. Other legal forms are subordinated, and often go unrecognized.<sup>9</sup> The claims made in the three cases under analysis were made in state courts, and thus formally acknowledge the applicability of state law. However, the actions and discourse deployed by litigants in the three cases under analysis reveal a curious tension. While none of the claimants contested the state court's jurisdiction over their situation,<sup>10</sup> litigants displayed a

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<sup>8</sup> See, *eg*, Sally Engle Merry, "Legal Pluralism" (1988) 22 *Law & Soc'y Rev* 869; John Griffiths, "What is Legal Pluralism?" (1986) 24 *J Legal Pluralism* 1; Franz von Benda-Beckman, "Who's Afraid of Legal Pluralism?" (2002) 47 *J Legal Pluralism & Unofficial Law* 37.

<sup>9</sup> See Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney L Rev* 375; Roderick Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 *Ariz J Int'l & Comp L* 69

<sup>10</sup> One expert witness, however, did question the legitimacy of the Canadian legal practice that, generally speaking, limits the participation of expert witnesses to the trial level:

The bottom line is, once it went [to the Supreme Court], they no longer had any reason to talk to me. I found that somewhat inappropriate to be honest, I mean, it may be perfectly fine in the legal system, but they started getting briefs from other people, other groups or whatever, and that's where I think they started to get the impression that the Jewish community as a whole was opposed to my decision, even if what they said was somehow skewed or misrepresented the legal reality, and I think it would have been better, although I don't know if it's even legal, had they come back to me and said look, we've gotten these responses, do you have anything to say about them? Um, maybe I was right and maybe I was wrong, and maybe what I said would be valuable



subtle form of resistance to the state monopoly on law in both the documents submitted to the courts and narrative accounts of their experiences.

## 2.1 Legal Language

One form of resistance to the state's exclusive claims on legal authority occurred at a discursive level. As noted in Chapter 2, some legal pluralist scholars place a strong emphasis on the use of legal language.<sup>11</sup> Even if one is not inclined to accept that *anything* people call “law” is actually legal in nature, I suggest that the use of legal terminology is significant nonetheless. At minimum, the persistent use of legal terminology reveals the special premium placed on “legal” norms. Moreover, participants often used legal terminology both in and out of court to describe their religious obligations, suggesting both that participants perceive the religious norms to have a legal quality, and that legality exerts a special force in the context of personal narratives.<sup>12</sup> This sub-section will set out examples where participants employed legal terminology in relation to religious obligations, demonstrating the different ways in which this pattern took on significance.

Affidavits submitted by the Orthodox Jewish claimants in *Amselem* provide a first example of the use of legal language in relation to religious practices. These affidavits asserted:

THAT according to the commandment in Leviticus and the rabbinical interpretation that has evolved, I celebrate the holiday of Succat [sic] by dwelling in a succah for 8 days;

THAT as per Jewish law, during these 8 days I eat all of my meals in the succah.

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or not but, they never asked. And so, I think in a sense, the guys who got the last kick at the can had the greatest influence, and that strikes me as inappropriate (Expert Witness 1 Interview).

<sup>11</sup> See Brian Z Tamanaha, “A Non-Essentialist Version of Legal Pluralism” (2000) 27(2) *JL & Soc’y* 296 at 313: “Law is whatever people identify and treat through their social practices as ‘law’ (or recht or droit, and so on)”; Gunther Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 *Cardozo L Rev* 1443.

<sup>12</sup> Interestingly, counsel for the *succah*-building appellants in *Amselem* also argued that the notion of religious freedom should be broad enough to protect those religions that do not employ the concept of commandments, citing the example of Buddhism: *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem SCC*] (Transcript of Oral Argument at 83 (Julius Grey for *Amselem et al*)).

THAT as per Jewish law, every morning I take the 4 species (palm branch, citron, myrtle leaf and myrrh) to the succah and therein perform the ritual blessing.<sup>13</sup>

The affidavits begin by invoking a “commandment,” a term that may have lost some of its relevance in contemporary legal discourse, but here retains its legal resonance in relation to the commands of a sovereign. Then, the affidavits immediately reference the textual source of this commandment and its surrounding interpretive tradition, serving as authoritative sources for the explicit references to “Jewish law” that follow. Moïse Amselem made parallel comments in cross-examination. When opposing counsel asked a general question about the “tradition” of *Succoth*, Amselem responded: “C’est pas une tradition, c’est commandement de Dieu, faites attention.”<sup>14</sup> He went on to explain that Judaism has both a written and oral tradition, the latter comprising the rabbinic interpretations of the written tradition.<sup>15</sup>

The legal terminology employed in these documents and exchanges serves to provide context and legitimacy for the descriptions of rituals which, to most, would appear to be unconnected to a legal system. Indeed, the rabbis called as expert witnesses by both sides of the dispute in *Amselem* explained some of the intricacies of Jewish law (*Halakhah*), and demonstrated some of the interpretive tensions that exist within that tradition. Rabbi Ohana, the expert witness called by religious freedom claimants, noted in his expert report that “[l]a loi et coutume juives ne s’arrêtent... pas au symbole et définissent dans le détail des modalités

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<sup>13</sup> *Ibid* (Affidavit of Gabriel Fonfeder, 9 December 1997 at paras 7-9; Affidavit of Thomas Klein, 22 December 1997 at paras 7-9; Affidavit of Moïse Amselem, 18 December 1997 at paras 8-10 (the Amselem affidavit is in French, but is a direct translation of the information in the other affidavits)). In cross-examination, a litigant used more colourful legal terminology to describe the same obligation: “according to Jewish law, the very first night it’s obligatory [to eat in the *succah*] even if it pours cats and dogs”: *ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent’s Record, Vol 1 at 210).

<sup>14</sup> *Ibid*, (Cross-examination of Moïse Amselem, 3 February 1998 Respondent’s Record, Vol 1 at 283). Similarly, at 303, Mr. Amselem later said: “Alors tout ça, vous savez, ce n’est pas des choses qui sont symboliques, ce sont des commandments, et on se sent très mal à l’aise de faire – de transgresser un commandement... Ce n’est pas une histoire de symboles.”

<sup>15</sup> *Ibid* (Cross-examination of Moïse Amselem, 3 February 1998, Respondent’s Record Vol 1 at 284). Thomas Klein, another of the religious freedom claimants, made similar comments in cross-examination, explaining the difference between the biblical and rabbinical “requirements” associated with *Succoth*, and later distinguishing two or three levels of rabbinical interpretation (“oral law” and “interpretation of the oral law as well as the written law in the Bible”): *ibid* (Cross-examination of Thomas Klein, 29 January 1998, Respondent’s Record Vol 1 at 245-247).

d'application du commandement biblique.”<sup>16</sup> Similarly, the condominium syndicate’s expert, Rabbi Levy, noted in his report: “The number, size, and shape of the walls are regulated... The roof of the sukkah is the most important part, and many rules govern it.”<sup>17</sup> The difference of opinion between these rabbis was brought out most starkly during their expert testimony at the Superior Court. In Rabbi Ohana’s view, where taking one’s meals in the *succah* becomes a source of serious discomfort, one is liberated from the obligation of dwelling in the *succah*.<sup>18</sup> Further, those who remain in an uncomfortable *succah* (for example, where it is raining), “manquent de sophistication en matière religieuse et ne font pas nécessairement plaisir à Dieu, puisque *la loi* vous a dit que, quand la *succah* devient source raisonnable d’inconfort... vous devez la quitter.”<sup>19</sup> Rabbi Levy’s testimony, while clearly disagreeing on the nature of the

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<sup>16</sup> *Ibid* (Expert Report of Rabbi Dr. Moïse Ohana, 16 February 1998, Appellants’ Record Vol 2 at 316). The report went on to deal with some of the practical requirements of celebrating the holiday – transporting fine linens, dishes, decorations, food – which lead to the practice of arranging for easy access to the *succah*.

<sup>17</sup> *Ibid* (Expert Report of Rabbi B. Barry Levy, Ph.D., 19 February 1998, Appellants’ Record Vol 2 at 323). Rabbi Levy’s report also includes a discussion of the various laws governing the Sabbath and the ways in which these interact with the observance of *Succoth*. Interestingly, two of the religious freedom claimants noted in cross-examination that, though they observed the *succah* practice, they were not experts in all of the various rules that relate to it: “I’m not a rabbi to dwell on it in details”: *Amselem SCC*, Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent’s Record Vol 1 at 205; “I am not a rabbi, but as far as my understanding is, on those days, even if you were not hungry, you have to eat there... to fulfill the biblical requirements of dwelling in the *succah*”: *Amselem SCC*, Cross-examination of Thomas Klein, 29 January 1998, Respondent’s Record Vol 1 at 243. There is, perhaps, a parallel here to non-lawyers, who generally observe state law but do not possess expert knowledge. In other words, another factor marking Jewish law as a legal system is a class of juristic experts in the topic.

<sup>18</sup> In support of this position, Rabbi Ohana cited the *Shulhan Aroukh*, a well-known religious text, and Talmudic interpretations of Biblical verses: *ibid* (Examination of Moïse Ohana, 17 March 1998, Appellants’ Record Vol 1 at 267-269). Rabbi Ohana went on to note that the obligation is vacated only when the discomfort is unforeseeable; where discomfort is foreseeable, one is obligated to build one’s *succah* in such a way that “vous puissiez tout au long de la fête y jouir avec plaisir et sans corvée excessive (at 273).” Moreover, in describing those who do not fulfill the obligation of dwelling in the *succah*, Rabbi Ohana employed the language of “transgression,” further indicating the legal contours of the religious norm (at 288). In a meeting of the co-owners that occurred in parallel to the litigation, Mr. Amselem drew on this concept to explain why he rejected the compromise of the common *succah*:

l’accord qu’il y a eu entre les avocats... et le Congrès Juif Canadien, c’était une ouverture, un compromis très honorable et très valable... Mais il y a eu un... une faille *du point de la loi juive*. Parce que il [sic] faut transporter, il faut manger dans la souccah, il faut transporter ses ustensiles, sa nourriture dans la souccah. Pour celui qui peut être à côté, c’est idéal. Mais pour une personne qui a des enfants et qui habite de l’autre côté... marcher un kilomètre avec des casseroles et les mains... alors c’est pour ça que l’accord... était faible de ce côté là: *ibid*, (Extracts of the Recording of the Assembly of Co-owners, 19 November 1997, Respondent’s Record, Vol 1, at 452-453).

<sup>19</sup> *Ibid* (Examination of Moïse Ohana, 17 March 1998, Appellants’ Record Vol 1 at 269 (emphasis added)).

*succah* obligation, nonetheless used legal terminology throughout his testimony to describe the obligation as he saw it. He stated, for example:

The *Jewish legal system*, called *Halakhah*... has been in operation for more than three thousand (3,000) years and I don't believe it's possible to find in that entire literature, which is huge, any claim that one must build a *succah*. *The law* requires that one use one, live in it, eat in it, sleep in it... there is no obligation to build a *succah*.<sup>20</sup>

The complexity and sophistication of Jewish law, and its attendant interpretive disagreement, are all familiar characteristics to the Canadian state legal system. Of course, not every complex and sophisticated discourse is necessarily a legal discourse. But the style of argumentation in this case, wherein one rabbi based his opinion on the absence of a specific obligation to build one's own *succah* while another tried to overcome this difficulty by relying on a more purposive interpretation of the obligations associated with the holiday has a special resonance with constitutional adjudication in Canada. Indeed, one could find an analogue in the Supreme Court's decision in *Amselem* itself: the lower courts and dissenting judges of the Supreme Court preferred to look to the specific terms of the building's by-laws, while the majority of the Supreme Court took a more purposive approach to religious freedom. Alternatively, the disagreements amongst the rabbis and amongst the judges could also be analyzed as based on a more fundamental difference in principle; in any event the resonance remains.

As in *Amselem*, the religious freedom claimants in *Wilson Colony* used the language of "commandment" and other terms familiar to legal discourse to describe their religious practices. In an affidavit submitted to the courts, one Colony member explained that he and the other

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<sup>20</sup> *Ibid* (Examination of Barry Levy, 17 March 1998, Appellants' Record Vol 1 at 297 (emphasis added)). Rabbi Levy used nearly identical language in his expert report, where he also made some general comments on the nature of the Jewish legal system:

Halakhah is the generic name of the Jewish legal system that began in the Bible, that has continued to be developed ever since, and that contains the operative collection of regulations and principles according to which observant Jews conduct their lives. There is only one halakhic system, which derives largely from the Torah ..., the Mishnah and the Babylonian Talmud... and several vast medieval codifications of Jewish law. Thousands of other texts are part of the halakhic literature including commentaries on the above mentioned works, and other legal digests, essays, collections of laws and customs related to specialized sub-areas of religious life, and responses to specific questions of legal theory and practice (Expert Report of Rabbi B. Barry Levy, Ph.D., 19 February 1998, Appellants' Record Vol 2 at 322).

members “adhere to the *principles, commandments and doctrines* of the Bible.”<sup>21</sup> Indeed, as noted in Chapter 3, the Hutterites objected to being photographed based on their understanding of the Second Commandment in the Old Testament. They interpret that commandment’s prohibition on graven images to forbid all kinds of images, treating them as idolatrous. In the same affidavit, the Colony members also used the language of “prohibition” to describe the religious obligations flowing from the Second Commandment:

the Hutterian Brethren believe that Commandment No. 2 of the Ten Commandments prohibits the capture of one’s image, and accordingly, do not submit to allowing their photographs to be willingly taken as to do so would be a sin. Commandment No. 2 states: “You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth”, which the Hutterian Brethren interpret to include photographs capturing their likeness.<sup>22</sup>

In an interview, one participant explained the extent of the prohibition:

Interviewer: And the, Second Commandment which deals with images, that applies to all kinds of images, right?

Respondent: Yes.

I: Paintings, all those kinds of things, is that all included?

R: Like pictures on the wall and all over.

I: So you don’t have any of that.

R: No.<sup>23</sup>

For the Hutterite participants, the matter was straightforward: God’s commandments demand obedience. There was little room, in this case, for an interpretive solution that read the Second Commandment in another way, as shown in this exchange:

I: I understand from the documents that it’s the Second Commandment that prohibits the taking of the photo.

R: Yes.

I: Can you give me a little bit more background on that?

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<sup>21</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Wilson Colony SCC*] (Affidavit of Samuel Wurz affirmed 10 August 2005, Appellant’s Record, Vol 2 at 191).

<sup>22</sup> *Ibid* at 192.

<sup>23</sup> Litigant 3 Interview.

R: You don't need more background... When God made the Ten Commandments, and gave 'em to Moses for him to give to the children of Israel, he wrote 'em in stone and if you put something in stone well that should last forever and ever. And this, these commandments, we try to obey them, these Ten Commandments, and it's not only the Ten Commandments we try to obey, it's all what our Jesus taught us...<sup>24</sup>

Like the religious freedom claimants in *Amsalem*, the *Wilson Colony* participant here situates the Second Commandment in a larger body of obligations and teachings, contextualizing the particular obligation in a religious legal tradition.

In another exchange, one Hutterite participant added another layer of legal significance to the practice. When asked about the accommodations proposed by the Alberta government, which both involved the taking of a photograph, he described a transgression of the commandment as breaking a vow: “the damage is done if you sit down and ... they take your photo, what's the use of hiding that photo, you've done it, the damage is done, you've broken your vow to God.”<sup>25</sup> This adds another legal dimension to the transgression of breaching a particular commandment, as such behaviour also constitutes a breach of covenant. As in the common and civil laws of contract, this narrative treats promises as giving rise to an obligation, and entailing consequences when breached.

The use of legal language in the *Multani* litigation was less prevalent. However, when asked why certain proposed solutions regarding the carrying of a *kirpan* were unacceptable, one litigant explained:

[The school board representatives said,] “Oh, you should wear the wooden *kirpan*, or you should be wearing plastic *kirpan*, you should wear it in your neck or something like that, very small,” these things obviously, if we accept that, then... I'm giving up [the] whole thing...

*Kirpan* is made of metal... *I have [been] given it with laws.*<sup>26</sup>

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<sup>24</sup> Litigant 4 Interview.

<sup>25</sup> Litigant 4 Interview.

<sup>26</sup> Litigant 1 Interview (emphasis added). The same litigant also drew on the religious laws associated with the *kirpan* as a source of confidence when confronted by authority figures: “And I explained to her, since I was well aware of what it is, why I carried it, I knew the laws and everything.” In a textual source on Sikhism cited by the Multanis' expert witness called, the “five Ks” required of Sikhs (which include the *kirpan*) are described as

Here, the participant invokes the legal nature of the religious obligation to explain that some compromises are unacceptable. In this participant's view, his religious law must at some point be unyielding, and the obligation to wear a *kirpan* is not satisfied by an object that does not meet the technical requirements of a *kirpan*. There is, perhaps, a resonance here with the view from inside state law, which has its own red lines, as seen in *Wilson Colony* and other religious freedom cases such as *R. v. N.S.*<sup>27</sup> In both those cases litigants came up against the boundaries of the state's accommodation. Though Canadian courts have pursued an approach of reconciling competing rights claims where possible, there are some things state law will not bear.

There is a significant caveat to my claim that, by using legal terminology, religious freedom claimants perform an act of subtle resistance against the state's claimed monopoly on law. One participant suggested that litigants in the *Amselem* litigation performed a more controversial form of resistance to state laws by representing a less than wholly accurate picture of Jewish law to the state courts.<sup>28</sup> This participant suggested that some of those connected with the litigation were conforming to a different norm in the Jewish legal tradition, according to which rabbis, "in the defence of whatever it is they consider to be under attack, can do all kinds of things, and I think in this case they may done that."<sup>29</sup> This narrative casts the litigants'

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belonging to a prescribed discipline and code: see Dharam Singh, *Dynamics of the Social Thought of Guru Gobind Singh* (Patiala: Publication Bureau Punjabi University, 1998) at 121, cited in *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [*Multani SCC*] (Affidavit of Manjit Singh, Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol 1, at 61).

<sup>27</sup> *R v NS*, 2010 ONCA 670. The Ontario Court of Appeal held that while in some circumstances, a witness in a sexual assault case would be allowed to testify while wearing a *niqab*, this would not be allowed in all circumstances: "If the judge concludes that the wearing of the niqab in all of the circumstances would infringe the accused's right to make full answer and defence, that right must prevail over the witness's religious freedoms and the witness must be ordered to remove the niqab (at para 88)." The Supreme Court of Canada recently heard the appeal of this decision, see "Niqab case goes to Canada's top court" *CBC News* (8 December 2011), online: <<http://www.cbc.ca/news/canada/story/2011/12/08/niqab-supreme-court.html>>.

<sup>28</sup> See Ihsan Yilmaz, "The challenge of post-modern legality and Muslim legal pluralism in England" (2002) 28(2) *Journal of Ethnic and Migration Studies* 343 and Suzanne Last Stone, "The Intervention of American Law in Jewish Divorce: A Pluralist Analysis" (2000) 34(2) *Isr L Rev* 170. Both Yilmaz and Stone present situations in which religious adherents successfully co-opted or manipulated the laws of the state to serve their own ends. But see Angela Campbell, "Bountiful Voices" (2009) 47 *Osgoode Hall LJ* 183 for a more complex example of the unorthodox deployment of the state laws regarding same sex marriage in the context of a polygamous relationship.

<sup>29</sup> Expert Witness 1 Interview. The participant was somewhat ambivalent on this point, having previously suggested that he was "not accusing the rabbis" of misrepresenting rabbinic law.

behaviour as “strategic essentialism,”<sup>30</sup> *i.e.*, presenting a caricaturized version of their tradition to suit their purposes in litigation. Indeed, one of the litigants in *Amselem* suggested that part of his motivation for pursuing the claim was his perception that the opposition to his *succah* was connected to anti-Semitism.<sup>31</sup> That said, there was never any real suggestion to the courts that the *Amselem* litigants were insincere; the opposing argument was instead that they were incorrect in their interpretation of Jewish law. Indeed, one expert witness explained how the lawyer who had hired him suggested that he point out an error of religious law made by the expert testifying for the opposing side:

I remember very distinctly that the lawyer for our side caught the rabbi testifying for the other group in an error, and told me that, you know, I should speak about this you know to correct him, which I did, but it was a small point, I don't know that it made whole lot of difference in terms of the principle of the thing.<sup>32</sup>

This strategy emphasizes the way in which participants on both sides of the dispute approached the norms of Judaism as legal norms. The syndicate's argument was, essentially, that the religious freedom claimants had made an error of law.<sup>33</sup>

While the use of legal terminology by the claimants in *Amselem*, *Multani* and *Wilson Colony* underscores the perception by participants that religious normative systems are legal in their own right, they also illustrate the complexities of defining what the term “law” means, which has been a matter of persistent debate in legal pluralist scholarship.<sup>34</sup> Indeed, some of the

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<sup>30</sup> Tariq Modood, “Anti-Essentialism, Multiculturalism, and the ‘Recognition’ Of Religious Groups” in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 175 at 178.

<sup>31</sup> Litigant 2 Interview.

<sup>32</sup> Expert Witness 1 Interview.

<sup>33</sup> As counsel for B'nai Brith Canada put it in his oral argument to the Supreme Court, the syndicate's answer to the *succah* claim was “here is a Rabbi, here is a gentleman learned in Jewish law and he says there is no religious obligation to put a succah hut on your balcony.” *Amselem SCC*, *supra* note 12 (Transcript of Oral Argument at 20 (Steven Slimovitch for B'nai Brith Canada)).

<sup>34</sup> See Chapter 2, Section 2.5. Oren Perez treats this as a significant weakness of legal pluralism: “the concept of legal pluralism, despite the long scholarly engagement with it, is deeply vague... This vagueness concerns, primarily, the jurisprudential questions of the meaning of law and the (proper) distinction between law and non-legal normative orders.” Oren Perez, “Legal Pluralism” in *The Oxford Encyclopedia of American Political and*



religious obligations at issue in these cases are an awkward fit with some of the posited functional definitions of law, which rely on notions of social control, institutionalized dispute resolution, or institutionalized norm enforcement.<sup>35</sup> Arguably, the obligation at issue in *Wilson Colony* is consonant with the notion of law as social control or institutionalized norm enforcement. The prohibition on idolatry is, perhaps, given broad scope in order to protect a particular version of monotheism. Moreover, in cases where there was a breach of this obligation, transgressors were sometimes punished. Indeed, the *Wilson Colony* litigation provided a glimpse of the role of religion as a force of social order in the colony's life.<sup>36</sup>

However, the insistence by the *Amselem* and *Multani* claimants on the legal nature of their religious obligations is more challenging for these functional definitions. It is difficult to see how the obligation to construct a *succah* on one's own property or the obligation to wear a *kirpan* fits into the posited functions of law mentioned above. Certainly, the erection of a *succah* is a norm amongst a subset of Jews, as is the wearing of a *kirpan* among some Sikhs, but there is no institution that enforces those obligations; similarly, the religious practices clearly fulfill a social function in the life of the individual, family, or community, but to claim that the obligation to build a *succah* or wear a *kirpan* is a form of social control is true in only a tangential sense. Both are imagined as symbolic instantiations of higher principles, but do not, as such, control social interactions.

One possible response is that the religious obligations are not legal at all, and, to the extent that the claimants take such a position, they are mistaken. But such a response does violence to the common understanding that there is something called religious law, embodied in written and oral traditions and subject to multiple interpretations. Moreover, insisting that religious norms are not legal discursively diminishes the significance of the religious practices. The particular obligations at issue in these cases thus challenge state-centred and functional definitions of law, prompting a re-examination of the term "law."

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*Legal History*, Donald . Critchlow & Philip R. VanderMeer, eds (Oxford: Oxford University Press, forthcoming 2012). See also Ralf Michaels, "Global Legal Pluralism" (2009) 5 *Annu Rev Law Soc Sci* 243 at 250-251.

<sup>35</sup> See Tamanaha, "Non-essentialist", *supra* note 11 at 312-313.

<sup>36</sup> In the next sub-section, I highlight elements of the data that demonstrate this in some detail.

One way of re-examining “law” is through James Tully’s Wittgensteinian approach, discussed in Chapter 2, which groups terms together on the basis of their “family resemblances” to one another. In the three particular cases under review in this work, the religious obligations contain aspects that mark them as belonging to law’s family. First, all the religious freedom claimants viewed their practices as obligatory in meaningful ways. In all of the cases, the participants were willing to take on the significant financial and time-related burdens of pursuing litigation to the highest level in order carry out their religious practices. Participants also demonstrated the extent to which they were *compelled* by the force of their religious obligations in other ways. For instance, one *Amselem* participant described how he celebrated *Succoth* at his family’s house during the interval when he was enjoined from building his own *succah*;<sup>37</sup> there was never any question of not fulfilling the *succah* practice in some form. Likewise, when Gurbaj Singh Multani was prohibited from wearing his *kirpan* in the public school, he and his family opted to pay for private schooling so Gurbaj Singh could continue to wear his *kirpan*. In *Wilson Colony*, as will be explained below, the Hutterite response to the Supreme Court’s ruling was divided. Some colony members showed the strength of Second Commandment’s force by continuing to drive with expired licences and absorbing the cost of the associated fines. Others saw themselves as compelled by contradictory forces: the court’s ruling and the religious obligation of maintaining self-sufficiency. These members opted to have their photos taken, but expressed anguish in the decision.<sup>38</sup>

Of course, the nature of the compulsion in these religious contexts differs from state law’s forms of compulsion. The claimants in the cases under review did not risk fine or imprisonment if they failed to fulfill their religious obligations. (That said, as will be seen in the next sub-section, the *Wilson Colony* claimants could have faced consequences within the colony including being forced to seek forgiveness publicly.) In all the cases, however, even though the kind of compulsion differs from that which emanates from the state, participants nonetheless evidenced a deep commitment to the practices, and absorbed significant costs in order to

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<sup>37</sup> Litigant 2 Interview.

<sup>38</sup> Litigant 3 Interview.

maintain them, showing that it would be difficult to dismiss the religious practices as mere choices of the practitioners.<sup>39</sup>

A second way in which participants marked their religious practices as legal was by describing them as following from higher principles within a larger tradition. As seen above, the *Amsalem* claimants and their expert witness connected the *succah* to human dependence on God. The *Multani* claimants, their counsel, and the World Sikh Organization described the *kirpan* as a symbol of resisting oppression and injustice. The *Wilson Colony* claimants framed the Second Commandment as flowing from a monotheistic tradition that forbids idolatry. In state law, too, practical obligations flow from principled commitments. Indeed, the judges rationalized the obligations embodied in the court rulings in all three cases as being in service of the higher values of religious freedom and its reasonable limits.

Third, all the practices at issue parallel more familiar legal obligations in that they are regulated in detail and have practical implications in the lives of the practitioners. *Amsalem* offered a glimpse into the level of detail with which the *succah* obligation is regulated in the rabbinic literature. The *Multani* claimants emphasized that the material with which the *kirpan* is constructed was significant to their fulfilling the practice, as was the material of the sheath; interviews revealed that some practitioners of the *kirpan* tradition would have objected to sewing it into its sheath.<sup>40</sup> Interviews with *Wilson Colony* participants showed that the prohibition on idolatry manifests at the most mundane levels, regulating how Hutterites decorate their homes. Thus, like the terms of a condominium's by-laws, a school's code of conduct, or the regulations regarding driver's licences, each of these practices required particular forms of behaviour with respect to the minutiae of everyday activities.

Fourth, in all of the cases, there was reasoned disagreement within the relevant religious community as to the import and nature of the obligations. This was clearest in *Amsalem*, where expert witnesses performed that disagreement at the Superior Court. In *Multani*, there was some

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<sup>39</sup> On the difficulties of treating religious obligations as mere choices of adherents, see David C Williams & Susan H Williams, "Volitionalism and Religious Liberty" (1991) 76 Cornell L Rev 769; Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45 Osgoode Hall LJ 277.

<sup>40</sup> Lawyer 3 Interview.

discussion of Sikhs who find it acceptable to wear a pendant in the form of a miniaturized *kirpan* in order to fulfill their *kirpan* obligation, with Gurbaj Singh explaining the reasons why this not acceptable to him. Likewise, in *Wilson Colony*, there was evidence of a difference of opinion among Hutterites as to whether the Second Commandment prohibited adherents from having their photos taken for their driver's licences. There is a resonance here with the narrowly divided *Amselem* (5:4) and *Wilson Colony* (4:3) decisions of the Supreme Court. These rulings show that, even at the highest levels of Canada's state legal system, there is often disagreement as to the meaning of legal principles and their application. Indeed, even when judges agreed in the result, they often diverged on the reasons for that result. This form of reasoned disagreement is thus a common feature of the religious norms studied here and the state legal system in Canada.

In my view, these aspects of the religious practices at issue in *Amselem*, *Multani*, and *Wilson Colony* taken collectively are sufficient to draw a compelling analogy to widely recognized legal forms. Accordingly, the religious norms can be treated as legal in their own right. This may not be the case for all religious norms (though I would suggest a presumption of this nature), but under Tully's Wittgensteinian approach, it is neither necessary nor appropriate to enter into that debate at this stage. Like the common law, this approach prefers to deal with new cases as they arise rather than speculating in the absence of a full factual context.

## 2.2 Religion as Source of Social Order in *Wilson Colony*

As alluded to in the preceding section, *Wilson Colony* involved a community that, more clearly than in the other cases, draws on its religion to make basic social ordering decisions. This merits special consideration, as it illustrates how a religious normative system can operate in ways that are easier to understand as legal. This is seen most clearly in the colonies' communal holding of property. In a historical study of the Hutterian Brethren submitted to the court in *Wilson Colony*, Robert Friedmann argues that sociological explanations for this practice fail to fully explain it, and that religious commitments are the central reason for the continuation

of communal living.<sup>41</sup> Participants explained this practice in both historical and religious terms.

For example:

Well, this colony got started way back in the Hutterian Brethren Church, a community of Christians in 1528, by the man named Jacob Hutter. And he... started the Hutterite way of life which says in the Bible, Acts the second chapter, all those who are together, believe in that everything in common, they sold their possessions and goods, and laid them to the apostle's feet, that's what the Bible teaches us, Acts the second chapter.<sup>42</sup>

The same participant explained how this religious commitment to community structures daily life:

R: Well, in daily life, we share everything we have everything in common. What I have, my brother has. And, when we all eat together, one eats, we all share everything.

I: So that all flows from the religious principles?

R: Yes.<sup>43</sup>

Another participant provided a more detailed answer:

Whatever we do, Jesus says, you eat or you drink or whatever you do, to the praise of the Lord, and that's what we do. In the mornings when we get up, the first thing we do is we pray to God that He should, well we thank Him for letting us live through the night and He had His angel out there ... the next thing we sing a morning song, praise the Lord with a hymn, and we go have breakfast, and when we go, everybody's got their assigned job, like the hog man, the cattle man, they all go to do their jobs, and... around quarter to six, we go to church, just about every evening we have... church services, and after church services when there is time, everybody goes home and sings and reads the Bible and teach the kids about the way, what the Lord wants from us, and ... the German school teacher, he has to take care of the children, he takes 'em into German school in morning and the evening, and when he, or there is no school, he keeps 'em busy in the garden helping out with the vegetables... all our activities in the colony are based on religion and we do for

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<sup>41</sup> *Wilson Colony SCC*, *supra* note 21 (Robert Friedmann, "The Christian Communism of the Hutterite Brethren," Exhibit A to the Affidavit of Samuel Wurz affirmed 10 August 2005, Appellants' Record Vol 2 at 199-200).

<sup>42</sup> Litigant 3 Interview.

<sup>43</sup> *Ibid.*

our fellow man, and we believe whatever we do unto our fellow man we do unto the Lord.<sup>44</sup>

Thus, in this account, the Second Commandment's influence on the mundane details of everyday life, discussed in the preceding sub-section, is just one example of how religious norms provide the basic structure for all that happens on the colony.

Hutterite participants also explained that religious norms structure how their communities deal with those who transgress religious rules. These norms thus serve a disciplinary function parallel to state law's penal aspects. For example, one participant recounted the use of disciplinary sanctions employed against young men who had wanted to join the Hutterite Church, but had previously had their photos taken for their driver's licences:

Well these boys, they were not baptized, they were not members of the colony, and they went ahead and they put their photo on by themselves ... then when we find out that they had their photos on there, well we had a policy, rules and regulations that when a person is not a member, he can be punished by just standing up in church for half of the church, or kneeling for half the church, or... the school teacher can punish him in Sunday school by having him stand all Sunday school.<sup>45</sup>

Another participant explained the use of temporary ex-communication as a sanction when members breach religious laws:

R: ... [I]f they're a member and we discipline them, then we excommunicate them from the colony so they're no members for while... Till they come back and beg to be members again... [T]hat's our punishment in the colony.

I: So what happens to a member who is excommunicated?

R: Well he, he's no member, he doesn't, he's not able to come to church or eat with the members, he has to eat separate for a while till he begs to be a member again.

I: But he can go on living in –

R: Yes, he stays in the colony, yes, he doesn't have to leave the colony.

I: And is there a set amount of time before he's allowed to beg –

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<sup>44</sup> Litigant 4 Interview.

<sup>45</sup> *Ibid.* See also *Wilson Colony SCC*, *supra* note 21 (Affidavit of Samuel Wurz affirmed 18 January 2006, Appellant's Record Vol 3 at 303-305).

R: Well, all depends how hard he wants to be a member again. Two, three, four weeks ...<sup>46</sup>

Thus, in the Hutterite case, the data highlighted a particularly vivid example of the legal aspects of religious norms. Commitments to communal living function like constitutional principles, forming the basic structure of life on the colony. From the same principle, the colony derives a disciplinary function, as sanctions relate to the transgressor's relationship with the rest of the community. The colony exercised this function in order to maintain a particular form of social order on the colony, which comprised both the commitment to communalism as well as other religious norms, such as the prohibition on images.

### 3 Hierarchies of Legal Systems

If both state norms and religious norms exert their own legal force in the lives of religious freedom claimants, which prevails in a case of conflict? In all three cases under review, a religious norm conflicted with a norm recognized by state law. A religious prohibition on being photographed conflicted with a government regulation; a religious obligation to wear a *kirpan* conflicted with the decision of an administrative state actor; a religious obligation to build a *succah* conflicted with a contractual provision that, though not created by the state, would ordinarily be enforced by state courts. State law has its own story to tell about the relative priority of state and religious norms, and some of that story emerges from the judicial decisions. For example, the *Amselem* decision holds that the state must remain agnostic as between varying interpretations of the same religion.<sup>47</sup> In the face of conflicting expert reports on the religious significance and laws associated with the *succah*, the majority of the Supreme Court confined its analysis to whether the claimants sincerely believed in their interpretation of Judaism. There are good reasons for this deferential posture to individual religious interpretation. Arguably, it flows from the principle that state courts do not possess the right kind of authority to be making decisions regarding religious doctrine.<sup>48</sup>

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<sup>46</sup> Litigant 3 Interview.

<sup>47</sup> *Amselem SCC*, *supra* note 12 at para 50.

<sup>48</sup> It is also sometimes argued that courts do not possess the requisite expertise to make these types of determinations. This position, however, disregards that state judges are often called upon to make decisions on

However, implicit in this approach is a kind of double standard: state law is comfortable with indeterminacy when it comes to religious legal systems, and it supports this position with reference to the values of tolerance and multiculturalism.<sup>49</sup> At the same time, this kind of openness is not tolerated when it comes to state law.<sup>50</sup> Even in a case like *Amselem* where the Supreme Court's justices sharply divided on the proper resolution of the case,<sup>51</sup> the state legal system insists on finality in both the particular dispute before the court and in the articulation of legal rules. Thus, the decision of a narrow majority of the Supreme Court had a significant impact on subsequent religious freedom litigation in Canadian courts. *Amselem*'s individualistic and subjective test for religious belief, a view not shared by all the judges,<sup>52</sup> has come to be cited in nearly all subsequent religious freedom cases.<sup>53</sup> I am not arguing that state courts ought to be more partisan with respect to the adjudication of disputes involving religious norms, nor that state judicial decisions ought to be less than final. My comments here are aimed to bring into sharper relief the ways in which state law sees itself as sitting on top of a legal hierarchy,

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matters for which they have little to no expertise, such as, for example, the relevant standards for engineering safety in cases of extra-contractual liability, or highly technical scientific matters in patent litigation. The justification for courts not making decisions of religious dogma, then, should be found elsewhere than in judges' particular expertise. Thanks to Prof. Jean-François Gaudreault-Desbiens for this insight.

<sup>49</sup> For an argument that Canadian law is less tolerant than it imagines itself to be, see Benjamin L Berger, "The Cultural Limits of Legal Tolerance" (2008) 21(2) Can JL & Jur 245.

<sup>50</sup> Notably, in the opinion of one of the expert witnesses called in *Amselem*, "normally it is relatively simple to determine when a [Jewish] law is accepted by all, when a position has been influenced by local teachings that may deviate from the norm, when enhancements and strictures are of a voluntary nature, and when personal preferences have played a role in setting practices." *Amselem SCC*, *supra* note 12 (Expert Report of Rabbi B. Barry Levy, Ph.D., 19 February 1998, Appellants' Record Vol 2 at 322).

<sup>51</sup> Indeed, in the course of the case's litigation through the trial and appellate courts, more judges came down on the side of the condominium syndicate (i.e., one trial judge, three judges of the Quebec Court of Appeal, and four judges of the Supreme Court of Canada) than did on the side of the religious freedom claimants (five judges of the Supreme Court of Canada).

<sup>52</sup> See Justice Bastarache's dissenting opinion, *Amselem*, *supra* note 12 at para 135.

<sup>53</sup> Lawyer participants explained that the *Amselem* holding structures litigation strategy for lawyers handling religious freedom claims: Lawyer 2 Interview, Lawyer 3 Interview, Lawyer 4 Interview.



subsuming other legal systems within its dominion.<sup>54</sup> The difference in state law's treatment of itself and treatment of religious law is, in part, an aspect of this view.

The Albertan government's arguments in *Wilson Colony* also expressed this general view. Counsel for Alberta made this submission on the notion of "reasonable accommodation":

what it means to provide reasonable accommodation for a religious belief that happens to conflict with an otherwise unobjectionable law is that, where it is possible to achieve the purpose without impairing the religious belief, we must do that. But if the religious belief causes or demands a genuine impediment to achievement of a pressing and substantial purpose, then reasonable accommodation has been achieved.<sup>55</sup>

Counsel argued that this view was particular to the religious freedom context because of the "subjective character" of the *Charter* right to religious freedom. He thus provided a rationale from inside state law for the prioritization of state law over religious law. Broken down to its component parts, the argument runs: (1) the Supreme Court held in *Amselem* that religion must be treated subjectively; (2) this subjectivity has the potential to give individuals the power to avoid the application of state law; (3) to control this unpredictability, if there is no way for the state to fully achieve its purpose without infringing religious beliefs, the courts must prioritize state purposes over religious practices. Counsel further explained step (1) of this argument with reference to an internal limitation of state law, namely that the state cannot (by its own principles) get into the business of weighing the importance of a particular religious belief. In his words, the holding in *Amselem* supports the proposition that "you can't compare an impact on one person's belief to another person's belief, and you certainly can't compare the extent of impact on someone's belief to a secular goal."<sup>56</sup> As noted in Chapter 3, the majority of the *Wilson Colony* Court eventually held that the reasonable accommodation analysis was

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<sup>54</sup> See The Right Honourable Beverley T McLachlin, PC, "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen's University Press, 2004) 12. Suzanne Last Stone has described the ways that some practitioners of Orthodox Judaism took advantage of this same hierarchy, using state law to resolve a problem that Jewish law could not: Stone, *supra* note 28. This demonstrates, perhaps, a willingness by some religious adherents to accept, for practical purposes, the dominance of state law over religious law.

<sup>55</sup> *Wilson Colony SCC*, *supra* note 21 (Transcript of Oral Argument at 16 (Rod Wiltshire for the Attorney General of Alberta)).

<sup>56</sup> *Ibid* at 20.

inappropriate when scrutinizing the validity of a statute or regulation (rather than government action). However, the court's finding has the same implication: if the state cannot fully achieve a valid purpose, religious law must yield.

While this may be the position of state law, it does not provide a complete picture of the complexities experienced by those subject to overlapping legal systems. Even after courts make their orders, questions of behaviour can linger as participants struggle to reconcile their religious and state legal obligations. As Martha Minow has noted,

[d]ecisions reached within formal governmental authorities do not end the matter for members of subgroups who are themselves tolerating the secular political arrangement only as long as it remains compatible with their own sense of alternative authorities... The official authorities may themselves seem peripheral to those minority groups that seem peripheral to the majority.<sup>57</sup>

Indeed, as will be detailed more fully in the coming paragraphs, interviews highlighted the tensions experienced by participants when state and religious norms demanded conflicting behaviours, and each normative system claimed comprehensive authority.

One might suppose that religious adherents approach their religious laws in a parallel fashion to how state judges explain state law, *i.e.*, that a religious believer would view his or her divine legal system as all-encompassing<sup>58</sup> and supreme over state law, especially in a religion with a tradition of martyrdom at the hands of state officials or other authorities.<sup>59</sup> In some respects, the data support this supposition. In cross-examination, one of the *Amselem* litigants said concerning the installation of his *succah*: “C’est peut-être contre la loi du Sanctuaire [the

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<sup>57</sup> Martha Minow, “Pluralisms” (1988) 21 Conn L Rev 965 at 971. In a similar vein, Shauna Van Praagh has suggested that courts participate alongside communities in the construction of identity as “partner[s] in an ongoing dance”: Shauna Van Praagh, “Identity’s Importance: Reflections of – and on – Diversity” (2001) 80 Can Bar Rev 605 at 617-618.

<sup>58</sup> In cross-examination, Mr. Amselem described the commandment to dwell in a *succah* in this fashion: “c’est un commandement qui vous enveloppe entier, toute votre vie il enveloppe.” *Amselem SCC*, *supra* note 12 (Cross-Examination of Moïse Amselem, 3 February 1998, Respondent’s Record, Vol 1 at 285). Notably, however, he also distinguished the *Succoth* practice from other Jewish observances which do not envelop one’s entire being, such as the practice of laying phylacteries.

<sup>59</sup> In this vein, Robert Cover notes the “self-referential supremacy of each [normative] system.” Robert Cover, “*Nomos and Narrative*” in Martha Minow, Michael Ryan & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) 95 at 127.

name of the condominium complex] mais ce n'est pas contre la loi ni de Dieu ni d'une loi normale."<sup>60</sup> Similarly, Hutterite interview participants were firm in their view that "God's law" was supreme, and were quick to relate stories of their ancestors who were persecuted for their faith but remained steadfast in their beliefs. As one participant related: "you take our forefathers, when they become believers and Christians... they wouldn't do anything against the Ten Commandments or the will of God, they were burned at the stake, they were beheaded, they were drowned, all kinds of persecutions just because of religion."<sup>61</sup> One practical instantiation of this view outside the context of the dispute in *Wilson Colony* was a participant's description of how the curriculum for the Hutterite English school<sup>62</sup> was set:

[In] English school we teach whatever the county, the curriculum the county asks from us, or the county asks itself. Except we kind of go through and see if there's any books that are not meant for our children, like, for instance, reproduction all that kind of stuff that is not meant for Hutterite colony, we tend to shy away from that to teach our children.<sup>63</sup>

So, when it comes to setting the school curriculum, the participant's narrative was that the Colony complies with state law to the extent that its religious views allow; where there is a tension, the religious norms prevail. One participant put the principle more generally: "we cannot please the world and God at the same time, we have to shine as a light and not wander in the darkness."<sup>64</sup> This articulation indicates that the observance of the Hutterite faith where it conflicts with state law is not meant only to preserve the spiritual lives of members, but also to set an example for others.

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<sup>60</sup> *Amselem SCC*, *supra* note 12 (Cross-Examination of Moïse Amselem, 3 February 1998, Respondent's Record, Vol 1 at 326). Apparently, the litigant aimed to distinguish between the by-laws and government legislation.

<sup>61</sup> Litigant 4 Interview. Notably, Cover's work focused on litigation involving Amish communities, whose religion stems from the same Anabaptist tradition as does Hutterianism, and shares a similar "jurisprudence of exile and martyrdom": Cover, *supra* note 59 at 152.

<sup>62</sup> The participant explained that the colonies run an English school for state-mandated courses and a German school for religious instruction.

<sup>63</sup> Litigant 4 Interview.

<sup>64</sup> Litigant 3 Interview.

However, the Hutterites were divided in their response to the Supreme Court ruling. Some of the Hutterite litigants have decided to have their photos taken for their drivers' licences,<sup>65</sup> while others have decided to go on driving and have the Colony absorb the cost of the fines for driving without valid licences.<sup>66</sup> This division was made possible, in part, by the fact that the Wilson Colony has split into two colonies; this is a standard practice among Hutterites when colonies come to be a certain size (around 140 members), and was already underway when the litigation began.<sup>67</sup> A member of the colony that has opted for its members to drive with expired, non-photo licenses explained the decision by reference to a biblical narrative:

there was an incident there in the Bible where... 12 apostles were preaching in the temple, and the scribes and the Pharisees they said, no you can't do that, and they chased them out of the temple and even whipped 'em for doing that. And Peter was put in jail, and in the night time... an angel come to Peter and woke him up and said let's go, the chains fell off of him... the gates opened by themselves and he went to the other disciples and they were all kind of surprised, where did you come from, you was locked up? He said an angel of the Lord took me out of jail. The next day he went into the temple and preached again. The Scribes and the Pharisees seen that, and they called him and said you're not supposed to do that. He said, yes I am supposed to do that, God says I should go and preach and I have to obey God more than man.<sup>68</sup>

Likewise, in materials submitted to the courts, several members of Hutterite colonies wrote:

Some laws are just, but some are unjust... each person must determine for himself in accordance with his conscience in which category each law falls. Those that fall in the unjust basket may be freely violated & even though thereafter this law is held valid, the disobedient may continue his recalcitrance, if his conscience will not permit him to agree...

Yes, the Holy Scripture urges all men obey the civil authorities Romans Chapter 13 which we are in agreement, up to the point when Authorities order conduct contrary to God's expressed command...

we believe that the Hebrew youths who refused to bow to the golden image erected by the King Nebuchadnezzar of ancient Babylon took the right alternative open to

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<sup>65</sup> Litigant 3 Interview.

<sup>66</sup> Litigant 4 Interview.

<sup>67</sup> Litigant 3 Interview; Litigant 4 Interview.

<sup>68</sup> Litigant 4 Interview.

men of God when they refused to comply with the degree [sic] of the king and remained loyal to God.<sup>69</sup>

In contrast, a member of the colony that has decided to have some members have their photos taken framed the issue in this way:

R: ... still there's quite a few members of ours that had to obey the law and put, and take a photo and put it on their licence.

...

I: How has that affected the life on the colony?

R: Well, what else had we done, could we do? Look at all the business we have to do, how else could we keep on going and doing our way of life and make a living?

...

[W]e were forced to do it, you know for yourself we were forced to do it... Against the Ten Commandments.<sup>70</sup>

Indeed, according to this participant, after the decision of the Supreme Court, police officers were aware of the situation and “were waiting on corners already for us.”<sup>71</sup> The economic threat that this presented was too great: “if... you get a ticket every other day, pretty soon you’ll be in the poor house.”<sup>72</sup> For at least some litigants, this illustrates that the state possesses the means at its disposal to alter the behaviour of religious adherents, causing them to act in violation of their religious norms and adopt narratives of the state’s coercion.<sup>73</sup> This demonstrates Shauna Van Praagh’s point that “[i]n Canadian society, members of communities can never completely

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<sup>69</sup> This text comes from a letter composed to Alberta government officials, that was apparently never sent: *Wilson Colony SCC*, *supra* note 21 (Exhibit F to Affidavit of Samuel Wurz, Affirmed 10 August 2005, Appellants’ Record, Vol 2 at 209). See also *Wilson Colony SCC*, *ibid* (Transcript of the Cross-Examination of Samuel S. Wurz by R. Wiltshire (on Affidavit), 2 February 2006, Appellant’s Record Vol 5 at 689): “when it comes to disobeying God’s word, then we want to believe – obey God more than man.”

<sup>70</sup> Litigant Interview 3.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> See W Michael Reisman, “Autonomy, Interdependence, and Responsibility” (1993) 103 Yale LJ 401.

avoid interactions with [state] law and its influence; neither can they dictate unilaterally the terms of their engagement with [state] law.”<sup>74</sup>

The *Wilson Colony* litigation also brings to light larger dimensions of the conflicts between state law and religious law. In a frequently cited article, Robert Cover argues that when religious freedom claimants from insular groups have their claims denied by the state, there is more at stake than the particular practice at issue in the lawsuit. Rather, the denial of the claim by a state court can be “jurispathic,” destroying the community’s narrative interpretation of state law.<sup>75</sup> It could be argued that, in Canada, the jurispathic tendencies of state courts have been significantly attenuated by the holding in *Amselem*, which focuses courts’ attention on the sincerity of the individual’s belief rather than the objective verifiability of the religious practice.<sup>76</sup> However, in *Wilson Colony*, there was some evidence of the continued jurispathic effects of Canadian judicial decisions. Participants were bewildered by their loss in the face of Canada’s commitment to freedom of religion:

R: It seems like... there is no more freedom of religion, is there?

I: Well, what do you mean?

R: You have to do what the government and all court cases tell you.

I: So what would freedom of religion mean to you then?

R: Like freedom of religion, you can practice a way of life and uh, I don’t mean to break laws or anything, but like it says in the Bible, you have to be steady fast in your religion and practice the way of life God wants you to live.<sup>77</sup>

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<sup>74</sup> Van Praagh, “Identity”, *supra* note 57 at 609.

<sup>75</sup> Cover, *supra* note 59 at 152-155. For an argument that Cover’s views are inconsistent in that they insist that the law is necessarily violent and at the same time urge state judge’s to be less jurispathic, see Austin Sarat & Thomas R Kearns, “Making Peace with Violence: Robert Cover on Law and Legal Theory” in Austin Sarat & Thomas R Kearns, eds, *Law’s Violence* (Ann Arbor: University of Michigan Press, 1992) 211.

<sup>76</sup> See *Amselem SCC*, *supra* note 12 (Transcript of Oral Argument at 16 (David Matas for B’nai Brith Canada)): “it’s simply inappropriate for Courts to get involved in deciding on what religions dictate and that all the judges below were wrong in saying... this is what the Jewish religion requires, that when there’s a matter of religious controversy, the Courts should, if at all possible, avoid the controversy... not as a matter of convenience but as a matter of principle.”

<sup>77</sup> Litigant 3 Interview.

Another Hutterite litigant drew a connection between religious freedom and the Hutterite experience of religious persecution in Europe:

Well freedom of religion it's right in the Charter of Canada, and anybody that has a religious conviction or religious belief, he should be able to live that religion. And what is freedom of religion if you can't live your religion, if you're hindered? That's what happened in Europe, in the old country, with our forefathers, there was no freedom of religion, if you didn't belong to the same religion that was at that time, why, you was put in the dungeon or you was beheaded, or you had to flee to another country.<sup>78</sup>

This narrative understanding of religious freedom will be taken up in more detail in Section 4 below. For now, the crucial point is that when the state asserts its dominance by imposing fines and potential imprisonment, the effects can be felt not only at the level of the particular practice that is regulated, but also at the level of the community's jurisprudence of religious freedom.

The issues of hierarchy were less immediate in *Amselem* and *Multani*.<sup>79</sup> In both cases, when the litigants faced unfavourable results from the state courts, they found ways to comply with the court orders while fulfilling their religious obligations. In *Amselem*, for example, a participant explained that, until the Supreme Court of Canada eventually found in his favour, he moved to one of his children's homes for the duration of *Succoth* so he could have comfortable access to a *succah*.<sup>80</sup> In the *Multani* scenario, rather than violate a court's order by having Gurbaj Singh bring his *kirpan* to the public school, the Multani family found alternate schooling. However, there was a time period during which Gurbaj Singh did not attend any school,<sup>81</sup> in violation of Quebec's *Education Act*, which makes school attendance mandatory for children aged six to sixteen.<sup>82</sup> In this sense, the Multani family prioritized their religious obligations over an obligation imposed by state law, but it was likely fairly clear that Quebec

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<sup>78</sup> Litigant 4 Interview.

<sup>79</sup> In the initial phases of these disputes, though the claimants resisted the application of a legal norm recognized by the state (a contract or an administrative decision), they did so on the basis of the state's own legal norms. For that reason, I focus here on their responses to court rulings.

<sup>80</sup> Litigant 2 Interview.

<sup>81</sup> Litigant 1 Interview.

<sup>82</sup> *Education Act*, RSQ, c I-13.3, s 14.

would not prosecute this violation. Perhaps because both the *Amselem* and *Multani* claimants were eventually successful, they did not express any concerns analogous to the Hutterite participants, whose faith in the protection of religious freedom had been shaken, and who were put to a more pressing choice. Moreover, whereas the *Amselem* litigants could celebrate *Succoth* elsewhere and Gurbaj Singh could attend another school, the Hutterite claimants did not see the Supreme Court's suggestion that they contract out their transportation services as a viable option because of their religious commitment to self-sufficiency. In all the cases, at least some claimants found ways to maintain their religious practices, suggesting that the state's claimed position at the top of a hierarchy may be true at the level of enforcement, but not at the level of normative legitimacy in the eyes of its subjects.

## 4 Religion as Lens for State Law

So far in this chapter, I have argued that the religious norms of litigation participants can be seen as possessing their own legality, and detailed some of the complex ways in which both religious and state norms claim a place at the top of a normative hierarchy. It would be simplistic, though, to paint the relationship between religious and state legal norms as a mere competition. In addition, members of religious communities often view state legal concepts through their own normative lenses. Robert Cover argues that though citizens may be bound by the same laws, the meaning those laws take on is conditioned by the normative worlds inhabited by the particular citizen:

The precepts we call law are marked off by social control over their provenance, their mode of articulation, and their effects. But the narratives that create and reveal the patterns of commitment, resistance and understanding... are radically uncontrolled... The structure of the Anabaptist *nomos* determines the place within it, and therefore the meaning, of the principle of free exercise of religion enunciated in the United States Constitution.<sup>83</sup>

Put more simply, a group's particular history and religion can structure understandings of state legal concepts. The interview data illuminated some of the particular ways in which this occurs. Historical narrative was certainly significant to Hutterite participants. One Hutterite litigant said in an interview: "Oh yeah, in 1918, and we got the documents to show for it, they

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<sup>83</sup> Cover, *supra* note 59 at 110-111, 123.



promised us freedom of religion, till the end of time, that we could practice our religion in Canada till the end of time, there will be no hindrance.”<sup>84</sup> Thus, in part because of the Hutterites’ particular history in Canada, the participant described the protection of religious freedom in covenantal terms. Religious freedom is important, in this narrative, not because the government bound itself by the adoption of constitutional legislation, but because it made a promise to the Hutterites.

Additionally, the Hutterite historical narrative also includes instances of migration when religious freedom was threatened. The most recent instance occurred in 1918, when some Hutterites migrated to Canada in order to avoid conscription and associated difficulties in the United States.<sup>85</sup> Interestingly, however, the Hutterite interview participants expressed hopelessness at finding a place where photos would not be required on driver’s licences.<sup>86</sup> Thus, though Martha Minow cautions that for some groups, “exit remains a viable option,”<sup>87</sup> in the particular circumstances of the *Wilson Colony* litigation, the Hutterite colonies<sup>88</sup> did not seem willing (or perhaps able) to consider leaving Alberta. At the same time, there was some

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<sup>84</sup> Litigant 4 Interview. The “documents” referred to here are apparently an account written by a member of the Hutterian Brethren of Manitoba and approved by its Committee of Elders, published first in 1955. There, Peter Hofer writes that the “Canadian government, when it permitted us to immigrate into Canada from the United States as welcome and desirable immigrants, promis[ed] us absolute freedom of religion and the unhindered practice thereof, as well as our peculiar customs and the communal way of life, as we understand it.” *Wilson Colony SCC*, *supra* note 21 (Exhibit B to the Affidavit of Samuel Wurz, Affirmed 10 August 2005, Appellant’s Record, vol 2 at 204). This publication advocated against regulations that would have required Hutterite colonies to observe minimum distance requirements between colonies. One Hutterite interview participant gave me a similar pamphlet published in Alberta for similar purposes. That pamphlet states that the Canadian government had promised the Hutterites “freedom of religion and the unhindered practice thereof, together with [their] peculiar customs and the community way of life as [they] understand it”: *The Hutterian Brethren of America* (Lethbridge: 1968) at 6. See also *Walter v AG of Alberta*, [1969] SCR 383, where a Hutterite community unsuccessfully challenged provincial regulations restricting their ability to purchase land.

<sup>85</sup> A study of Hutterite history submitted as to the court by the Wilson Colony recounted the Hutterites’ expulsion from Moravia in 1622 and their exodus from the United States in response to “new sufferings at the hands of super-patriots”: *Wilson Colony SCC*, *supra* note 21 (Robert Friedmann, “The Christian Communism of the Hutterite Brethren,” Exhibit A to the Affidavit of Samuel Wurz affirmed 10 August 2005, Appellant’s Record Vol 2 at 196-197).

<sup>86</sup> Litigant 3 Interview; Litigant 4 Interview.

<sup>87</sup> Minow, “Pluralisms”, *supra* note 57.

<sup>88</sup> Though interviews were conducted with individual members of the colonies, each related that the decision to stay in Alberta was made by the colony. Indeed, there is no sign that the members of Hutterite colonies in Alberta have made steps towards migration within or outside Canada.

suggestion in the cross-examination of a Hutterite litigant that he would be willing to face imprisonment to maintain his beliefs,<sup>89</sup> and some Hutterites have opted to pay fines rather than be photographed.<sup>90</sup> In this case, then, while migration was discounted as an effective option and actual martyrdom was not a realistic possibility, at least some Hutterites have shown a willingness to accept the punishments of the state in order to maintain their practices, enacting a kind of attenuated martyrdom.

In addition to the importance of historical narrative, the data also demonstrated how a particular religious outlook can also influence understandings of state laws. For example, one litigant expressed his admiration for the decisions of Canadian judges by likening to the Talmudic writings:

quand on lisait le jugement, c'était un cours de Talmud, un cours de Gemarrah, c'est extraordinaire comment un dit oui, l'autre, moi je trouve c'est magnifique la justice ici dans ce pays. Les gens sont bien informés, et bravo! C'est vraiment, il faut être fier de ça.<sup>91</sup>

Thus, the rulings of the state court were, in terms of their style, filtered through the religious lens of a participant, and respected on this basis.

The data also showed that, at times, the substance of state law was similarly filtered. For example, in an affidavit, one Hutterite emphasized that the *Charter's* preamble recognizes the "supremacy of God" in explaining his understanding of the right to religious freedom.<sup>92</sup>

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<sup>89</sup> *Wilson Colony SCC*, *supra* note 21 (Transcript of the Cross-Examination of Samuel Wurz by Rod Wiltshire (on affidavit), 2 February 2006, Appellant's Record, Vol 5 at 674-675).

<sup>90</sup> Litigant 4 Interview.

<sup>91</sup> Litigant 2 Interview.

<sup>92</sup> *Wilson Colony SCC*, *supra* note 21 (Affidavit of Samuel Wurz affirmed 10 August 2005, Appellant's Record, Vol 2 at 193). Notably, the Supreme Court of Canada has not drawn on this interpretive provision in fleshing out the notion of religious freedom. In any event, the protection of conscientious freedom likely resolves doubt as to whether non-theocentric belief systems are constitutionally protected: see Peter Hogg, *Constitutional Law of Canada*, 2010 Student Edition (Toronto: Carswell, 2010) at s 42.3; see also the concurring minority opinion of Wilson J in *R v Morgentaler*, [1988] 1 SCR 30 at 176-180 (holding that a woman's right to abortion is an aspect of conscientious freedom). But see *Allen v Renfrew (Corp of the County)* (2004), 69 OR (3d) 742 at para 19 (SCJ), in which the Ontario Superior Court held that a town council that opened its meetings with a prayer referring to a single God did not violate the *Charter*, relying in part on the "supremacy of God" clause.

Admittedly, though a member of the Wilson Colony signed the affidavit, the drafting bears the imprint of a person with training in Canadian law, stating:

I have reviewed the Canadian Charter of Rights and Freedoms and am of the belief that the Government of Canada recognizes the supremacy of God and the freedom of religion only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>93</sup>

Nevertheless, this reference cannot, in my view, be dismissed entirely as emanating from counsel. Rather, the reference to the “supremacy of God” clause can be taken as significant here because it is consistent with the narratives recounted by the Hutterites regarding obedience to God rather than man excerpted in section 3 above.<sup>94</sup> Indeed, the supremacy of God can be understood in this narrative as a necessary partner to, and a reason for, religious freedom. Similarly, a *Multani* litigant explained his understanding of the concept of religious freedom in distinctly religious terms: “So, there’s different paths but the destination is only one... we are trying to reach God, so there should be a freedom of religion.”<sup>95</sup> In this narrative, the purpose of religious freedom is not based on liberal ideas of autonomy or practical reasons of maintaining social peace, but to allow individuals to connect with the divine in various ways. These religious understandings of constitutional principles represent highly particularized interpretations of Canadian law.

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<sup>93</sup> *Wilson Colony SCC*, *supra* note 21 (Affidavit of Samuel Wurz affirmed 10 August 2005, Appellant’s Record, Vol 2 at 193).

<sup>94</sup> For an argument that the “supremacy of God” clause should be taken as a general interpretive principle rather than a statement privileging particular religious views, see Lorne Sossin, “The ‘Supremacy of God’, Human Dignity and the *Charter of Rights and Freedoms*” (2003) 52 UNBLJ 227. For an argument that the clause refers to the individuals’ natural and inalienable rights that pre-exist the state, see Jonathon W Penney & Robert J. Danay, “Embarrassing Preamble? Understanding the ‘Supremacy Of God’ and the *Charter*” (2006) 39 UBC L Rev 287.

<sup>95</sup> Litigant 1 Interview. The full passage reads as follows:

Human rights here and Charter of rights of Canada allows to practice any religion the way it is, however it is. So I believe every religion, however they practice, they should be allowed to practice it, yeah, well if it’s dangerous or something, people should learn about, don’t just panic. Like, in my case, they were panicked, oh it’s a weapon, it’s a weapon, it’s a knife, you know? So, uh, freedom of religion is like, from my perspective, it’s just like, you should be free to practice your religion, you know, like don’t bound, that what makes us, like in my religion, if I’m like this, that’s what makes me different from others, like I’m practicing religion, so if I become like them too then I forgot the values of my religion, or what’s right or what’s wrong, how I’m gonna learn that? So, there’s different paths but the destination is only one, we are reaching God, we are trying to reach God, so there should be a freedom of religion the way they want, the way it is.

In addition to the interview data, some of the sources cited by the Wilson Colony in their court documents also use religious sources to frame debate on state laws. The Wilson Colony included in their materials a piece first published in the 1950s by the Hutterian Brethren of Manitoba and approved by a Committee of Elders. The publication argues against proposed legislation that would have required Hutterites to maintain minimum distances between their colonies. In support of this position, after referring to historic promises of religious freedom made by the Canadian government, the pamphlet cites the Book of Matthew, thereby appealing to religious principles to persuade its audience that a state law should not be adopted.<sup>96</sup> Likewise, in a 1968 Hutterite publication given to me by a Hutterite interview participant, the authors argue against land restrictions on Hutterites by appealing to biblical verses and stories. They situate the source of anti-discrimination principles in verses from the Old Testament, and use a biblical story as a parable to demonstrate the dangers of a state that opposes God or the faithful:

As Pharaoh challenged God's authority to command him to release his people, God subdued him through the ten plagues so that he had to release the chosen people so long held in bondage and miserable servitude.

In his foolish attempt to wrest from God's hand the chosen people whom the Lord had led out of Egypt, Pharaoh and his armies drowned in the Red Sea, thus showing the suicidal folly of fighting against God and his people or loyal subject.<sup>97</sup>

Similarly, in the *Wilson Colony* context, members of several Hutterite colonies drafted a letter intended for the Alberta government (but apparently never sent). The authors support arguments in favour of the photo exemption by reference to the Ten Commandments, described as “eternal bases for moral values.” The letter also cites numerous other biblical verses, expressing the view that one who breaches the commandments is a “transgressor of God's laws.”<sup>98</sup> Thus, Hutterite advocacy repeatedly assesses the validity of state laws through a particular religious lens.

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<sup>96</sup> Peter Hofer, *The Hutterian Brethren and Their Beliefs* (Starbuck, Man: Hutterian Brethren of Manitoba, 1973), cited in *Wilson Colony SCC*, *supra* note 21 (Exhibit B to Affidavit of Samuel Wurz, Affirmed 10 August 2005, Appellant's Record, Vol 2 at 205).

<sup>97</sup> *The Hutterian Brethren of America* (Lethbridge, 1968) at 7 (on file with the author).

<sup>98</sup> *Wilson Colony SCC*, *supra* note 21 (Exhibit F to Affidavit of Samuel Wurz, Affirmed 10 August 2005, Appellant's Record, Vol 2 at 207).

A final, related variation of the pattern wherein participants drew on religious norms in their interpretation of state norms occurred when participants applied their religious norms to assess the correctness of the court's decision in their own cases. Thus, one participant explained that, in *Amselem*, the state court erred in accepting an incorrect statement of rabbinic law:

given all the other issues that are involved which rabbinic law would take into account, it seems to me that . . . the court ultimately has accepted the wrong decision, I'm not gonna say they made the wrong decision, they made the best decision they could based on Canadian law, but I wasn't asked to write about Canadian law, I was asked to write about Rabbinic law...<sup>99</sup>

Notably, the participant was careful to distinguish between the state court "accepting" and "making" the wrong decision. Still, though the participant treats each legal system as operating on its own terms, he finds fault with the Supreme Court in its apparent preference for an erroneous rabbinic opinion.

In sum, as legal pluralists have suggested, the overlap of legal systems occurs on at least two levels. First, as seen in the previous section, overlap occurs within legal systems, as laws of one system are invoked in the context of a different legal system's procedure. Second, consistent with post-modern and critical legal pluralist thought,<sup>100</sup> overlap is evident within individuals' understandings, as the laws of one legal system are interpreted through the lens of another. For Cover, religious communities' tendency to internalize legal norms through their own specific lens was "at odds... with the effort of every state to exercise strict superintendence over the articulation of law as a means of social control."<sup>101</sup> In his view, a community that decides to act in accord with its own view of law in contravention of a state pronouncement, as did the Hutterite colony members who continued to drive with expired licences after the Supreme Court's decision, does not do so as a form of justifiable disobedience, but as a "radical

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<sup>99</sup> Expert Witness 1 Interview.

<sup>100</sup> See Boaventura De Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14(3) *JL & Soc'y* 279; Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical Legal Pluralism*?" (1997) 12 *Can JL & Soc* 25.

<sup>101</sup> Cover, *supra* note 59 at 146.

reinterpretation.”<sup>102</sup> For the Hutterite participants, religious freedom is given a radical reinterpretation as an instantiation of God’s supremacy or as an absolute promise made to the community. Such a manoeuvre was not necessary in *Amselem* or *Multani*, where the claimants’ views of religious freedom were affirmed by their success in court.

## 5 State Law as Lens for Religion

The relationship between state and religious legal norms is not unidirectional. Some of the earliest legal pluralist scholarship examined the ways in which the norms of one legal system can become “relevant” for another. In work originally published in the 1910s, Italian legal theorist Santi Romano developed this notion of relevance and analyzed its several modalities. Romano was particularly concerned with the relationship between state laws and ecclesiastical law, as well as with private international law. In his view, church laws could become relevant to state laws by entailing civil effects, such as when the religious celebration of a marriage creates consequences in state law.<sup>103</sup> Similarly, when state courts apply doctrines of private international law, the laws of a foreign jurisdiction can become relevant by producing domestic legal consequences.<sup>104</sup> More attenuated forms of relevance can be seen in the civilian tradition’s practice of regarding certain obligations as “natural”; as Baudouin and Jobin note, in this tradition, while a natural obligation cannot be the basis for a civil remedy, one who voluntarily fulfills a natural obligation cannot obtain restitution on the basis of unjust enrichment.<sup>105</sup> In Romano’s Italy, the internal order of the family, the ecclesiastical order, and

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<sup>102</sup> *Ibid.*

<sup>103</sup> Santi Romano, *L’Ordre Juridique*, French translation of the 2d ed. by Lucien François & Pierre Gothot (Paris: Dalloz, 1975) at 132-133. This French translation from the 1970s is the only non-Italian version of which I am aware; Romano’s ideas presaged in many ways the legal pluralist thought developed later in the 20th century. For a contemporary discussion of Romano’s work, see Guy Rocher, “Pour une sociologie des ordres juridiques” (1988) 29 *C de D* 91; Romano’s institutional theory of legal pluralism also receives brief mention in Michaels, *supra* note 34 at 245.

<sup>104</sup> Romano, *ibid* at 136.

<sup>105</sup> As Baudouin and Jobin note, the natural obligation is seen a valid debt, but cannot be the basis for a legal action: Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Les Obligations*, 5th ed (Cowansville: Les Éditions Yvon Blais Inc., 1998) at 24-26.

certain private institutions (such as gambling houses) could generate these kinds of natural obligations, given intermediate recognition by the state.

As described in Chapter 3, the Canadian law of religious freedom attributes a particular kind of relevance to religious norms. As held in *Amselem* (and later affirmed in *Multani* and *Wilson Colony*), the sincerely held religious beliefs of religious freedom are significant in defining the content of the constitutional right of religious freedom. The state does not purport to set out a list of religious practices that will benefit from the protection. In Romano's terminology, this effectively makes the religious belief of an individual relevant for the state while making "correctness" of a particular interpretation of religious law irrelevant. In principle, whether a particular community generally accepts a religious practice is relevant for Canadian courts only in the evaluation of a claimant's credibility.<sup>106</sup> If the claimant demonstrates a sincere belief that is hindered by state action, the courts then use the analytical framework of section 1 of the *Charter* to limit the ambit of such claims, giving the state final say as to which religious norms will entail consequences in the state's legal system.

The interview data showed that litigants and their counsel sought to make the religious norms "relevant" to state courts in another way: by emphasizing the similarities between the religious norms and state laws. By presenting their religious practices as rooted in values espoused by the state, participants made their religious practices intelligible to state judges, and more likely to be afforded the state's protection. This is arguably attributable, in part, to the institutional pressures created by litigation before state courts. The knowledge that the dispute will be decided on the basis of state norms will encourage litigants and their counsel to present a narrative of their religious obligations that is accessible to judges and others immersed in the Canadian legal system.<sup>107</sup>

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<sup>106</sup> For an argument that the state ought to require, in some circumstances, testimony that a religious freedom claimant belongs to a particular community that observes a particular religious practice, see Robert E Charney, "How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief" (2010), 51 SCLR (2d) 47.

<sup>107</sup> In Chapter 5, I will revisit this notion from a different angle, examining religious freedom litigation as a forum for cross-cultural communication.

At a formal level, this occurred in *Multani* when the intervening World Sikh Organization (WSO) chose to cite the decisions of state justice institutions to explain the religious significance of the *kirpan* and other Sikh articles of faith.<sup>108</sup> It is one thing to cite these decisions as persuasive authorities to encourage a state court to adopt a particular policy with respect to the *kirpan*'s inclusion/exclusion, and the factum does this. More interestingly, the factum also cites these cases in its presentation of the *kirpan*'s religious meaning. One could trivialize this point by claiming that the WSO was simply arguing that other state organs had found sufficient proof of the *kirpan*'s religious significance. However, in my view, the WSO was also anticipating that courts would be more comfortable relying on the decisions of other state institutions than they are in relying exclusively on a religious authority, even when it comes to evaluating the meaning of a religious object. Indeed, in response to the school commission's argument that Sikhs view the *kirpan* as a ceremonial dagger, the WSO argued: "Canadian Courts have accepted that the kirpan serves only a spiritual and symbolic value for Sikhs."<sup>109</sup> Further, the WSO also drew on the definition of the term "weapon" in Canada's *Criminal Code* to argue that the *kirpan* was not a weapon.<sup>110</sup>

In addition to the formal consideration of deciding which sources to cite as authoritative, state norms also at times impacted the substance of parties' description of their practices. In her analysis of *Multani*, Valerie Stoker has argued that the religious freedom claimants framed their religious practice in terms that would be familiar and sympathetic to the Canadian courts. Stoker writes:

By offering up a discourse on the practice of kirpān-wearing that invokes shared values such as equality, tolerance, and inclusivism, Sikhs in this case simultaneously

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<sup>108</sup> *Multani SCC*, *supra* note 26 (Factum of the Intervener WSO at paras 5-7, 43-46). Specifically, the WSO factum cites decisions of the Ontario Board of Inquiry and the Alberta Board of Inquiry regarding human rights complaints: *Peel Board of Education v Pandori et al.* (1990), 12 CHRR D/364 (Ont Bd Inq); *Pritam Singh v WCB Hospital and Rehabilitation Centre* (1981), 2 CHRR D/459 (Ont Bd Inq); *Tuli v St. Albert Protestant Board of Education* (1987), 8 CHRR D/3736. The factum also cites a decision of the Court of Appeal of Ohio, *State of Ohio v Singh* (1996), 117 Ohio App 3d 381, for similar purposes.

<sup>109</sup> *Multani SCC*, *ibid* (Factum of the Intervener WSO at para 27). In this regard, the WSO also argued that *R v Hothi et al* (1985), 33 Man R (2d) 180 (QB), in which a man accused of assault was barred from wearing his *kirpan* in the courtroom, was an outlier in the broader Canadian jurisprudence on the *kirpan*.

<sup>110</sup> *Multani SCC*, *ibid* (Factum of the Intervener WSO at paras 30-36).



aligned their traditions with dominant values and preserved their distinctive identity.<sup>111</sup>

In other words, the norms that the claimants used to frame the religious practice were ones that the state had previously embraced. My own research echoed this conclusion. For instance, in its written representations to the Supreme Court, the WSO argued that the *kirpan*'s design was meant to reflect the value of equality:

While it is accurate that the kirpan must be made of steel, and cannot be miniaturized, there is no valid authority which supports the proposition that the kirpan must be kept this way so that it can be used as a weapon. Indeed, in *Pandori*, the evidence was that the requirement for the kirpan to be made of iron (now cast as steel) emphasized the concept of equality of all peoples, "since iron was widely available to the poor, it assumed the aspect of commonality, simplicity and equality."<sup>112</sup>

The interview data pointed in a similar direction. For example, a lawyer who acted on behalf of a religious organization made explicit the link between religious values and state values, using state legal terminology to frame the religious practice.

The kirpan is what we call the sword of spiritual power, it's never to be used, it's not a physical instrument at all in that sense, the whole purpose of it, and all of these articles of faith is really again internalizing the external, constant reminders for us of how to live our lives... if you hear about all those ideals, they're very consistent with Charter values, they're very consistent with Canadian values... defending the defenceless, that's what the Charter is all about, really right? To protect the minority against the tyranny of the majority.<sup>113</sup>

In a similar vein, a litigant involved in the case linked the *kirpan* with justice, the most basic value espoused by the adjudicative institutions of the Canadian state: "kirpan is for justice, like if there's injustice going on I have to stand up for that, it's not necessary to use the kirpan, but it reminds you know, go stand for it."<sup>114</sup> I do not intend to claim that the values connected by

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<sup>111</sup> Valerie Stoker, "Zero Tolerance? Sikh Swords, School Safety, and Secularism in Québec" (2007) 75(4) *Journal of the American Academy of Religion* 814 at 818.

<sup>112</sup> *Multani SCC*, *supra* note 26 (Factum of the Intervener WSO at para 25). This passage also highlights the previously identified pattern of relying on decisions of Canadian state bodies to explain the *kirpan* practice.

<sup>113</sup> Lawyer 3 Interview. The phrase "the tyranny of the majority" is associated, in Canadian jurisprudence, with the Supreme Court of Canada's decision in *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 96 (Dickson J).

<sup>114</sup> Litigant 1 Interview.

participants to the *kirpan* practice of *kirpan* are or were foreign to Sikhism or to the religious lives of the participants in the case. Rather, my argument here is that in the context of litigation, in order to make the religious practice intelligible to Canadian courts, participants may emphasize those aspects of the practice that resonate most with official state values.

Clear examples of this can also be seen in the oral arguments put before the courts; there, the state values referred to were in some cases of no real relevance to the legal issues. At trial, for example, the lawyer representing the Multani family emphasized the origins of Sikhism as being opposed to the caste system, favour of sexual equality and consistent with the “modern” notion of individual autonomy:

la religion sikh était une révolte contre deux choses, contre le système de caste hindou et contre le traitement des femmes chez les musulmans. . . le début, l'idée était une idée tout à fait moderne pour souligner l'autonomie individuelle, la liberté d'expression, une idée qui était belle.<sup>115</sup>

He went on to argue that Sikhism is integrationist in nature, and does not oppose mixed marriage:

les sikhs n'ont pas de doctrine de séparation, pas d'argument contre les mariages mixtes... ça n'a pas l'effet que possiblement le voile, certainement, aurait de séparer l'étudiant du reste de la société, pas du tout. Les sikhs se mêlent. Ce n'est pas une question de garder - de garder un groupe séparé de toute la société. Mais c'est une croyance profonde.<sup>116</sup>

It is difficult to see the connection between these arguments and the question of whether a student should be allowed to wear a *kirpan* to school. But here, they have the effect of creating a more general affinity between the values of Sikhism and the Canadian state.

Dealing more specifically with the *kirpan* itself, the same lawyer linked the *kirpan* with resistance to oppression:

The symbolism was one of resistance to an oppression... I think the proper image of a sword or a dagger or a resistance is one which is not a negative system in the school system... since schools are dedicated to the freedom of thought, freedom of

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<sup>115</sup> *Multani SCC*, *supra* note 26 (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 10, Appellant's Record before SCC Vol 2 at 257).

<sup>116</sup> *Ibid* at 262.

expressions, it is at least arguable that the resistance to oppression is a commendable virtue...<sup>117</sup>

In setting up this argument, the lawyer did not refer only to abstract values, but also referenced the violent image of a sword employed in the French version of *O Canada* (“Car ton bras sait porter l’épée”) in order to demonstrate a harmony in symbolism between the official Canadian anthem and the *kirpan*.<sup>118</sup> Complicating this analysis, the lawyer also referred to *La Marseillaise* (“Aux armes, Citoyens”) and the “millions of paintings [at our Museum of Fine Arts] in which Christ rises from the grave holding a sword.”<sup>119</sup> While these latter examples are not officially linked to the Canadian state, they are Western cultural artifacts whose value would be clear to judges of the Supreme Court. Thus, not only were state norms used to frame the practice of *kirpan*-wearing, other dominant cultural symbols were as well.

The religious materials submitted to the court as evidence emphasized similar themes. Dharam Singh, whose work was relied upon to describe the Sikh religion, highlighted the important role of the values of peace, love, and equality in Sikhism. He also noted that

justice, universal love, equality, fairness, consideration and cooperation lead to the dawn of eternal peace. However, whenever these values get threatened, man must resist this threat though this resistance must be peaceful and non-violent to begin with. However, resort to arms is declared valid and advisable if all other means fail.<sup>120</sup>

Having framed the practice of *kirpan*-wearing in a manner consistent with state values in both argument and evidence, counsel then called upon the value of inclusiveness (framed as a shared value between integrationist Sikhism and the Canadian state) to argue for the

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<sup>117</sup> *Multani SCC*, *supra* note 26 (Julius Grey, Transcript of Oral Argument to the Supreme Court on behalf of Multani at 23).

<sup>118</sup> *Ibid* at 22-23.

<sup>119</sup> *Ibid*.

<sup>120</sup> Dharam Singh, *Dynamics of the Social Thought of Guru Gobind Singh* (Patiala: Publication Bureau Punjabi University, 1998) at 46, cited in *Multani SCC*, *supra* note 26 (Application for Leave to Appeal to the Supreme Court of Canada at 128). The author goes on to note that the “Sikh view of peaceful and just social order entails respect for the rights of others and non-exploitation of others (at 47).”

accommodation of the Sikh student. The lawyer argued that public institutions, in general, should be welcoming:

we should encourage people to use the public school system, the public health system, the public justice system and the purpose for accommodation is to make them feel at home in the public system.<sup>121</sup>

Further, according to this argument, allowing the *kirpan* in school demonstrates the inclusiveness of Canada as a country: “if anything, it would have a positive effect in demonstrating... the acceptability, the Canadianess of somebody who happens to be wearing a turban and a kirpan.”<sup>122</sup>

In other, analogous contexts, scholars have noted the tendency of state courts to accept the religious freedom claims of litigants when judges view the religious beliefs as congruent with the state’s values. Martha Minow, for example, explains the decision of the U.S. Supreme Court to allow Amish families to withdraw their children from public schooling at age 14 in the landmark *Wisconsin v. Yoder* decision in these terms:

[Justice Burger’s majority opinion in *Wisconsin v. Yoder*] suggests that the rest of the community faces no sacrifice in respecting the subgroup’s differences because this subgroup so resembles the majority in its ability to teach its children just what the majority hopes its public schools will teach: the self-sufficiency and productivity of the yeoman farm family. In essence, the opinion maintains that here the state must respect religious and cultural differences because the Amish really are fundamentally the same as the larger society.<sup>123</sup>

Linda McClain explains the dissenting view of Justice Blackmun in *Oregon v. Smith* in like fashion. In that case, the majority of the U.S. Supreme Court held that the use of peyote in a religious ceremony could be valid grounds for the termination of employment. McClain argues that Justice Blackmun’s dissenting view stressed the congruence of the Native American Church with both state laws and Amish traditions, which latter were held to be prototypical of the

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<sup>121</sup> *Multani SCC*, *supra* note 26 (Julius Grey, Transcript of Oral Argument to the Supreme Court on behalf of Multani at 26).

<sup>122</sup> *Ibid* at 27.

<sup>123</sup> Minow, *supra* note 57.

American yeoman farmer in *Yoder*.<sup>124</sup> In these judgments, the affinity between state values and the values said to undergird a religious practice or a religion more generally had a noticeable impact on the result of the decisions. It follows from this observation that counsel for religious freedom claimants would be well advised to underline these affinities where they exist.

In addition to encouraging the *Multani* claimants to frame their practices as being consistent with state values and symbols, the litigation process also led to the description of practices as being rule-bound. In this regard, Sikhism's rules were presented as clear and predictable, as state law is often idealized.<sup>125</sup> Valerie Stoker explains:

By making Sikh behavior appear more rule-bound and consistent, Sikhs might also make it seem more 'rational' and therefore trustworthy to a non-Sikh audience, particularly an audience that is suspicious of religion in general and that considers the kirpān's symbolism too subjective a standard by which to evaluate its threat to school safety.<sup>126</sup>

In this vein, counsel for the Multani family argued at trial that removing the *kirpan* from its sheath was strongly prohibited by the Sikh religion, saying that Sikhs were afraid of such an occurrence and were very punctilious on this issue.<sup>127</sup>

In the course of interviews, while some participants' views were consistent with this presentation of the *kirpan*'s rules, at least one participant showed some contrary tendencies. He noted the exceptional circumstances under which, in his view, it is permissible to remove the *kirpan*. He limited these circumstances to cases where someone was being attacked and the

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<sup>124</sup> Linda C McClain, "Religious And Political Virtues And Values In Congruence Or Conflict?: On Smith, Bob Jones University, And Christian Legal Society" (2011) 32(5) *Cardozo L Rev* 1959 at 1975, internal citations omitted.

<sup>125</sup> Of course, there is significant debate as to whether state law is actually determinate, see e.g. Lawrence B Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54 *U Chicago L Rev* 462.

<sup>126</sup> Stoker, *supra* note 111 at 822. This is also consistent with the way in which both sides of the *Amselem* dispute presented the *succah*, with the Jewish co-owners claiming they had a religious obligation to erect a *succah* on their own balcony and the syndicate of co-owners arguing that while there are a set of laws applicable to the *succah*, they did not include the obligation to erect one's own *succah*.

<sup>127</sup> *Multani SCC*, *supra* note 26 (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 124, Appellant's Record before SCC Vol 2 at 371).

*kirpan* was the only way to defend them.<sup>128</sup> This suggests that, even if in general Sikh teachings emphasize the impermissibility of using the *kirpan*, there is some variation amongst practitioners on this point. It also suggests that there were a range of narratives which litigants and counsel could have attached to the *kirpan*, and opted to present the one with the strictest rules.

The decision to present the rules of the *kirpan* as bound by strict rules seems to have been wise. Comments from the bench indicated that while the Superior Court was mindful that the interpretation of a religion can be highly varied, the Court also believed it possible to objectively identify the rules that a religion prescribes. Thus, in an exchange between counsel for the Multani family and Justice Grenier regarding the possibility of sheathing the *kirpan* in a leather case, the judge grew frustrated with counsel's reluctance to commit to such a compromise:

Non, mais maître Grey, là, je viens de vous le dire, là, ça se peut fort bien que si vous parlez à dix personnes, vous recueillerez dix opinions différentes. C'est pas une question non plus de qui est votre client, là. *C'est une question de qu'est-ce que c'est cette religion.*<sup>129</sup>

In this particular exchange, counsel was not able to make the Sikh rules intelligible to the Court. Interestingly, while the rules of the *kirpan* were presented as being strict and having their own internal order, ultimately counsel reverted to the view that religious beliefs are not susceptible to rational explanation:

Votre Seigneurie. . . je pense que la religion - les croyances religieuses sont des choses qui ne sont pas rationnelles.<sup>130</sup>

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<sup>128</sup> Litigant 1 Interview.

<sup>129</sup> *Multani SCC*, *supra* note 26 (Grenier J, Oral Argument on behalf of Multani before Superior Court, at 130, Appellant's Record before SCC Vol 2 at 377 [emphasis added]). There is a resonance here with the experience of counsel in the *Amselem* case; one lawyer felt that at trial and at the Court of Appeal, judges were looking to find the religion's "rule book" (Lawyer 1 Interview). This is discussed again below in Chapter 5.

<sup>130</sup> *Multani SCC*, *supra* note 26 (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 128, Appellant's Record before SCC Vol 2 at 375 (In answer to a question regarding the material used to make a sheath for the *kirpan*)). For an argument that the protection of religious freedom is justified in part by the irreducible core of religious practice that is beyond the reach of rational explanation, see Avihay Dorfman, "Freedom of Religion" (2008) 21 Can JL & Juris 279.

This retreat suggests that there were some aspects of the *kirpan* practice that were not fully accessible to state judges. When counsel ran up against this wall, he took refuge in a justification for state law's supremacy over other normative systems: its rationality.

From the above, we might conclude that, in *Multani*, litigants and counsel found it advantageous to present their religious practices as (1) consistent with the values of state law and (2) rule-bound and predictable, like state law.<sup>131</sup> In *Amselem*, these patterns were less pronounced. However, the litigants (or perhaps their counsel) thought it important to cast their more general religious approach in a manner consistent with state values. Thus, each *succah*-building litigant found it important to affirm that he practiced his “religion with pride, dignity and resolve.”<sup>132</sup> The notion of “dignity” was, at the time, a defining value in the Supreme Court of Canada's jurisprudence on equality;<sup>133</sup> the invocation of that concept was not, in my view, accidental. Moreover, each religious freedom claimant asserted that he wore a *kippah* “at all times,” and that his “entire family was also observant.”<sup>134</sup> This assertion served not only to support the claimants' credibility, but also to paint their religious lives as strictly rule-bound.

In *Wilson Colony*, there was no argument that not having one's photo taken was harmonious with state values.<sup>135</sup> However, as noted above, participants emphasized the

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<sup>131</sup> Like the tendency toward congruence, this pattern is also consistent with the dissenting view of Justice Blackmun in *Oregon v. Smith*; as McClain notes, Justice Blackmun was careful to point out the “carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs”: *Employment Division, Department of Human Resources of Oregon v. Smith*, (1990) 494 US 872 at 913, as cited in McClain, *supra* note 124 at 1975.

<sup>132</sup> *Amselem SCC*, *supra* note 12 (Affidavit of Thomas Klein 22 December 1997, Appellants' Record, Vol 2 at 200; Affidavit of Moïse Amselem 18 December 1997, Appellants' Record, Vol 2 at 183; Affidavit of Gabriel Fonfeder 9 December 1997, Appellants' Record, Vol 2 at 173).

<sup>133</sup> See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, which used dignity as touchstone for the adjudication of discrimination claims. More recently, the Supreme Court has retreated from this amorphous concept without overruling it explicitly, see *R v. Kapp*, [2008] 2 SCR 483; *Withler v. Canada (Attorney General)*, 2011 SCC 12.

<sup>134</sup> *Amselem SCC*, *supra* note 12 (Affidavit of Thomas Klein 22 December 1997, Appellants' Record, Vol 2 at 200; Affidavit of Moïse Amselem 18 December 1997, Appellants' Record, Vol 2 at 183; Affidavit of Gabriel Fonfeder 9 December 1997, Appellants' Record, Vol 2 at 173).

<sup>135</sup> Hutterite advocacy has previously drawn on state values to support its claims. In a pamphlet protesting proposed legislation that would have limited Hutterite land purchases by requiring 40 miles between colonies,

strictness with which the Second Commandment was observed, highlighting the internal consistency of the religious observance, and creating a parallel between the religious norm and state law in its idealized form.

## 6 Blurred Boundaries

Though at times it was possible to identify when participants approached one set of norms through the lens of another, at other times the boundaries between normative systems were harder to trace. Arguably, these moments signify the deepest interpenetration of legal and normative systems. For example, in one interview participant's assessment of the claimants' position in *Amsellem*, he simultaneously invoked norms of various provenances:

I: . . . you mentioned that given that the condo owners had signed away their right to use their balconies for a succah, that was a factor in your decision, and I wonder if, is that a factor in your decision under rabbinic law or in your general perception of the case?

R: No, my general perception of the case. According to rabbinic law, they might not have been able to do that, I have to think about it, but the fact is that when they bought the condos, they agreed not to put anything on the balcony, so the decision then to go ahead and put a succah there was clearly a post facto decision. Now, they claimed they had never read this, and they didn't realize what they had signed. I don't know what the legal significance of that is, you know Canadian law, but I have since heard, but at the time that was not even my issue. All I was supposed to deal with was whether or not by Jewish requirements they had to build a succah on the balcony and I don't believe they did.<sup>136</sup>

In this moment, though the interview participant maintains a distinction between Canadian law and rabbinic law, it is not entirely clear which values and norms guided his moral assessment of the dispute.<sup>137</sup> From a review of the trial transcripts and expert reports submitted in the litigation, it is clear that both expert witnesses restricted their representations to the court to

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Hutterites in Lethbridge, Alberta supported their claims with reference to the values of tolerance, anti-discrimination, and democracy: *The Hutterian Brethren of America*, *supra* note 119 at 6-7.

<sup>136</sup> Expert Witness 1 Interview.

<sup>137</sup> Part of this lack of clarity may be attributable to the way in which the question was phrased. By posing the question in an either/or fashion, I made it less likely that the participant would draw on his own terminology. Nonetheless, the response shows, at the very least, that the respondent was drawing on something other than rabbinic legal norms. Moreover, in this section of the interview transcripts, in responding to more open questions, the participant continued to draw on multiple of normative sources.



issues of Jewish law. However, for this participant, the decision to provide his expertise was based, in part, on his general assessment that the condominium board had the weight of moral argument on its side; this general assessment was influenced by multiple and overlapping norms. Drawing on these multiple sources, at another point in the interview, the participant said:

Had [the condominium board] said, for example, that there's no way we'll allow a succah to be available, then I would not have agreed, but that's not what they were saying, all they were saying was they want to put it on the ground, near the building, and while I'll admit it's not the most convenient thing, given that they had signed away the rights to use the balconies for this when they bought the condos and a whole bunch of other ancillary issues, seemed to me that the weight of the argument clearly went against the residents.<sup>138</sup>

One of the Hutterite participants also showed some signs of boundaries blurring. In section 4, I noted that a Hutterite participant was of the view that the Supreme Court ought to have regard for God's law. I drew on this example above to demonstrate that participants use their own religious lenses to guide their understandings of state laws and institutions. But the participant's justification of this view was noteworthy for a different:

[The Court] should really have regard for God's law 'cause Canada's a democratic country, and why should we have laws that does away with the democratic way of life? We're kind of going back to communism, if you don't do as I tell you, that's what the government kinda says, why, you haven't got anything, you're a nobody.<sup>139</sup>

He went on to describe the Supreme Court's decision as "very unconstitutional" and "very undemocratic," and in the same breath, referenced the biblical book of Daniel to explain the situation.<sup>140</sup>

Thus, the participant drew not only on explicitly religious norms, but also on his understanding of democracy and the constitution to explain his view on what a state Court

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<sup>138</sup> Expert Witness 1 Interview.

<sup>139</sup> Litigant 4 Interview.

<sup>140</sup> *Ibid.*

should do. He thus took up civic values (democracy and the constitution),<sup>141</sup> filtered through his own understanding of religious freedom (which has a particular meaning in the Hutterite narrative, discussed in section 4), to articulate why a state court ought to take guidance from religious law. The ebb and flow between state and religious norms is particularly high here, and it becomes difficult to say where one begins and the other ends.

A different form of boundary blurring was also present in the affidavits presented in *Amselem*. Litigants all affirmed that, “according to Jewish law, my succah represents the principal residence for the eight-day period and my condominium becomes the secondary residence.”<sup>142</sup> In an exchange with one of the litigants, counsel for the syndicate showed some skepticism about this, and there was some ambiguity in the litigant’s response:

Q- ... you mention that the succah represents the principal residence, could you explain what you mean by that?

A- It’s just an expression, since you eat there, you know, and entertain guests and study, it’s called the principal.

Q- But it’s not really a residence, it’s not a place where you sleep?

A- If I want.

Q- If you want.

A- But I can change my mind.<sup>143</sup>

It is unlikely that any of the litigants would make the assertion that the *succah* is a principal residence in other contexts. For example, they would not expect any tax consequences to flow

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<sup>141</sup> At another point in the interview, the participant invoked the notion of a plurality of laws in explaining further his view of democracy:

I: And what do you mean when you say democratic way of life?

R: Democratic, if somebody has got religious conviction, he should be able to live that religion, cause we’re bringing in foreigners, we’re bringing in Muslims, we’re bringing in Black people, we’re bringing in everybody, all nationalities, and are we gonna just force something on all those nationalities, just have one law? Is that democratic? It’s not democratic (*ibid*).

<sup>142</sup> *Amselem SCC*, *supra* note 12 (Affidavit of Gabriel Fonfeder 9 December 1997, Appellants’ Record, Vol 2 at 173, Affidavit of Thomas Klein 22 December 1997, Appellants’ Record, Vol 2 at 200; Affidavit of Moïse Amselem 18 December 1997, Appellants’ Record, Vol 2 at 184).

<sup>143</sup> *Amselem SCC*, *supra* note 12 (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent’s Record, Vol 1 at 212-213).

from this characterization of the *succah*. So, while for some purposes the *succah* could not be imagined as a principal residence, for the purposes of Jewish law, it is. This illustrates the simultaneous application of multiple normative orders in the lives of these affiants. And because they are subjects of these multiple orders, things can be true and not true at the same time. The *succah*, though a single structure, both is and is not the principal residence.

This blurring of boundaries adds an important gloss on critical legal pluralist theory. One of Kleinhans and Macdonald's main concerns in positing their critical legal pluralism is to "call for more intense scrutiny of the legal subject conceived as carrying a multiplicity of identities."<sup>144</sup> They insist that "legal subjects hold each of their multiple narrating selves up to the scrutiny of each of their other narrating selves, and up to the scrutiny of all the other narrated selves projected upon them by others."<sup>145</sup> This can be read as suggesting that the individual legal subject is an agent of constant, conscious reevaluation in the construction of legal norms, which are organized in the minds of subjects on the basis of their provenances. The data suggest that the process of norm generation and deployment is at times messier and more unconscious than Kleinhans and Macdonald's writing suggests.<sup>146</sup>

## 7 Conclusion

This chapter's close study of religious freedom litigation in Canada reveals multiple layers of legality in participant narratives of their experiences, showing that the legal pluralism literature canvassed in Chapter 2 adds nuance to the description of this particular social field. Participants attached distinctly legal significance to their religious practices. Court documents and participant interviews provided insight into the complexity, sophistication and depth of commitment attached to religious legal norms. On a more normative level, I argued that there

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<sup>144</sup> Kleinhans & Macdonald, *supra* note 100 at 40.

<sup>145</sup> *Ibid* at 46.

<sup>146</sup> At other points in their writing, Kleinhans & Macdonald seem more conscious of this potential for blurring, writing that the key to multiple normative orders "is to understand how each hypothesized legal regime is at the same time a social field within which other regimes are interwoven, and a part of a larger field in which it is interwoven with other regimes." *Ibid* at 40-41.

are good reasons for external observers to treat the religious norms in these three cases as legal, particularly if one accepts an aspectival approach to defining law.

In addition, participant narratives presented individuals and communities as subjects of overlapping and contradictory claims of authority over their behaviour. The interrelationships between those various normative claims are complex. At times, state legal concepts were filtered through the lenses of participants' particular religious and historical narratives. In this vein, participants treated the concept of religious freedom as covenantal or premised on the purpose of allowing legal subjects to connect with the divine. The converse phenomenon was also present, as participants described their religious norms and obligations congruent with state values. They thus presented their religious practices as rule-bound, rational, and consistent with the values as equality, inclusiveness, and dignity. Finally, this chapter demonstrated that subjects of multiple legal systems frequently have messier normative lives than Romano's term "juridical order" suggests; boundaries between the orders blur at some points in participant narratives, demonstrating instances of legal hybridity.<sup>147</sup>

The next chapter explores the relationships between litigation participants and courts from a different vantage point. The current chapter has been principally concerned with presenting a detailed picture of the interrelationships between legal systems. However, the tendency of participants to filter state norms through their own particular lenses and present their religious norms can equally be analyzed as moments of translation (and mistranslation) between cultures. The literature on cross-cultural communication surveyed in Chapter 2 provides some normative standards by which these exchanges can be normatively evaluate. Accordingly, in the next chapter, I consider the successes and failures of cross-cultural communication in the cases under review.

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<sup>147</sup> On the notion of hybridity, see Sherry Simon, *L'Hybridité culturelle* (Montreal: Ile de la Tortue, 1999).

# Chapter 5 Cross-Cultural Communication

## 1 Introduction

The interaction between subjects of multiple legal systems described in the previous chapter can be seen as part of a larger phenomenon of exchanges between members of various cultures. Indeed, in socially diverse societies, public institutions are active participants in dialogues that cross cultural lines. Approaching religious freedom litigation as a cross-cultural encounter sheds new light on the relationships between state actors, citizens, and communities, and the descriptive work carried out above serves to enrich this analysis. Interview participants in this study narrated many instances of cross-cultural communication, both successful and unsuccessful, between religious freedom claimants and state officials. While interview and textual data offer many examples of unsuccessful cross-cultural communication in the litigation context, there were also, moments of success, most notably in the *Multani* case.

Chapter 2 provided an overview of literature in the field of cross-cultural communication that provides the foundation for the analysis in this chapter. Part 2 of the current chapter examines additional theoretical considerations of cross-cultural communication particular to the religious freedom litigation context. This sets the stage for Part 3, which analyzes the successes and failures of cross-cultural communication in each of the cases under review in this study.

## 2 Religious Freedom Litigation as Cross-Cultural Encounter

Legal scholars have begun develop the argument that religious freedom litigation ought to be examined through the lens of cross-cultural communication. Benjamin Berger, for example, claims that “the meeting of law and religion is not a juridical or technical problem but, rather, an instance of cross-cultural encounter.”<sup>1</sup> According to Berger, most accounts fail to see that “the constitutional rule of law is, itself, a cultural system... an interpretive horizon,

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<sup>1</sup> Benjamin L Berger, “The Cultural Limits of Legal Tolerance” (2008) 21 Can JL & Juris 245 at 246.

composed of sets of symbols, categories of thought, and particular practices that lend meaning to experience.”<sup>2</sup> Indeed, the failure to see law as a site of cross-cultural encounter can be seen even from within studies of cross-cultural communication. Sadri & Flammia, for example, explain how cross-cultural communication is important across multiple disciplines, and include in their discussion political science, war and peace studies, sociology, education, and technical communication.<sup>3</sup> While their list is not meant to be exhaustive, law’s absence is notable.

As can be seen in Chapter 3’s discussion of the cases under review in this study, current Canadian case law manages religious diversity through the lenses of “reasonableness” and “proportionality.” These notions operate as “a limiting apparatus that looks to the central values and assumptions of society to decide the justifiable boundaries of toleration.”<sup>4</sup> In other words, these purportedly neutral concepts operate as a mask for the cultural assumptions that animate the jurisprudence, and usually end up determining the outcome of cases. In this section, I will build on Berger’s claim, drawing out the ways in which religious freedom litigation operates as a cross-cultural encounter.

## 2.1 Legal Systems in Dialogue

One way of adding depth to the claim that religious freedom litigation is a form of cross-cultural communication is to revisit the notion, developed in Chapter 4, that religious freedom claimants often articulate their religious obligations in legal terms. Clearly, the legality of these obligations does not stem from the state’s legal system, but from a religious one. Moreover, each of these legal systems becomes relevant to the other in particular ways. In other words, they have something to say to each other.

Nicholas Kasirer’s consideration of McGill’s transsystemic curriculum, which teaches the common law and civil law traditions comparatively, provides inspiration for thinking about how dialogue between legal systems can work. For Kasirer, simply comparing “the informational

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<sup>2</sup> *Ibid* at 246.

<sup>3</sup> Houman A Sadri & Madelyn Flammia, *Intercultural Communication: A New Approach to International Relations and Global Challenges* (New York: The Continuum International Publishing Group, 2011) at 11.

<sup>4</sup> Berger, “Cultural Limits,” *supra* note 1 at 256.

plane of rules and outcomes” of multiple legal systems results in an impoverished approach.<sup>5</sup> Rather, the civil law should be “presented as one *mentalité* or epistemology for law, in conversation with another mindset.”<sup>6</sup> In this view, the civil law and common law traditions emerge from particular mindsets, each coloured by sets of assumptions, ways of knowing, and commitments to particular values. The religious legal traditions of litigants in religious freedom cases can be similarly conceptualized. In this light, the claim that religion and law can be partners in dialogue begins to make more sense.

## 2.2 The Nature of the Dialogue

Even if it is accepted that members of the state’s legal culture can enter into a dialogue with members of religious legal cultures, special attention must be paid to the particular kind of dialogue that is possible between citizens and state officials. The state’s power to enforce its norms makes such a dialogue necessarily asymmetrical. As Berger notes, “[l]aw and religion are certainly not engaging in a conversation as relative equals.”<sup>7</sup> Indeed, according to Berger, when religious freedom litigation is analyzed as a cross-cultural encounter, “it becomes clear that the culture of law’s rule is structurally positioned and very much prepared to assert its dominance.”<sup>8</sup>

The most practical aspect of this unequal power dynamic is that, once the parties have finished stating their cases, the court releases a judgment that explains its decision and an order that governs parties’ behaviour. This order is backed by the threat of the state’s police power. Relatedly, litigants (through their counsel) are required to observe particular requirements, set by the courts and legislature, when submitting their arguments and evidence to court. Throughout the case, the court retains power over the parties to limit their representations. This has peculiar effect on dialogue. As Diana Eades notes,

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<sup>5</sup> Nicholas Kasirer, “Bijuralism in Law’s Empire and in Law’s Cosmos” (2002) 52 *Legal Educ* 29 at 39. In a memorable turn of phrase, Kasirer describes this comparison as “the intellectual equivalent of comparing the Paris and London phone books.”

<sup>6</sup> *Ibid.*

<sup>7</sup> Berger, “Cultural Limits,” *supra* note 1 at 256.

<sup>8</sup> *Ibid* at 276.

There are good *legal* reasons why witnesses' stories are filtered, organised and restricted in the courtroom... (such as the prohibition on hearsay evidence, or the strategy of a lawyer in examination-in-chief preventing a witness from introducing any matters which may damage their case)... But, the way in which a witness's story has to be filtered through lawyer questions is a fundamental *sociolinguistic problem* for the ability of witnesses to tell their own story in their own way. It is also a fundamental sociolinguistic problem for the ability of a court to hear, understand and assess the competing stories which form the basis of a courtroom hearing.<sup>9</sup>

The power relation also plays itself out through a set of prior commitments, which can serve to structure the range of successful arguments that can be made to the courts. The adoption of these prior commitments is made possible by the perception, discussed above, that the courts' reasoning is culturally neutral, which Berger calls a "conceit."<sup>10</sup>

One such prior commitment of Canadian law is individualism. Berger has argued persuasively that Canada's jurisprudence treats religion individualistically in three different ways: by focusing on the individual aspects of religion at the expense of its communal aspects, treating religion as a matter of choice, and treating religion as essentially private.<sup>11</sup> Each of these aspects can be seen as culturally situated. First, the collectivist Hutterite worldview, discussed in Chapter 4, reveals a view of religion at odds with the Court's focus on the individual aspects of religious practice. Second, conceiving of religion as a matter of choice is also a problem for adherents of faith who ascribe spiritual consequences to matters outside their control.<sup>12</sup> Third, the notion that religion should be restricted to the private sphere is problematic for those who believe that their faith permeates all aspects of their lives and should govern their public and private selves, or for whom the public/private distinction takes on a different

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<sup>9</sup> Diana Eades, "Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications" (2008) 20 *Current Issues Crim Just* 209 at 211-212 (emphasis in original).

<sup>10</sup> Berger, "Cultural Limits," *supra* note 1 at 276.

<sup>11</sup> Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45 *Osgoode Hall LJ* 277. Lori Beaman presents an alternative vision, drawing a distinction between the subjectivization of religion and its individualization, see Lori G Beaman, "Is Religious Freedom Impossible in Canada?" (2012) 8(2) *Law, Culture and the Humanities* 266 at 277-279. See Chapter 7, Section 2 for further discussion.

<sup>12</sup> See David C Williams & Susan H Williams, "Volitionalism and Religious Liberty" (1991) 76 *Cornell L Rev* 769.



meaning.<sup>13</sup> Indeed, in many parts of the world, religion is an integral part of public discourse.<sup>14</sup> Accordingly, Canadian law's individualism is hardly a universal or neutral way to understand religion; indeed, Brislin and Yoshida note that "[b]eliefs regarding the importance of the individual and importance of the group... tend to be highly emotional."<sup>15</sup>

A second prior commitment of Canadian law is the distinction between beliefs and practices. As Lori Beaman notes, though religious freedom litigation always focuses on some religious practice, the *Amselem* ruling requires religious freedom claimants to first and foremost demonstrate a sincere belief, and then connect the practice at issue to that belief.<sup>16</sup> In this two-step analysis, the assumption is that "[r]ituals and embodied practices are taken to be symbolic rather than constitutive of faith, and as ultimately about belief."<sup>17</sup> Following Winnifred Fallers Sullivan,<sup>18</sup> Beaman argues that the understanding that beliefs are prior to practices has roots in Protestant Christianity.<sup>19</sup> However, such a neat distinction is at odds with more practice-based religions or, more commonly, situations in which practice and belief are interwoven and neither

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<sup>13</sup> Bhiku Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Houndmills: Macmillan Press Ltd., 2000) at 181-182, 201-202, 324.

<sup>14</sup> See Ran Hirschl, *Constitutional Theocracy* (Cambridge, U.S.A.: Harvard University Press, 2010).

<sup>15</sup> Richard Brislin & Tomok Yoshida, *Intercultural Communication Training: An Introduction* (Thousand Oaks: Sage Publications, 1994) at 50-51. In a review of literature on cross-cultural lawyering, Piomelli notes attention directed to "lawyers' discomfort with expressions or discussions of emotion, our extolling of and expectation for linear thinking." Ascanio Piomelli, "Cross-Cultural Lawyering By The Book: The Latest Clinical Texts and a Sketch of a Future Agenda" (2007) 4 *Hastings Race & Poverty LJ* 131 at 177.

<sup>16</sup> Beaman, *supra* note 11 at 14-20. As Beaman notes, the separation between beliefs and practices is also evident in the Supreme Court's earlier decision in *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772, where the Court held, at para 36, that "[t]he freedom to hold beliefs is broader than the freedom to act on them."

<sup>17</sup> Beaman, *ibid* at 16.

<sup>18</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005).

<sup>19</sup> Perhaps there is something of the common law's faith in step-by-step, analytical reasoning behind this distinction as well, see Simon Stern, "The Analytical Turn in Nineteenth-Century Legal Thought" (2011) Social Science Research Network Working Paper Series, online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1856146](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856146)>.

is truly prior to the other.<sup>20</sup> Admittedly, there are significant practical distinctions between beliefs and practices.<sup>21</sup> My point here is that the conceptual distinction operates as an unspoken prior assumption that structures cross-cultural dialogues in religious freedom litigation.

A third prior commitment of Canadian law is found in the fact that, as noted above, religious freedom cases in Canada most often turn on the legal discourses of “reasonableness” and “proportionality.” Under these rubrics, “the possibility of the use of a language other than law’s own is foreclosed.”<sup>22</sup> Litigants must use the language of precedent and/or describe their perspectives in quantifiable terms in order to tip the scales of the cost-benefit analysis that will determine their dispute. Failure to comply with these discursive norms will likely result in losing one’s case; in Berger’s analysis, “you are either required to conform your way of life to the symbols, values, and meanings of the rule of law, or permitted to carry on without interference because the law recasts the meaning of your practices and beliefs as already consistent with those cultural commitments.”<sup>23</sup>

In sum, the power imbalance between courts and litigants is played out on several levels. The courts can literally tell litigants what to do, and their orders come with significant coercive threats. The courts also control the way in which the dialogue can be carried out by controlling the rules of evidence and procedure, and setting the terms of the discussion. Moreover, the concepts and language used in these decisions structure the discussion of them in the legal profession, the academy, and the mainstream media. This power relation engenders resistance from minority voices. According to Tully,

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<sup>20</sup> Beaman, *supra* note 11 at 17.

<sup>21</sup> Parekh, *supra* note 13 at 145, notes:

Beliefs are necessarily general, even vague and amenable to different interpretations, whereas practices which are meant to regulate human conduct and social relations are fairly determinate and concrete. Secondly, while beliefs are not easy to discover and enforce, conformity to practices is easily ascertainable and enforceable. Thirdly, beliefs primarily pertain to the realm of thought and practices to that of conduct... Fourthly, coherence among beliefs is a matter intellectual consistency and is different in nature from that among practices where it is basically a matter of practical compatibility.

<sup>22</sup> Berger, “Cultural Limits,” *supra* note 1 at 274.

<sup>23</sup> *Ibid.*

If we listen to what people are trying to say in actual cases, the demands of minorities are often made in the face of the majority having the power to suppress or misrecognize minorities, to assimilate them to the majority's cultural norms, to rule over and remake their identities by destroying their languages, and to present this as if it were universal. These cases are not conflicts between 'difference' and 'equality' but among groups with tremendous inequalities in power and resources.<sup>24</sup>

Is it possible to give voice to alternative expressions when the power relations are so imbalanced? James Boyd White draws attention to the practical role of the lawyer, who guides her client in crafting a story that is (hopefully) both authentic and comprehensible to state justice institutions:

Think now of the life of the lawyer: in her conversations with her client, from the beginning, her task is to help him tell his story, both in his own language and in the languages into which she will translate it... The client is... led to learn something of the language of the law; at the same time, the lawyer must learn something of the language of the client; between then they create a series of texts that are necessarily imperfect translations of the client's story into legal terms, and in doing so they also create something new, a discourse in which this story, and others, can have meaning and force of a different kind: the meaning and force of law.<sup>25</sup>

In Section 3.2 of this chapter, I will consider moments in the *Multani* litigation where counsel and the intervening organizations were successful, to some degree, in doing just this. Before turning to the actual cases, however, I examine the ways judges might best respond in the context of a cross-cultural encounter.

## 2.3 How is a Judge to respond?

Given the considerations of power and prior commitments of Canadian jurisprudence discussed in the preceding subsection, can judges give expression to the notion that they are participants in cross-cultural dialogues? Jeremy Webber has proposed that judges ought to act as mediators for the multiple positions relevant to any dispute, synthesizing these arguments and

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<sup>24</sup> James Tully, "The Practice of Law-Making and Problem of Difference: An Introduction to the Field" in Omid Payrow Shabani, ed, *Multiculturalism and Law: A Critical Debate* (Cardiff: University of Wales Press, 2007) at 30.

<sup>25</sup> James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) at 260-261.

engaging “in the rational search for normative reconciliation.”<sup>26</sup> However, Webber also notes that the reconciliation of opposing viewpoints “will often be impossible.”<sup>27</sup>

Relatedly, in his discussion of the Canadian law on Aboriginal rights, Dwight Newman shows that, when courts do not pay enough regard to their own positionality, they can end up imposing their own normative perspective on litigants even as they strive for dialogue:

In its 2005 decision in *R. v. Marshall*, the [Supreme Court of Canada] called for the assessment of Aboriginal rights in terms of how they “translate” into rights known to the Canadian legal system... Although this “translation” metaphor and test arise within a discussion that refers to both Aboriginal and European perspectives, they parallel Kymlicka’s advice that “it is important to find a justification of [Aboriginal rights] that [non-Aboriginal judges and politicians] can recognize and understand.” The priority in terms of concept or justification becomes comprehensibility within the non-Aboriginal (and “modern”) context.<sup>28</sup>

Thus, because the state legal discourse is framed as neutral, it becomes the privileged language into which alternative perspectives must be translated in order to be taken into account. But in this translation, as in all translation, something is inevitably lost. As White notes:

to acknowledge that [an individual’s] language cannot be translated into other languages (or into some superlanguage) without real loss requires us to give up the dream of an Objective or Universal language of authority, one into which all others can be translated and in which the truth can be spoken plainly and clearly. It requires us to recognize that the insistence upon the adequacy of a single language is a kind of tyranny.<sup>29</sup>

So, if true translation is impossible, but judges are nonetheless required to render judgment, is there a way out? The norms of respect and self-awareness, found in the literature on cross-cultural communication discussed in Chapter 2, may help judges to take into account a wider array of perspectives, but they do not solve the problem of value incommensurability in any obvious way.

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<sup>26</sup> Jeremy Webber, “A Judicial Ethic for a Pluralistic Age” in Omid Payrow Shabani, ed, *Multiculturalism and Law: A Critical Debate* (Cardiff: University of Wales Press, 2007) at 88.

<sup>27</sup> *Ibid* at 87-88.

<sup>28</sup> Dwight G Newman, “You Still Know Nothin’ ’Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights” (2007) 52 McGill LJ 725 at 731-732.

<sup>29</sup> White, *supra* note 25 at 264.

However, there are other helpful streams in the literature on cross-cultural communication that encourage a different approach altogether. Some scholars of cross-cultural communication, for example, conceive of cultural production as “coculturation,” wherein culture is shaped by “complex and ongoing processes of identification... macrolevel sociopolitical and sociohistorical contexts, as well as microlevel social interactional processes.”<sup>30</sup> Others take a dialectical approach that “emphasizes that cultures and cultural knowledge are always shaped in relationship to other cultures.”<sup>31</sup> Both schools of thought assume an agonal process wherein norms are constantly contested and evolving. From this vantage point, even though judgment of the Supreme Court is legally final, it does not mark the end of the story for participants or for the contest over norms in the broader culture. Rather, while judges have powerful voices, other actors may nonetheless continue the conversation even after judgment is rendered.

Within the state’s legal institutions, this may take the form of a dialogue between disagreeing judges, between courts and legislatures, or between legislatures and government-sponsored initiatives such as the Bouchard-Taylor Commission.<sup>32</sup> But the contest extends further, as cultural communities, professional communities, academic commentators, media organizations, and other social groups respond to the judicial decisions in their own ways. This ongoing contest may reflect the “inherently indeterminate” nature of the complex, practical reasoning involved in resolving normative conflicts linked to cultural differences.<sup>33</sup> More optimistically, it can also be taken to indicate a kind of openness to new ideas and potential for mutual change arising from dialogue. Becoming comfortable with this ongoing contest may be a

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<sup>30</sup> Melissa L Curtin, “Coculturation: Toward A Critical Theoretical Framework of Cultural Adjustment” in Thomas K Nakayama & Rona Tamiko Halualani, eds, *The Handbook of Critical Intercultural Communication* (Blackwell Publishing, 2010) 270 at 277-278.

<sup>31</sup> Judith N Martin & Thomas K Nakayama, “Intercultural Communication and Dialectics Revisited” in Thomas K Nakayama & Rona Tamiko Halualani, eds, *The Handbook of Critical Intercultural Communication* (Blackwell Publishing, 2010) 59 at 75

<sup>32</sup> See Kent Roach, “Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience” (2005) 40 *Tex Int’l LJ* 537; Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 *Osgoode Hall LJ* 74.

<sup>33</sup> Tully, “Law-Making”, *supra* note 24 at 31.

key to participating effectively in the dialogue; as Brislin and Yoshida note, “[t]olerance for ambiguity has... been cited in numerous cross-cultural studies as one of the most important characteristics for overseas success.”<sup>34</sup> Perhaps the best advice to judges, then, is to strive to maintain the values of respect and self-awareness in their reasoning, and to recognize that the finality of their decisions is something of a legal fiction. The impact of the particular decision and its future applications will likely be a matter of further contest and dialogue between legal institutions and citizens.

### 3 Successes and Failures of Communication in the Cases

Having examined general considerations related to cross-cultural dialogue in Chapter 2 and, above, some concerns more specific to the religious freedom litigation context, I now apply these insights to the data collected for the three cases under review. The discussion below will consider some of the cross-cultural encounters leading up to litigation. Then, I will analyze the dialogue that occurred within the context of the adversarial litigation process. The very nature of this process creates a structural obstacle for meaningful exchange, as parties are placed in opposition to each other; for this reason, the cross-cultural encounters that occurred between the opposing parties can often be marked by a lack of respect or self-awareness. Nevertheless, by exploring in detail how the religious freedom claimants sought to make themselves understood to opposing parties and to the courts, significant moments of cross-cultural communication are revealed. I will then consider the judicial responses to the religious freedom claimants, where a wider variety of postures were evident. I will argue that the values of respect and self-awareness were crucial in determining the success of a cross-cultural exchange. Finally, I will turn to consider litigants’ reflections on the cross-cultural exchange. A consideration of these narratives demonstrates that litigants often attribute their lack of success to a court’s lack of understanding of their cultural practices.

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<sup>34</sup> Brislin & Yoshida, *supra* note 15 at 40.

### 3.1 *Amselem*

In the events leading up to the litigation in *Amselem*, one litigant described his experience at a meeting of the co-owners of his building in profoundly negative terms:

il y avait une réunion des propriétaires ici, avec le président du syndicat, et le président de tous les condominiums... et j'ai vu que c'était vraiment, là, c'était méchant, vraiment, avec une *chutzpah*, et un qui m'a traité de Khomeini... Depuis on n'a plus allé à cette réunion, c'est fini, on y va plus.

In this description, the litigant's narrative describes a form of misrecognition by the other co-owners that made him wish never to return to a co-owners meeting. He felt that he had been treated as a religious fundamentalist, a "Khomeini." Notably, he used a Hebrew term ("*chutzpah*")<sup>35</sup> to describe the attitude he encountered when the French term "méchant" seemed inadequate. From this account, it is apparent that the litigant did not feel that he had been accorded respect required for a successful cross-cultural exchange. This may, in part, account for the escalation of the dispute; indeed, according to the litigant, his interactions with the syndicate of co-owners left him feeling a "scent of anti-Semitism,"<sup>36</sup> which he said contributed to his decision to pursue litigation.<sup>37</sup> As an example of this, he pointed to the syndicate's position that a super-majority of 90% of the voting shares in the building would be required to allow for the *succah* installation, which the litigant characterized as "à la Saddam Hussein."<sup>38</sup>

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<sup>35</sup> The term has entered the English lexicon; Cambridge Dictionary, for example, defines it as "unusual and shocking behaviour, involving taking risks but not feeling guilty." Online: <<http://dictionary.cambridge.org/dictionary/british/chutzpah?q=chutzpah>>.

<sup>36</sup> Litigant 2 Interview (author's translation).

<sup>37</sup> *Ibid.*: "Ce n'était pas vraiment qu'on voulait violer quoi que ce soit, c'était au contraire, on était bien frustré de voir cette réaction qui était une réaction qui touchait un peu l'antisémitisme."

<sup>38</sup> *Ibid.* A change to a condominium's by-laws should not ordinarily require this super-majority, but a simple majority (art 1096 CCQ); amendments to a condominium's "destination," however, do require a 90% super-majority (art 1098 CCQ). While the lower courts held that the restrictions on ownership were justified by the building's destination, they were not part of the building's destination. Though there may be arguable merit to the claim that the upscale nature of the building implied its exterior uniformity, this seems to me more of a case of legal posturing. Though this did not become a point of contention before the courts, the litigant's claim that the syndicate took this position in the events leading to the litigation is supported by a transcript of a co-owners' meeting submitted to the courts. There, the syndicate indicated that it would not hold a vote as 75% of the co-owners were not present; this level of quorum is only required for super-majority decisions (*ibid*).

### 3.1.1 Adversarial Dialogues

In *Amselem*, as in all the cases under review, the litigation began with the parties exchanging affidavits, which laid out witnesses' accounts of the relevant facts. Each witness was then cross-examined by opposing counsel. In this context, counsel for the co-owners' syndicate demonstrated some of the skills and values associated with successful cross-cultural communication discussed above. For example, in prefacing questions about witnesses' *succah* practices, opposing counsel demonstrated self-awareness, explaining that his own knowledge of the practice was limited:

you have to bear in mind that I personally may not know, and although I have some basic idea of what a succah is, what it stands for, what it means to you, I may ask you questions unfortunately that you may find either amusing or maybe not relevant.<sup>39</sup>

Counsel went on to ask a series of questions about the history of each litigant's *succah* practice.<sup>40</sup> Further demonstrating his self-awareness and showing openness to learning about other communities, counsel sought clarification regarding the internal complexities of Montreal's Jewish community, specifically the differences in *succah* practices between the Sephardic and Ashkenazi groups.<sup>41</sup> This spirit of openness led to some particularly poignant moments of cross-cultural communication. For example, in order to explain the holiday of *Shemini Atzereth*, which follows the *Succoth* holiday but is not technically part of the holiday,<sup>42</sup> one litigant explained that he continued to use the *succah* during those days to express his desire to be near to God, to say: "on veut rester encore un jour avec toi, [Dieu],... on ne va pas partir

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<sup>39</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem SCC*] (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent's Record Vol 1, at 190). Counsel made a similar statement in *ibid* (Cross-examination of Thomas Klien, 29 January 1998, Respondent's Record Vol 1 at 233 and in the Cross-examination of Moïse Amselem, 3 February 1998, Respondent's Record Vol 1 at 281).

<sup>40</sup> In one case, for example, he sought information about a litigant's first experience in a *succah*, and then about his use of a *succah* during his youth, his married life, before and after his immigration to Canada: *ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent's Record Vol 1, at 191-193).

<sup>41</sup> *Ibid* (Cross-examination of Moïse Amselem, 3 February 1998, Respondent's Record Vol 1, at 281-283).

<sup>42</sup> See *ibid* (Expert Report of Rabbi B. Barry Levy, Ph.D., at 2, Appellants' Record Vol 2 at 323).



comme ça, brusquement... On dirait comme quelqu'un qui accompagne un roi qui s'en va."<sup>43</sup>  
 Here, the litigant drew the analogy to the departing king in order to make his cultural practice accessible to opposing counsel.

If these conversations were held outside the litigation context, counsel for the syndicate might be read simply as an inquisitive individual, seeking to understand the meaning of the *succah* to the litigant. But the litigation context alters that dynamic. It becomes clear to a reader of the transcripts that, in addition to learning some basic information about the holiday and community,<sup>44</sup> opposing counsel is seeking to draw out inconsistencies in the litigants' religious practice or other weaknesses in their case. For example, counsel for the syndicate was concerned with times during a litigant's life when he did not observe the *succah* practice; times when a litigant did not have a *succah* at his own house; whether, when a litigant was married but did not have children, he felt "morally obliged to go to [his sister's *succah*] or could... have skipped a day"; whether a litigant ate his dinners but not his lunches in the *succah*, or was able to eat snacks outside the *succah*; and whether the litigant's friends and relatives build *sucloth*.<sup>45</sup> Of course, the syndicate's counsel cannot be faulted for all this. It is his professional obligation, as the syndicate's lawyer, to uncover inconsistencies in the facts alleged by the opposing parties. This is simply one of the structural obstacles to effective communication in the litigation context. Arguably, this contributed to some of the communication breakdowns to which I now turn.

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<sup>43</sup> *Ibid* (Cross-examination of Moïse Amselem, 3 February 1998, Respondent's Record Vol 1, at 308).

<sup>44</sup> Counsel was interested, for example, in learning about which days are considered "holy days," the holiday's timing in relation to other holidays and the Sabbath, and during which days of *Sucloth* it was permissible to work; he asked about the requirements for a *succah*'s roof. Moreover, through some general questions, he learned of the various ritual practices carried out by the litigants, each in his own fashion: *ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent's Record Vol 1, at 194-197; Cross-examination of Thomas Klein, 29 January 1998, Respondent's Record Vol 1 at 234-235; Cross-examination of Moïse Amselem, 3 February 1998, Respondent's Record Vol 1, at 284, 296-297, 299).

<sup>45</sup> *Ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent's Record Vol 1, at 193-194, 205, 208, 213; Cross-examination of Thomas Klein, 29 January 1998, Respondent's Record Vol 1 at 232, 238-240; 244. Cross-examination of Moïse Amselem, 3 February 1998, Respondent's Record Vol 1 at 292, 306-307, 309, 312-316).

In some exchanges, opposing counsel showed tendencies associated with poor cross-cultural communication, imposing his own assumptions on litigants. For instance, he adopted the assumption, discussed above in Section 2.2, that practices and beliefs are neatly distinguishable. He asked the litigant, “To you what does... the period of Succoth represent?” The litigant responded, “It’s a holiday that I keep as I was thought [sic] from my childhood.” This answer did not satisfy the syndicate’s counsel, so he continued, “But what meaning does it have, do you know... what it represents in the Jewish religion?” The litigant’s answer was somewhat vague, as if the question itself did not make sense to him: “The story is subscribed [sic] in the Book, it’s part of the harvest day and part of the remembrance of the difficulties that the Jews went through from the expulsion of Egypt.”<sup>46</sup> A similar exchange occurred when opposing counsel asked a different witness about the *mezuzah*<sup>47</sup> he has affixed to his doorpost:

Q... could you summarily explain what is a mezuzzuh?

A- A mezuzzuh is basically a religious item that has a portion of the Bible written on it. That is basically a small piece of parchment... That paper is then, after it is written by a scribe, taken from the Bible, it is rolled up and put into a holder which is called a mezuzzuh.

Q- What message does that send?

A- I can’t really tell you exactly what, - if it is...

Q- I will ask you a more simpler [sic] question. Why did you put one up?

A- I put one up because it is a biblical obligation to put one on your door.<sup>48</sup>

The communication difficulties in these exchanges suggest that the “belief before practice” paradigm was not a perfect fit for some of the litigants.

Notably, however, another litigant independently described the “message” in *Succoth* as the shedding of material goods, the recognition of life’s fragility and God’s power. This signals

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<sup>46</sup> *Ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent’s Record Vol 1, at 205-206).

<sup>47</sup> The website of the Orthodox Union, an organization of Orthodox Jews, describes the *mezuzah* as “a small scroll of parchment on which are written two Biblical passages... [Put in a case, it] is then nailed or screwed or glued to the right side of the door, in the upper third part of the door-post, leaning inward towards the interior of the house or the room.” Online: <<http://www.ou.org/about/judaism/m.htm>>.

<sup>48</sup> *Amselem SCC*, *supra* note 39 (Cross-examination of Thomas Klein, 29 January 1998, Respondent’s Record Vol 1, at 264).

some variations in approach amongst the *succah*-building litigants, with at least one narrative fitting more closely into the belief-before-practice paradigm. Still, this litigant explained that the Biblical commandment of observing *Succoth* did not form a complete basis for his religious practice, noting the importance of Judaism's oral tradition.<sup>49</sup> Further, the litigant and opposing counsel engaged in a prolonged discussion regarding whether the litigant had a religious obligation to eat warm food on *Succoth* or could rather satisfy his religious obligations by eating cold food. After a series of oblique answers, finally the litigant said: "Ça fait partie de la fête. Est-ce que vous croyez que manger froid c'est agréable?... Quand il y a la fête il faut faire les choses les plus agréables pour vous et pour le Seigneur."<sup>50</sup> Taken together, these statements indicate that the notion that one could find a textual source for all aspects of practice is overly simplistic, that the sources of the obligation are multiple, and that the belief and the practice are not easily separated. Indeed, the litigant went on to explain, "la *souccah* enveloppe l'être humain en entier dans son corps et dans son âme."<sup>51</sup>

Further communication difficulties arose as counsel attempted to draw other distinctions that did not seem relevant to litigants. For instance, counsel posed the following question of one litigant:

Now, if I was to try to separate... the religious tradition from the tradition itself that is not necessarily religious, would you say that to bring expensive items is a religious obligation or is it more of an old tradition to make it more festive?<sup>52</sup>

The litigant resisted this compartmentalization: "It's actually a religious affair, it's even written somewhere in the Holy Books that you should bring in expensive nice things to your place to have the festive [sic] in its full value."<sup>53</sup> A similar kind of resistance can be seen in the passage

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<sup>49</sup> *Ibid* (Cross-examination of Moïse Amselem, 3 February 1998, Respondent's Record Vol 1, at 284-285).

<sup>50</sup> *Ibid* at 344.

<sup>51</sup> *Ibid* at 286.

<sup>52</sup> *Amselem SCC, ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent's Record Vol 1, at 211).

<sup>53</sup> *Ibid*.

cited in Chapter 4, where counsel and a litigant discussed whether the *succah* was considered a principal residence:

Q- ... you mention that the succah represents the principal residence, could you explain what you mean by that?

A- It's just an expression, since you eat there, you know, and entertain guests and study, it's called the principal.

Q- But it's not really a residence, it's not a place where you sleep?

A- If I want.

Q- If you want.

A- But I can change my mind.<sup>54</sup>

In the same vein, in discussing whether a litigant took a meal in the *succah*, counsel attempted to distinguish between a complete meal and a symbolic meal where only bread and wine are eaten. The litigant answered: “Vous savez, il n’y a pas de repas symbolique,” and went on to discuss some of the minutiae of what constitutes a meal in Jewish law (30 grams of bread, in the litigant’s account).<sup>55</sup> Thus, while for the litigant there was a distinction between what did or did not constitute a meal, the notion of the symbolic meal did not make sense. Likewise, another litigant had difficulty answering counsel’s question about the relative importance of *Succoth* and other Jewish holidays, explaining that “every Jewish holiday is important” and saying that he did not understand the nature of the question.<sup>56</sup> The exchanges in these instances suffer, in my view, because the syndicate’s counsel attempted to impose categories from the state legal culture onto the litigants’ religious practices.

Once the matter moved to the courts and the litigants’ counsel began to make representations on their behalf, they generally spoke from within state legal frameworks. Counsel explained the litigants’ claims in the language of legislation, contracts, property, and other categories familiar to the courts. There were moments, however, when counsel attempted

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<sup>54</sup> *Ibid* at 212-213.

<sup>55</sup> *Amselem SCC, ibid* (Cross-examination of Moïse Amselem, 3 February 1998, Respondent’s Record Vol 1 at 300). The litigant reiterated his view several times that “il n’y a pas de symbolism dans le judaïsme,” at 302, 303.

<sup>56</sup> *Ibid* (Cross-examination of Thomas Klein, 29 January 1998, Respondent’s Record, Vol 1 at 236-237).

to speak from the religious practitioners' perspectives, and make their particular religious practices comprehensible. As counsel for B'nai Brith Canada put it to the court,

if you're celebrating Soukot with my family, that's perfectly acceptable under Jewish law, but if it's a hardship... if it becomes a "corvée exceptionnelle" for you to celebrate Soukot with my family, with my kids yelling in the succah and perhaps another five families, then you are not only supposed to, but you are forbidden under Jewish law to celebrate Soukot in that fashion.<sup>57</sup>

Interestingly, the lawyer who made these representations soon drew an analogy to another religious faith to illustrate his argument about religious freedom: "[The *Charter*] does not protect – to use a Catholic idea, it does not protect exclusively the Pope's version or the Pope's explanation of what a Catholic obligation is."<sup>58</sup> In this moment, the cross-cultural communication is quite rich, as counsel sought to make his argument more accessible by referencing a religious tradition that may have been more familiar to judges. Of course, the judges would have to eventually translate whatever understandings they reached into the terms of Canadian constitutional culture. But the reference to Catholicism might have helped judges with a Catholic or other Christian background understand what was at stake for the religious freedom claimants.

Other instances of cross-cultural communication within the adversarial process can be seen in the involvement of rabbis under the legal category of "expert witnesses." In cross-examination, opposing counsel sought to demonstrate the weaknesses in each rabbi's position. For example, counsel for B'nai Brith Canada sought to make Rabbi Levy's support for a communal *succah* appear unreasonable by carrying the notion to absurdity, asking if a communal *succah* would be acceptable for the whole City of Outremont, the larger City of Montreal, or the whole of Canada.<sup>59</sup> Rabbi Levy, however, entertained the hypothetical examples, explaining his view that such a situation would be theoretically acceptable provided

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<sup>57</sup> *Amselem SCC, ibid* (Transcript of Oral Argument, Steven Slimovitch for B'nai Brith Canada at 23).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Amselem SCC, ibid* (Cross Examination of Barry Levy, 17 March 1998, Appellants' Record Vol 2 at 307-308).

that all the *succah* users would be prepared to live nearby.<sup>60</sup> This kind of exchange cannot, in my view, be considered successful cross-cultural communication, as the attempt to discredit another perspective runs counter to the principle of respect discussed above. Certainly, it is acceptable to question another's position, but outright attempts to make the other party appear unreasonable in the eyes of a judge crosses an important line.

Other communicative failures resulted from opposing counsel's adoption of overly simplistic accounts of Jewish rituals. For instance, after Rabbi Ohana opined that an observant Jew should not buy an apartment with a covered balcony because he would not be able to build a *succah*, counsel for the syndicate put it to Rabbi Ohana that another rabbi lived in the condominium complex in just such a situation.<sup>61</sup> By demonstrating that other rabbis do not share his views, the question implies that Rabbi Ohana adopts an unusual interpretation of the *succah* obligation. Applying a converse tactic, counsel for B'nai Brith Canada asked a question of Rabbi Levy emphasizing the differences between Sephardic and Ashkenazi observances of *Succhoth*.<sup>62</sup> To this, Rabbi Levy replied: "There are frequently minor differences... I think that what we're talking about is basically applicable in both communities."<sup>63</sup> Both of these questions demonstrate an over-simplification of practices within the Jewish community; the first glosses over the internal diversity of Jewish practice, the second overstates the differences found along sub-communal lines. These reductionist accounts represent both a (perhaps unconscious) lack of respect and a lack of self-awareness.<sup>64</sup> In a more ideal form of cross-cultural communication,

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<sup>60</sup> *Ibid* at 308.

<sup>61</sup> *Amselem SCC, ibid* (Cross-examination of Moïse Ohana, 17 March 1998, Appellants' Record Vol 2 at 282). In interviews, a litigant called this person a "self-proclaimed rabbi": Litigant 2 Interview (author's translation).

<sup>62</sup> *Amselem SCC, ibid* (Cross Examination of Barry Levy, 17 March 1998, Appellants' Record Vol 2 at 306).

<sup>63</sup> *Ibid* at 306-307.

<sup>64</sup> Indeed, one participant recounted how counsel for the condominium syndicate presented a simplified account to the court:

the judge says "ok, I read it, what's this all about?" I mean, he was very polite, but it's as if he was saying "what the fuck's a succah?" He says I don't know what you're talking about. And all this is in French, eh? And he's like... what is this "sucka [pronounced incorrectly]"... So the French Canadian lawyer representing the condo association, very nice fella, who actually had done, had actually worked for a big Jewish office for many years, he was extremely well versed in the laws of *Succhoth*, and he proceeded to explain what a *succah* was... It's probably what you

counsel would have reflected on their own cultures, realizing that such easy narratives fail to capture most lived cultural experiences.

Reflecting on the litigation process, one of the expert witnesses was frustrated that expert testimony is only heard at trial; appellate courts do not generally hear from them directly (aside from the evidence on the record). For this expert witness, this legal rule excluded him from the process, denying him the opportunity to explain his views:

The bottom line is, once it went [to the Supreme Court], they no longer had any reason to talk to me. I found that somewhat inappropriate to be honest, I mean, it may be perfectly fine in the legal system, but they started getting briefs from other people, other groups or whatever, and that's where I think they started to get the impression that the Jewish community as a whole was opposed to my decision, even if what they said was somehow skewed or misrepresented the [Jewish] legal reality, and I think it would have been better, although I don't know if it's even legal, had they come back to me and said look, we've gotten these responses, do you have anything to say about them? Um, maybe I was right and maybe I was wrong, and maybe what I said would be valuable or not but, they never asked. And so, I think in a sense, the guys who got the last kick at the can had the greatest influence, and that strikes me as inappropriate.<sup>65</sup>

Interestingly, the Supreme Court's position on expert testimony in religious freedom cases may limit opportunities for cross-cultural dialogue. As noted in Chapter 3, the Court held that expert testimony was relevant only to determine the credibility of a religious freedom claimant rather than the objective validity of a religious practice. This has had the effect of curtailing the involvement of expert witnesses in religious freedom cases. The expert testimony in *Amselem* went into a significant amount of detail regarding Jewish law, allowing the court (potential) entry into various views from inside Jewish culture. In contrast, there was a brief expert witness report in *Multani*, but no cross-examination or oral testimony; in *Wilson Colony*, there was no expert testimony. While the Supreme Court's ruling in *Amselem* allows courts a way out of having to determine a dispute regarding religious doctrine, it has also, perhaps, impoverished the opportunity for cross-cultural dialogue in litigation. This may simply be a case where the court

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would get if you were in a Hebrew school and you were in the third grade on *Succoth*, minus the drawings (Lawyer 1 Interview).

<sup>65</sup> Expert Witness 1 Interview.

had to choose between two incommensurable values. On balance, I agree with the choice made in *Amselem*; nevertheless, it is worthwhile to reflect on its costs.

### 3.1.2 Judicial Responses

Interviews and transcripts of oral arguments provide a window into judges' reasoning and communicative processes in responding to the adversarial dialogues presented to them. One lawyer explained the frustration that he felt from the bench as judges tried to pin down Jewish legal concepts:

In the Superior Court, in the Court of Appeal... especially in the Superior Court, you got the impression that the judge was saying, "Look, is there, is there not a rule book? Give me the damn rule book. Show me the rule book!"... That was the impression you got... it permeated everything, and we tried to explain to him, no sir, there is no rule book. There is no hierarchy of rules in the Jewish – yes, there are hierarchy of rules, but there are no, there is no hierarchy of rule-making, or rule-deciding... So we don't have the same system, so what do you do?<sup>66</sup>

This lawyer thus felt that some judges sought to impose a familiar sense of order on a religious tradition.

Indeed, at trial, much of the decision turned on the issue of which side could present the more coherent account of the *succah* and its laws. In my view, the trial judge's struggle to come to terms with Jewish law represents an unsuccessful moment of cross-cultural communication. In his encounter with a religious legal culture, he used his position of power to apply organizing concepts from Canadian law's culture. In oral argument at the Supreme Court, one judge articulated this power relationship in starker terms, saying to counsel: "so you accept that the Court controls the outer limits of what the religion is."<sup>67</sup> This power of definition, applied without sufficient respect for the religious claimants' perspectives, certainly does not embody the openness and respect necessary to successful cross-cultural communication.

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<sup>66</sup> Lawyer 1 Interview.

<sup>67</sup> *Amselem SCC*, *supra* note 39 (Transcript of Oral Argument at 26, question by Justice Binnie to Steven Slimovitch, Counsel to B'nai Brith Canada).



What does the majority decision in *Amselem* mean for cross-cultural communication? Berger argues that the Court adopted a variant of liberalism's relative indifference. In his view, it was only because the Court was able to understand the *succah* practice as a matter of individual preference that it did not seek to prevent the *Amselem* claimants from erecting their *succhoth*.<sup>68</sup> It might be troubling, from the perspective of cross-cultural communication, to imagine that the court applied this individualist paradigm on the *succah* without engaging the claimants' perspectives. However, in several instances it was counsel for the *succah*-builders who advocated an individualist response to religious freedom:

freedom of conscience is as important as freedom of religion and conscience by its nature, it comes before religion, and by its nature, can only be individual.<sup>69</sup>

Further, counsel for the intervener, B'nai Brith Canada, specifically advocated an approach of indifference:

it's simply inappropriate for Courts to get involved in deciding on what religions dictate and that all the judges below were wrong in saying... this is what the Jewish religion requires, that when there's a matter of religious controversy, the Courts should, if at all possible, avoid the controversy and deal with other issues if they can do so.<sup>70</sup>

Accordingly, it would be too simplistic to posit that the litigants and their counsel put forward a version of their religion that the Supreme Court misinterpreted, or that the Supreme Court's application of concepts from the state legal culture was done entirely at the judges' own motion. The arguments put forward by counsel make clear that there were other factors at work. The cultural, personal and educational backgrounds of counsel and the prior commitments of the existing case law stand out as likely candidates.

In the final analysis, though, Berger's argument is persuasive. The Court made sense of the *succah* practice in liberalism's individualistic terms, relying in part on counsels' arguments to come to this conclusion. The Court cared less about what the practice meant to the

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<sup>68</sup> Berger, "Cultural Limits," *supra* note 1 at 265-266.

<sup>69</sup> *Amselem SCC*, *supra* note 39 (Transcript of Oral Argument, Julius Grey for *Amselem et al.*, at 2).

<sup>70</sup> *Ibid* (Transcript of Oral Argument, David Matas for B'nai Brith Canada, at 16).

practitioners and more about the fact that the practice mattered to them at all. Cross-cultural communication in *Amselem* is deliberately thin, remaining indifferent to the nuances of religious experience. While this does leave some “real liberty” for religious practitioners,<sup>71</sup> it is disconcerting that success depends on painting a religious practice as consistent with a liberal ethos.

### 3.1.3 Litigant Reflections

In contrast to some of the reflections from counsel involved in the case, the *Amselem* litigant interviewed did not remark on the same communication problems with respect to the courts. Indeed, the litigant remarked: “tous les juges qui ont apporté les jugements concernant cette affaire, ils avaient raison.”<sup>72</sup> As detailed in Chapter 3, the 13 judges<sup>73</sup> who heard this case produced six separate opinions, some disagreeing in the final disposition, and all demonstrating variations in reasoning. In saying that all were correct, the litigant may have been exaggerating to make a point; alternatively, he can be taken as demonstrating a remarkable tolerance of ambiguity.

In addition, in internalizing the judgments, the litigant put them into his own culturally familiar terms:

quand on lisait le jugement, c’était un cours de Talmud, un cours de Gemarrah, c’est extraordinaire comment un dit oui, l’autre, moi je trouve c’est magnifique la justice ici dans ce pays. Les gens sont bien informés, et bravo! C’est vraiment, il faut être fier de ça.<sup>74</sup>

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<sup>71</sup> Berger, “Cultural Limits,” *supra* note 1 at 266.

<sup>72</sup> Litigant 2 Interview. Relatedly, the litigant had considered abandoning the litigation after the Superior Court’s decision; the day before the deadline to file the necessary paperwork to pursue the appeal he received a phone call from an unknown person who offered to pay his legal costs.

<sup>73</sup> 14 if the judge presiding over the interim injunction proceedings is included.

<sup>74</sup> Litigant 2 Interview. This passage is relied on in Chapter 4 to demonstrate how litigants can use their own normative lenses to internalize the state’s legal norms.

This framing of the judgments reiterates the necessary translation that individuals perform on texts undergo in order ascribe them meaning.<sup>75</sup> It is likely that this positive attitude was impacted significantly by the litigant's ultimate success in the case; however, it would have been open to the litigant to express some negative feelings towards the judgments that went against him, and he did not. In his narrative, these sentiments were reserved for the syndicate of co-owners.

### 3.2 *Multani*

Whereas the dispute in *Amselem* focused on whether the religious freedom claimants had a particular religious obligation, the difficulties in cross-cultural communication faced by the *Multani* litigants related principally to the characterization of the *kirpan* as a weapon. Indeed, part of their legal argument was that the school's "no weapons" policy did not require modification, as the *kirpan* was not a weapon in the circumstances. Gurbaj Singh did not intend to use it as a weapon, and it would be securely sewn to mitigate its dangerousness.<sup>76</sup> This difficulty in communication was experienced from the moment that the school principal became aware of the *kirpan*:

the principal came up to me, and she was like, she called me out of the class, uh, and my teacher, we were sitting together and she started asking me if I have a knife on me. I was like I don't have any knife you know, and she was like you have weapon or a knife on you? No I don't. She's like, you have something under your clothes? I'm like, yeah, I have kirpan.<sup>77</sup>

Following this, the litigant described an earnest attempt to engage in dialogue:

in the beginning... we tried our best to keep our article of faith and see what people's opinion too. Like, we tried to make a best compromise, it has to be tightened enough... like obviously it's always under my clothes, nobody can see it.<sup>78</sup>

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<sup>75</sup> This also resonates with Cover's writings explored in Chapters 2 and 4.

<sup>76</sup> At trial, counsel for the Multanis argued: "[La Code de Vie] n'inclut pas le kirpan sécurisé puisque ce n'est plus une arme, ce n'est pas porté comme une arme." *Amselem SCC*, *supra* note 39 (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 128, Respondent's Record before SCC at 130).

<sup>77</sup> Litigant 1 Interview.

<sup>78</sup> *Ibid.*

This initial dialogue was fruitful, as the principal and the family were able to reach an agreement as to how the *kirpan* would be worn. However, as the issue escalated, the litigant described how his family's attempts at dialogue were rebuffed. The school officials began by proposing options that he found unacceptable:

they were proposing few things. Oh, you should wear the wooden *kirpan*, or you should be wearing plastic *kirpan*, you should wear it in your neck or something like that, very small, these things obviously, if we accept that, then I'm giving up... [the] whole thing.<sup>79</sup>

In his narrative, he was left with no choice but to hire a lawyer and take the matter to court.

Then we didn't have any choice, we contact the local gurdwara committee... we believe we can solve things by talking, right, dialogue? So, they tried to talk to school. We had few students who were going to Concordia and McGill, wearing kirpan, and they don't have problems, so we took few of them, went to school, they still didn't agree, they kept saying security issues, so we didn't have any choice we met one of the lawyers.<sup>80</sup>

### 3.2.1 Adversarial Dialogues

Communication problems continued after the *Multani* litigants retained a lawyer. Indeed, the *Multani* litigant participant perceived that the school officials did not listen to what he, his family, and their lawyer had to say. In the litigant's recollection, school officials were dismissive of his family's concerns:

And then, I think, [our lawyer] set up a meeting with the school board, they wanted to meet with the whole school... We sat together, we tried to talk to them, they didn't listen, there were parents, there were schools, at school board there were about 20 to 30 members... So we were there explaining them, but they kept laughing, and uh, they just didn't listen to us.<sup>81</sup>

Though school officials, of course, may have different recollections, this participant's narrative indicates a lack of basic measures being taken to ensure that participants felt that they were respected and that their concerns were taken seriously.

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<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

When the matter came to court, the Multanis' counsel and the expert witness they put forward emphasized that the *kirpan* was not a weapon and framed the *kirpan* in terms of the values it represented.<sup>82</sup> For example, expert witness Manjit Singh explained: "The Kirpan is not a 'knife' or 'dagger'; it is quite blunt and it comes from the word 'Kirpa' meaning mercy and kindness and 'aan' meaning honour."<sup>83</sup> Moreover, in an apparent effort to bridge the cross-cultural gap, Manjit Singh affirmed that, in the Sikh tradition, "any resistance to evil must be pacific until all means have failed and that all people must be tolerated and treated well. In this way, Sikhism is very similar to Christianity or Judaism."<sup>84</sup> Finally, the expert witness intimated that fears of the *kirpan* were based in prejudice, calling them "absolutely untenable," and stating that "there is no chance that any form of resistance to anything would even remotely apply [in the circumstances] and that is why there has never been any incident known to me concerning a school anywhere."<sup>85</sup>

Counsel for the Multanis' oral argument contained similar themes. As noted in Chapter 4, counsel began by providing a general narrative of the emergence of the Sikh religion, and emphasizing the values that it shares with Canadian constitutional culture. According to counsel, Sikhism began as a revolt against the caste system and the unequal treatment of women, and was in favour of individual autonomy and free expression.<sup>86</sup> Moreover, according to counsel,

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<sup>82</sup> See the discussion of state law as a lens for religious norms in Chapter 4, Section 5 above.

<sup>83</sup> *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [*Multani SCC*] (Affidavit of Manjit Singh, March 25, 2002, Application for Leave to Appeal, Vol 1 at 61).

<sup>84</sup> *Ibid.* In support of this statement, the expert witness attached an extract of Dharam Singh, *Dynamics of Social Thought of Guru Gobind Singh* (Patiala: Publication Bureau Punjabi University, 1998) at 121, Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol 1, at 128, which states:

peace is, no doubt, of profound significance and is based on the doctrine of equality and universal love, but justice in human affairs and self-respect are higher values for which even the price of peace is not considered too high. In fact, justice, universal love, equality, fairness, consideration and cooperation lead to the dawn of eternal peace. However, whenever these values get threatened, man must resist this threat though his resistance must be peaceful and non-violent to begin with. However, resort to arms is declared advisable if all other means fail.

<sup>85</sup> *Ibid.* (Affidavit of Manjit Singh, March 25, 2002, Application for Leave to Appeal, Vol 1 at 61).

<sup>86</sup> *Ibid.* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 10, Appellant's Record before SCC Vol 2 at 257).

Sikhs are in favour of integration, rather than separation.<sup>87</sup> As I argued in Chapter 4, these shared values had little legal relevance to the dispute; however, arguably, this framing helped to translate the Multanis' perspective, making it intelligible to the courts. Interestingly, counsel for the Multanis also held up dialogue itself as a virtue. He criticized the Council of Commissioners for not attempting to have a dialogue with Sikh students. Specifically, the Multanis' counsel focused on the affidavit of Robert Brousseau, a former police officer who worked in the school and affirmed the large potential for violence in the school. The Multanis' counsel noted: "ce qui est intéressant pour monsieur Brosseau, c'est qu'il n'a pas essayé de parler avec les étudiants Sikhs... le problème c'est que voilà – l'attitude, l'attitude c'est qu'on n'essaie pas d'expliquer ou de concilier ou de faire rencontrer les étudiants."<sup>88</sup> In other words, the Multanis' counsel characterized the Council's behaviour, in part, as a failure of cross-cultural communication.

Another strategy pursued by counsel at trial was to refer to other Canadian jurisdictions that had accepted the *kirpan*, specifically Ontario, Alberta, British Columbia, and England, where the Sikh population is substantially larger than in Montreal.<sup>89</sup> When viewed as communicative acts, these references can be seen as efforts of translation, as counsel attempted to bridge the gap between his clients and the courts by citing cases where state courts had approved of the *kirpan*. Similarly, going outside the legal subculture, counsel also noted that, while positions taken by media organizations were divided, they were mostly supportive of his clients' position.<sup>90</sup>

In addition, it was significant that the World Sikh Organization, which intervened in the case, was represented by counsel who had training in Canadian law and was personally familiar

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<sup>87</sup> *Ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 15, Appellant's Record before SCC Vol 2 at 262).

<sup>88</sup> *Ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 50-51, Appellant's Record before SCC Vol 2 at 297-298). See also *ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court at 141, Respondent's Record before SCC at 143).

<sup>89</sup> *Ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 14, Appellant's Record before SCC Vol 2 at 261).

<sup>90</sup> *Ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 21, Appellant's Record before SCC Vol 2 at 268). See the discussion on this issue from a legal pluralist perspective in Chapter 2, Section 5.

with the Sikh religion and culture. According to a litigant, counsel for the WSO often served as an intermediary between the litigants and their own counsel.<sup>91</sup> Counsel for the intervener noted that sharing common ground with both the litigants and their counsel helped make the litigants more comfortable, specifically noting their shared language. This also aided in the development of the legal case:

certainly it was easier for [the litigant] to speak to me in those days he was a fairly recent immigrant to Canada and his family too, I speak the language and, you know [the litigant's counsel] and I had a close enough relationship that we understood that you know we were both on the same side and we trusted each other's instincts. And so definitely there were times where [the litigant's counsel] had some material that I knew was gonna have different reaching implications I could guide him and direct him, or where there were holes that he needed I would help him or you know where there were things that, um, you know, that he thought I was missing we would talk about those, or kind of bounce things back and forth, so there was a little bit more collaboration.<sup>92</sup>

Counsel for the intervener also explained how she was able to draw connections between the values underlying the *kirpan* practice and Canadian constitutional culture:

if you hear about all those ideals [associated with the *kirpan*], they're very consistent with Charter values, they're very consistent with Canadian values... defending the defenseless, that's what the Charter is all about, really right? To protect the minority against the tyranny of the majority. And so that was a large part of our educational process with the court, was to really be able to speak about what these articles of faith mean for the larger Sikh community, and why they're so important... why it's difficult and challenging for a Sikh to be parted from those and why that literally impacts on my conscience...<sup>93</sup>

Borrowing from Newman and Taylor's terminology discussed above in Chapter 2, the WSO's effort at cross-cultural communication here emphasized that there was not a value-based or concept-based difference between Sikh culture and Canadian constitutional culture. Rather, shared values between the two cultures should lead to the adoption, in their argument, of a legal form that allowed for students to wear their *kirpans*. Their argument also integrated the shared

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<sup>91</sup> Litigant 1 Interview. The litigant also noted that this served to help limit the legal fees payable to his own counsel.

<sup>92</sup> Lawyer 3 Interview.

<sup>93</sup> *Ibid.*

value of safety, which underpinned the Council of Commissioners' argument. Counsel for the intervener noted that it was part of her strategy to deconstruct the safety-based arguments of the Council, holding their assumptions about the *kirpan* up to rational scrutiny.<sup>94</sup>

One way that the WSO attempted to quell fears of the *kirpan* was to allow other members of the Sikh community to voice their experiences. In this regard, the WSO submitted a letter written by Jasbir Singh Bhatia, a principal of a Sikh school in Surrey, British Columbia. The principal explained that about half the students in the school wear the *kirpan* and the other articles of faith; the school had never had "an incident of improper use of the kirpan by a student or by any other individual." Further, as the school only provided education until grade 10, all of the students entered the public school system at some point, where they are permitted to wear a *kirpan*, and no violent incident had occurred.<sup>95</sup>

### 3.2.2 Judicial Responses

With respect to the Superior Court, it is difficult to gauge the effectiveness of efforts to bridge the cultural gaps between Sikh culture and the state legal culture. The ruling from Justice Grenier is short and simply contains the terms of an apparent settlement between the parties.<sup>96</sup> However, in one exchange between the trial judge and counsel, it is possible to detect the court's impatience for the perceived ambiguities in Sikhism. When counsel displayed some ambivalence about whether keeping the *kirpan* in a leather sheath would be acceptable to his clients, Justice Grenier sought a stable answer as to what the religion prescribed, irrespective of the Multanis' personal position.<sup>97</sup> Counsel did not attempt to resolve this ambiguity. Indeed, in his previous submissions, he had made reference to variation in practice within the Sikh

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<sup>94</sup> *Ibid.*

<sup>95</sup> *Multani SCC*, *supra* note 83 (Letter of Jasbir Singh Bhatia to World Sikh Organization, 26 May 2004, World Sikh Organization Motion for Intervention at 12).

<sup>96</sup> As noted above, the Council of Commissioners nonetheless appealed, arguing that it had never actually agreed to the accommodation contained in the judgment.

<sup>97</sup> *Multani SCC*, *supra* note 83 (Question from Grenier J to Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 130, Appellant's Record before SCC Vol 2 at 377).



community,<sup>98</sup> and also argued that religious beliefs not subject to rational scrutiny.<sup>99</sup> In responding to this particular question, counsel merely asked for time to confer with his clients.<sup>100</sup> This moment represents one in which counsel, serving as a translator,<sup>101</sup> could not bridge the gap between his clients' views and the court's desire for a rationalized version of the Sikh religion.

In another exchange, Justice Grenier showed that she was not prepared to accept the assertion that the *kirpan* was not a weapon: “La question c’est que dans les écoles on interdit le port d’arme blanche y compris des couteaux. Et le kirpan, peut-être pour vos clients un kirpan ce n’est pas un couteau, mais c’est avant tout un couteau.”<sup>102</sup> Nevertheless, Justice Grenier encouraged the parties to arrive at a mutually acceptable solution,<sup>103</sup> withdrawing herself from the dialogue to some degree and inviting the parties to dialogue directly with each other.

As described in Chapter 3, the Court of Appeal's reaction was quite different. While the language of the opinion is generally respectful and the Court acknowledges the sincere religious beliefs of the Multanis,<sup>104</sup> it was not willing to accept the proposition that a *kirpan* is not a weapon. The majority opinion remarked that the *kirpan*, “[s]tripped of its symbolic religious

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<sup>98</sup> *Ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 16, Appellant's Record before SCC Vol 2 at 263).

<sup>99</sup> *Ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 128, Appellant's Record before SCC Vol 2 at 375). See also Avihay Dorfman, “Freedom of Religion” (2008) 21 Can. JL & Juris 279, for an argument that religion is marked by an irreducible, non-rational core.

<sup>100</sup> *Multani SCC, ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 134, Appellant's Record before SCC Vol 2 at 381).

<sup>101</sup> In his oral argument, counsel emphasized his own position as a secular person: “je parle en [tant qu’une] personne complètement laïque donc, j’ai pas d’illusion quant à la perfection de n’importe quel groupe.” *Ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 12, Appellant's Record before SCC Vol 2 at 259).

<sup>102</sup> *Ibid* (Grenier J question to Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 131, Respondent's Record before SCC at 133).

<sup>103</sup> *Ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 134, Appellant's Record before SCC Vol 2 at 381); Lawyer 2 Interview.

<sup>104</sup> *Commission Scolaire Marguerite-Bourgeois v Singh Multani*, [2004] RJQ 824, 241 DLR (4th) 336 (Qc CA) at para 70.

significance... has all of the physical characteristics of an edged weapon.”<sup>105</sup> This context stripping is exemplary of a failed cross-cultural communication. By positing a single, objective characterization of the *kirpan*, the decision rests on the assumption that the court’s perception of the *kirpan* is without or above culture. As discussed below, counsel was eventually successful in demonstrating that the risk associated with a particular object is coloured in important ways by culturally specific assumptions.

At the Supreme Court, the *Multani* litigants were able to make themselves understood in important ways. In large measure, this was attributable to the ability of counsel to serve as translators and assist the Court in maintaining a level of self-awareness. This latter was achieved principally by comparing the *kirpan* to other potentially dangerous objects that were not excluded from schools. In his submissions to the Supreme Court, for example, counsel for the Multani family asked rhetorically why the Court should not accommodate a *kirpan* “when many more dangerous objects are present in the schools and we can only name a few: a compass, a baseball bat, gym equipment, lab equipment which may be used to set fires, an automobile which is used for excursions.”<sup>106</sup> He answered this rhetorical question by reminding the court of the minority status Sikhs in Canada: “The reason there’s been so much opposition to accommodating the kirpan... is because in the eyes of many, the accommodation of Sikhs is not important.”<sup>107</sup> Justice Bastarache challenged this proposition, suggesting that the reason people opposed accommodating the *kirpan* was “because a kirpan is a dagger and a dagger is an arm.”<sup>108</sup> Counsel responded by exposing the culturally contingent attitudes towards sharp objects:

My Lord... first of all, merely words. A kirpan is as much a dagger as a compass. A compass is a sharp object. It’s in the shape of a dagger... A kirpan is not an arm, it’s

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<sup>105</sup> *Ibid* at para 89.

<sup>106</sup> *Multani SCC*, *supra* note 83 (Transcript of Oral Argument, Julius Grey for Multani, at 5). At trial, counsel also drew analogies the integration of juvenile offenders and HIV-positive students into public schools even where such integration presented a risk: *ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 64, 67, Appellant’s Record before SCC Vol 2 at 311, 313).

<sup>107</sup> *Ibid* (Transcript of Oral Argument, Julius Grey for Multani, at 6).

<sup>108</sup> *Ibid*.

been held over and over again... It isn't intended to be a weapon, it isn't a weapon, it's a symbol of a weapon.<sup>109</sup>

Later, the Multanis' counsel again used analogies as a means of cross-cultural communication. As noted in Chapter 4, counsel described the *kirpan* as symbolizing resistance to oppression, and made links to cultural artifacts with which judges of the Court would be familiar, such as the lyrics to *O Canada* and *La Marseillaise*.<sup>110</sup> Further, echoing an argument made by counsel for B'nai Brith Canada in *Amselem*, the Multanis' counsel analogized the *kirpan* to other forms of religious expression more likely to be known to the judges:

The idea that Quebec students cannot be taught the difference between a kippa and an illegal hat or a baseball hat worn by students, that they cannot be taught the difference between a kirpan and a knife, that they can't be taught the difference between a scarf worn by a Muslim girl and an illegal violation of the school uniform is terrible and it's very close to the views now discredited that if an RCMP man wore a turban then, somehow, Canadians would not have respect for him.<sup>111</sup>

### 3.2.3 Participant Reflections

In the end, the Supreme Court was careful not to label the *kirpan* as a weapon, instead describing it as “a religious object that resembles a dagger and must be made of metal.”<sup>112</sup> For the *Multani* litigants, the Supreme Court functioned as a translator to the general public:

before you know our Superior Court gave the decision, media was kind of against us too, they always calling it knife or weapon or dagger, but right after once we won the case [in the Supreme Court] they started calling it kirpan, specifically kirpan in the newspapers, media and everywhere.<sup>113</sup>

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<sup>109</sup> *Ibid.* This passage also serves as another example of counsel's reference to other recognized authorities in the Canadian justice system as a way of making the *kirpan* understandable to the Court, see Section 3.2.1 above.

<sup>110</sup> *Ibid* at 22-23.

<sup>111</sup> *Ibid* at 11.

<sup>112</sup> *Multani SCC*, *supra* note 83 at para 3.

<sup>113</sup> Litigant 1 Interview.

Participating in the Supreme Court hearing also amplified and expanded the Multanis' opportunity to communicate with the broader public themselves: "so media always want to talk to me, right? Since I was involved in it."<sup>114</sup>

Perhaps because of the positive nature of the final ruling, the litigant was able to frame the longer narrative in similarly positive terms, including cross-cultural encounters he experienced after the decision:

It's not that everyone hates us, it's only few people as I was saying in the beginning to that, it was ignorance, right? I have met few people, their point of view towards it were very negative, but right after when I explained and everything, they are right after in 5 seconds they're changed. I went to few shops with my dad and they've been seeing us on TV, right? They see us, they react, they give us a bad look and stuff, but they do come up to us and ask, oh, you're the same guy, oh you know, you shouldn't do that, you're in the community like this, you're supposed to live the way they live, we explained them, and then we find that their point of view against the kirpan is changed right after we tell them.<sup>115</sup>

Likewise, in responding to the ruling, one of the lawyers involved expressed relief and satisfaction at the result, and optimism for future cases. Her narrative expressed her hope, before the Supreme Court hearing, that she would be understood, and her delight at feeling that she had been:

You just say, I don't know what the outcome's going to be. I know what it should be, but I just don't know whether what I am articulating will be understood by them in the same way in which I articulate it... For me it was the pinnacle... I was ready to retire, I was happy. To get the 8-0, but it wasn't just that. What I was blown away by when I read that judgment was that they really got it... some of the most profoundly beautiful statements on freedom of belief and conscience came from those 8 judges. I mean, to me it's a decision that all Canadians ought to read just for that reason alone, because of their intuitive understanding of what conscience was and what it meant, and what it meant to live in this multicultural society and I mean it was just the slam dunk, it was really what we needed, and more than what we needed, because up to that point in time, we would literally have situations where you'd win, but then somebody else would come up and you'd have the same old stuff over and over and over again, and you can't get better than unanimous, you know it literally just shuts the door.

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<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

...

I thought they did it, and we were profoundly grateful that um, really that we lived in a country where we could make such arguments and have such depth of understanding with judges who, you know, ivory tower, right? They're not necessarily living with Joe Average and all that but, who understood what Joga Singh Average was thinking and feeling, that, I think that's pretty cool.<sup>116</sup>

Thus, the Supreme Court demonstrated to participants that it could communicate across a significant cultural divide by taking into account the particular perspective of the *Multani* claimants. On the other hand, both Benjamin Berger and Lori Beaman have suggested that the Supreme Court's decision in *Multani* may not represent a large success in terms of cross-cultural communication. Berger argues that the *Multani* litigants were only successful because the Court was able to filter their religious practice through an individualist lens;<sup>117</sup> Beaman underscores the Court's separation of belief and practice.<sup>118</sup> However, the participant narratives explored here underscore that the primary communicative aim of the litigants and the intervening WSO was that the *kirpan* not be categorized as a weapon. Given that the Court of Appeal did, in fact, treat the *kirpan* as a weapon, it is important to recognize that the Supreme Court's view was far from a foregone conclusion when the matter was litigated. Accordingly, the Supreme Court's description of the *kirpan* can, in my view, be viewed as a significant success in cross-cultural communication.

### 3.3 *Wilson Colony*

Of the three cases under review, *Wilson Colony* represents the most challenging instance of cross-cultural communication. Colony members live in purposeful isolation. Moreover, while their holy scriptures are likely familiar to many members of the Canadian judiciary, their interpretative differences from more mainstream of Christianity set them apart. Indeed, their

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<sup>116</sup> Lawyer 3 Interview.

<sup>117</sup> Berger, "Cultural Limits," *supra* note 1 at 260.

<sup>118</sup> Beaman, "Is Religious Freedom Impossible in Canada?," *supra* note 11 at 283.

collective lifestyle is atypical of most patterns of property ownership in Canada; this has sometimes put them at odds with others in their regions.<sup>119</sup>

### 3.3.1 Adversarial Dialogues

A first challenge for the Wilson Colony's counsel was to locate an appropriate source text; this was quite literally a problem of translation, as the Hutterites use German language Biblical texts. It was crucial, according to counsel, to find an English version that accurately reflected the content of the German text:

Particularly the form of the Ten Commandments was a critical aspect, and that took some time to determine. I'm not an expert in the Bible, but there are various versions and various interpretations and that was a matter that required a fair amount of review and ensuring that we had the, that I understood what their interpretation was and which edition, I guess, it was that they followed. Of course they had the German one, but it is roughly translated out by the King James version, and that's what they confirmed, that was their, their belief, and if you look, the difference between the King James of the Second Commandment and some of the other versions of the Second Commandment, there is a difference, and that was [a] fairly critical, critical difference.<sup>120</sup>

The written affidavits prepared by counsel and representatives of the Wilson Colony show attempts to explain their particular religious beliefs and practices to the courts. Notably,

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<sup>119</sup> A publication from the 1960s included in the litigation documents is a remnant from such a dispute: *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Wilson Colony SCC*] (Exhibit B to the Affidavit of Samuel Wurz, Affirmed 10 August 2005, Appellant's Record, vol 2 at 204). This publication advocated against regulations that would have required Hutterite colonies to observe minimum distance requirements between colonies. One Hutterite interview participant gave me a pamphlet published in Alberta for similar purposes. That pamphlet states that the Canadian government had promised the Hutterites "freedom of religion and the unhindered practice thereof, together with [their] peculiar customs and the community way of life as [they] understand it": *The Hutterian Brethren of America* (Lethbridge: 1968) at 6 (on file with author. See also *Walter v. AG of Alberta*, [1969] SCR. 383, where a Hutterite community unsuccessfully challenged provincial regulations restricting their ability to purchase land.

<sup>120</sup> Lawyer 4 Interview. This issue also arose in cross-examination. Though the Wilson Colony submitted the King James translation of the Ten Commandments, they also included a translated passage from the Wisdom of Solomon, a book not included in all versions the King James translation. The government's counsel could not find the Wisdom of Solomon in the King James translation; the litigant explained: "We really don't use much of the English versions. Like we talk German, we read and write in German and we generally use our German version, the Hebrew version of the Bible. But in our German bible there is the Wisdom of Solomon in there." *Wilson Colony SCC, ibid* (Cross-Examination of Samuel Wurz, 2 February 2006, Appellant's Record, Vol 5, at 684). In other words, from the outset, the Hutterites had to work with translated versions of their religious source texts in order to make their religion intelligible to the state.

before dealing with the prohibition on photographs, one litigant's affidavit noted the communal nature of the colony:

I am a member in good standing of the Hutterian Brethren of Wilson Colony, which is a religious communal organization located in and recognized by the Province of Alberta. Property, lands and chattels are held collectively by the religious organization with individuals relinquishing the rights of ownership in favour of the benefits of membership.<sup>121</sup>

In a later affidavit, the litigant provided more detail:

The failure or inability of any member to carry out their responsibilities causes our religious commune to function improperly, thereby eroding the fabric of our social, cultural and religious way of life. Although not every failure or inability to perform results in a serious erosion of this fabric, the incremental damage to date resulting from the position of the [Alberta government] is significant.<sup>122</sup>

The affidavit goes on to explain the economic and practical impacts of the universal photo policy on the colony, claiming it would affect the operation of the colony's agribusiness and ability to drive members to medical appointments. In addition, one of the exhibits to the first affidavit provides a more detailed description of the religious import of communal living to the Hutterites, referencing the texts and ideas that form the religious foundation of this practice. For example, that text provides:

the idea of love –brotherly togetherness and sharing... was at the very center of Jacob Hutter's work. He visualized the brotherhood as a great family. Since in such a family all material things are shared as a matter of fact, this should also be the case in a true *Gemeinschaft*, or community... "Private property is the greatest enemy of Christian Love."<sup>123</sup>

In addition to explaining the religious practice of communalism, the affidavit evidence also explains the specific prohibition on photography. One affiant explained how having his photo willingly taken would be a violation of the Second Commandment with direct reference to the biblical text:

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<sup>121</sup> *Ibid* (Affidavit of Samuel Wurz, 10 August 2005, Appellant's Record at 191).

<sup>122</sup> *Ibid* (Affidavit of S. Samuel Wurz, 10 November 2005, Appellant's Record at 215).

<sup>123</sup> *Ibid* (Robert Friedmann, *The Christian Communism of the Hutterite Brethren*, Exhibit "A" to the Affidavit of Samuel Wurz, 10 August 2005, Appellant's Record at 200-201).

the Hutterian Brethren believe that Commandment No. 2 of The Ten Commandments prohibits the capture of one's image, and accordingly, do not submit to allowing their photographs to be taken willingly as to do so would be a sin. Commandment No. 2 states, "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth", which the Hutterian Brethren interpret to include photographs capturing their likeness.<sup>124</sup>

The litigant also explained the fact that some members of the Wilson Colony had, at one point, had photo driver's licences, an apparent inconsistency in the Wilson Colony's religious practice. The litigant stated that he was "shocked to learn" of this.<sup>125</sup> As discussed above in Chapter 4, he went on to explain that these members were to be punished in accordance with the Colony's traditions. In offering this explanation, the litigant integrates the apparent inconsistency into a narrative of imperfect faith, which includes the themes of obligation, sin, repentance, and punishment. Though the style of discipline may be unfamiliar to state actors, the narrative helps to affirm the Wilson Colony's particular interpretation of the Second Commandment even in the face of facts that would seem to contradict it.<sup>126</sup>

In addition to framing Hutterite practices in these terms, the affidavit also relies on authoritative state documents by making reference to the preamble of the *Canadian Charter of Rights and Freedoms*, which recognizes the supremacy of God.<sup>127</sup> As noted in Chapter 4, one might surmise that this paragraph was drafted in conjunction with legal counsel, who had a greater familiarity with the *Charter*. This leads to a claim more intelligible to a state court, especially when contrasted with the earlier letter drafted by a group of Hutterites that relied principally on biblical verses to construct an argument against the universal photo requirement.<sup>128</sup>

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<sup>124</sup> *Ibid* (Affidavit of Samuel Wurz, 10 August 2005, Appellant's Record at 192).

<sup>125</sup> *Ibid* (Affidavit of Samuel Wurz, 18 January 2006, Appellant's Record at 303).

<sup>126</sup> Similarly, when opposing counsel brought up the fact that images could be found on other Hutterite colonies, the litigant characterized this as a lapse in faith: "sometimes we get lax, we don't believe, and that's where these images come from." *Ibid* (Cross-Examination of Samuel Wurz, 2 February 2006, Appellant's Record, Vol 5, at 694).

<sup>127</sup> *Ibid* (Affidavit of Samuel Wurz, 10 August 2005, Appellant's Record at 193).

<sup>128</sup> *Ibid* (Exhibit "F" to the Affidavit of Samuel Wurz, 10 August 2005, Appellant's Record at 207).



One might suppose that counsel again served as a kind of translator for the religious freedom claimants, packaging their evidence in an affidavit containing narratives and forms most likely to be accessible to state officials. Nevertheless, the transcript of the cross-examination on this affidavit reveals several cross-cultural communication difficulties between a Colony member and the Alberta government's lawyer. The government's counsel began by drawing a distinction between participating in the creation of an image and having images in one's daily life.<sup>129</sup> He then applied this distinction to the driver's licence context:

Would you agree with me that the images that we have to create at the Ministry of Government Services to conduct our security process wouldn't become part of your daily life, wouldn't be something that you would have to use or possess, and that not having a – having a license with your photo on it would be – would not contradict that aspect of your concerns about idolatry and images?<sup>130</sup>

The Hutterite witness resisted these analytical categories, saying: “if you contradict one Commandment you are trespassing the rest of the Commandments.”<sup>131</sup> Counsel pursued the notion further, and was met by the same resistance:

Q: Earlier in our discussion I said, well, it seems to me... you have more than one concern with images. One part of your concern is participating in their creation and another part of your concern is having it direct your mind possibly to value things other than God. And I thought that those – there was a reasonable distinction to be drawn between those two things. Fair enough? You can tell those two things apart?

A: No.

...

We do not believe in pictures and there's no use arguing over trying to find an alternative if there is an image or a picture involved.<sup>132</sup>

Nonetheless, counsel for the government proceeded with the distinction:

one of our proposals, as I've described, is that we use a digital image for our internal security purposes and issue you a driver's license carrying no image, and I just want to establish that that would satisfy not all your objections but one of your concerns

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<sup>129</sup> *Ibid* (Cross-Examination of Samuel Wurz, 2 February 2006, Appellant's Record, Vol 5, at 670).

<sup>130</sup> *Ibid* at 674.

<sup>131</sup> *Wilson Colony SCC, ibid* (Appellant's Record, Vol 5, at 675, 681-684).

<sup>132</sup> *Ibid* (Cross-Examination of Samuel Wurz, 2 February 2006, Appellant's Record, Vol 5, at 679, 681).

about idolatry; namely, that it would not become part of --- possession would not become part of your daily life.<sup>133</sup>

The reason that counsel pushed on with this distinction was to lay the foundation for an argument that the government had done its best to accommodate the Wilson Colony members. By separating out two aspects of Hutterite belief, the government could claim that it met the Wilson Colony halfway by taking one aspect of the belief into account. The problem is, of course, that the analytical breakdown of the religious belief was put forward by the government's counsel and never accepted by the religious adherents. Indeed, the distinction seemed unintelligible to the litigant. When counsel asked whether it was fair to characterize the government's proposal as meeting "some of your concerns but... nonetheless, insufficient," the litigant simply did not understand, replying: "Can I beg your pardon on that? I quite don't follow you there."<sup>134</sup>

In arguments before the Supreme Court, counsel for the Albertan government demonstrated an understanding of the Hutterite objection to being photographed:

[The photo requirement] is inconsistent with a certain branch of Hutterian beliefs, certainly Wilson Colony's, the respondents', who believe that the making of the image involves them in the creation of graven image, contrary to the Second Commandment. So there is an inconsistency between the law of general application and the particular beliefs of the respondents.<sup>135</sup>

However, when counsel described the accommodations offered by the Albertan government, a shift in approach is noticeable. In assessing the gravity of the religious freedom infringement, counsel recalled the analysis he applied in cross-examination:

we say that a photograph that is created only for others' use, for the protection of others, is... a less central impairment of freedom of religion than perhaps it would be if we said, Okay, here's your licence; it has got a photograph on; you must use it.<sup>136</sup>

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<sup>133</sup> *Ibid* at 682.

<sup>134</sup> *Ibid* at 690.

<sup>135</sup> *Wilson Colony SCC* (Transcript of Oral Argument, Rod Wiltshire for Alberta, at 2).

<sup>136</sup> *Ibid* at 8. Later, counsel adopted a position at odds with this exercise of categorizing more or less severe infringements of religious freedom: "we believe that *Amselem* is quite clear that there is no comparing the extent of

At other points in the argument, counsel for the government discredited the evidence of the Wilson Colony members, who claimed that having driver's licences was essential for their community's survival. In making this argument, counsel analogized the Wilson Colony Hutterites to Amish communities, overstating the similarities between the two Anabaptist groups:

their evidence is, although we discount it, that having drivers' licences is essentially for the continued existence of their agricultural communal communities. In that sense it would be mandatory even in a religious sense, because they would have to choose... we believe that the consequence of requiring a driver's licence would be that the respondents would, as others would, prioritize their travel and hire someone to drive them, much as Amish do.<sup>137</sup>

As discussed below, this prediction turned out to be erroneous, arguably in part because it failed to appreciate the internal diversity of Anabaptist practice.

When counsel for the Wilson Colony appeared at the Supreme Court, he spent nearly the entirety of his oral argument engaged in a fairly semantic exchange with members of the Court regarding the nature of reasonable accommodation and the application of s. 1 of the *Charter*.<sup>138</sup> This is attributable, in large measure, to the fact that the infringement of religious freedom was conceded by the Alberta government. But it also highlights the degree to which the terms of discussion are set by concepts embedded in the state's legal culture.

Indeed, counsel for the Wilson Colony also spent a significant amount of their written submissions pursuing the argument that fundamental freedoms should not be infringed without debate in the legislature. It followed, according to this argument, that the abolition of the religious exemption to the driver's licence photo requirement fell afoul of this rule because it was accomplished by way of an amendment made by the executive branch of the government,

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infringement of freedom of religion (at 14)" and "I have disclaimed any ability to make sense of the idea of impairing religious freedom less rather than more (at 19)."

<sup>137</sup> *Ibid* at 13. This echoes the technique applied by counsel for the syndicate in the *Amselem* litigation, discussed in Section 3.1.1.

<sup>138</sup> *Wilson Colony SCC, ibid* (Transcript of Oral Argument, K Gregory Senda for Wilson Colony, 46-75).

without legislative debate.<sup>139</sup> The Supreme Court rejected this argument. But that counsel would spend so much time on it, when the Hutterian Brethren find engagement in the democratic process problematic (for example, they do not vote),<sup>140</sup> suggests that counsel felt compelled to pursue an argument that would have made little sense to their clients.<sup>141</sup>

Interestingly, counsel for two of the intervener organizations, the Evangelical Fellowship of Canada and the Christian Legal Fellowship,<sup>142</sup> opened a line of dialogue calling into question the Court's individualist approach to religion. Counsel asked "the court to recognize that there is a communal component of the freedom of religion; that the freedom of religion in large part manifested as a group or part of a group."<sup>143</sup> In my view, this discussion centres on a value-based difference that has implications for the legal form accorded to the norm of religious freedom. While the constitutional culture and the religious cultures represented in the *Wilson Colony* litigation agreed that religious freedom was an important norm, the precise legal form of that norm depends crucially on the values that underlie it. In the Supreme Court of Canada's articulation, those values share liberalism's concern for the individual; counsel for the interveners sought to introduce the value of community into this discussion. Notably, in an attempt to bridge the cultural divide, counsel for the intervener organizations grounded this argument in constitutional provisions and previous statements of the Supreme Court, rather than a religious text or artifact. In the next section, I turn to consider the judicial response to this and the other attempts at cross-cultural communication detailed in this section.

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<sup>139</sup> *Ibid* (Wilson Colony Factum at 14-18).

<sup>140</sup> Litigant 4 Interview.

<sup>141</sup> This may be explained, in part, by the holding of the Alberta Court of Appeal, which gestured in this direction: *Hutterian Brethren of Wilson Colony v Alberta*, 2007 ABCA 160 at paras 27-28 [*Wilson Colony CA*].

<sup>142</sup> According to an interview participant, these organizations did not make contact with the Hutterian Brethren before making their submissions: Litigant 4 Interview.

<sup>143</sup> *Wilson Colony SCC* (Transcript of Oral Argument, Charles Gibson for the Evangelical Fellowship of Canada and the Christian Legal Fellowship at 88).

### 3.3.2 Judicial Responses

The Court of Queen's Bench was attentive to the Wilson Colony's concern with being photographed. As noted in Chapter 3, Justice Lovecchio was not impressed with the offers of accommodation made by the province, as "under either accommodation, members of the applicant colony who wish to drive will have to submit to having their photograph taken which is precisely their problem."<sup>144</sup> At the same time, however, there is only an abbreviated discussion in his decision of the Hutterites' communalism.<sup>145</sup> Perhaps the court felt it did not need to engage in this kind of discussion in order to grant the Wilson Colony the remedy it sought.

In addition, showing a kind of self-awareness, the Court of Queen's Bench was skeptical of the government's description of the legislation's objective. Of course, courts frequently adopt such a posture, and being skeptical of a government argument is not equivalent to writing decisions that demonstrate reflection on the law's own prior assumptions. Still, it is notable that even though both the courts and the Alberta legislature speak the language of the state, the court thought it important to scrutinize the government's claims. This adds a gloss on Berger's insight that courts and litigants do not participate as equals in cross-cultural encounters. Judicial review serves as a balancing mechanism, albeit an imperfect one. To some extent, judges serve to decrease the likelihood that cross-cultural encounters between citizens and the state will take the forms of conversion or assimilation.

The majority of the Court of Appeal followed the Court of Queen's Bench in recognizing Hutterite religious beliefs and practices, and was similarly skeptical of the government's stated objectives. The majority also engaged more deeply with the communalist worldview of the Wilson Colony, showing sensitivity to the intertwined practical and religious consequences that a photo requirement would have on this aspect of the Colony's way of life:

although the colonies attempt to be self-sufficient, certain members must drive regularly on Alberta highways in order to, *inter alia*, facilitate the sale of

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<sup>144</sup> *Hutterian Brethern of Wilson Colony v Alberta*, 2006 ABQB 338 at para 23.

<sup>145</sup> *Ibid* at para 2.

agricultural products, purchase raw materials from suppliers, transport colony members (including children) to medical appointments, and conduct the community's financial affairs...

Given their communal way of life, the inability to drive would also have enumerable and severe practical consequences for each individual in the respondents' community... the very existence of the community depends on each individual carrying out the responsibilities assigned to him or her.<sup>146</sup>

In contrast, the dissenting judgment of Justice Slatter was less skeptical of the government's position, pointing out that its evidence on identity fraud was uncontradicted.<sup>147</sup> Moreover, as noted in Chapter 3, Justice Slatter supported his decision by referring to other jurisdictions where photos are required on driver's licences and no exemption exists.<sup>148</sup> In this way, Justice Slatter's opinion took comfort in views emerging from legal cultures of liberal states, likely congruent with the court's own cultural background. The dissenting judgment's largest failure of cross-cultural communication, however, is the manner of its engagement with the Hutterite religious beliefs and practices. In support of the conclusion that the accommodation offered by the government was reasonable, Justice Slatter offered his own interpretation of the biblical texts submitted by the Wilson Colony.

The central prohibition of the second commandment is the creation of idols, and in that respect the second commandment reinforces the first: "You shall have no other gods before Me." The proposed accommodations would preclude the respondents ever having to look at their photographs themselves. While obviously not ideal from the perspective of the respondents, the accommodations proposed by the appellant do have the effect of significantly minimizing the impact of the regulations on the respondents' observance of the second commandment.<sup>149</sup>

This finding accepts the government's analysis of the Hutterite religious obligation discussed above in Section 3.3.1. Though Justice Slatter purported to deal with the religious obligation "on

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<sup>146</sup> *Wilson Colony CA*, *supra* note 141 at paras 6, 54.

<sup>147</sup> *Ibid* at paras 65-68.

<sup>148</sup> *Ibid* at para 80.

<sup>149</sup> *Ibid* at para 116.

its own terms,”<sup>150</sup> his analysis reveals that he actually approached it on the government’s terms, disconnecting the biblical text from the Wilson Colony’s interpretive tradition.

At the Supreme Court, the majority recognized both the photo-related and communal living aspects of Hutterite religious practices. However, as noted in Chapter 3, the effects of the photo requirement on Hutterite communalism was not considered as an infringement of religious freedom, but as a factor to take into account in the proportionality analysis.<sup>151</sup> In contrast, Justice Abella’s dissenting opinion emphasized the religious nature of both aspects of Hutterite belief and practice.<sup>152</sup> In this way, the majority failed to fully respect the religious dimensions of the Wilson Colony’s communalism. Perhaps in part because of this communicative failure, the majority did not properly anticipate the colony’s reaction to its ruling. The majority held that the costs on the Colony would be financial, as they would have to hire non-members to perform the necessary driving tasks for the colony.<sup>153</sup> However, as noted in Chapter 4, instead of contracting out driving services, some colony members have decided to compromise their religious beliefs, while others have chosen to accept the consequences of driving with expired licences.<sup>154</sup>

Perhaps more worrying for future cases, the majority decision in *Wilson Colony* sets up a scenario where governments can refuse accommodation sought by a minority religious group if the accommodation would not allow the government to completely reach its objective. This may discourage dialogue between governments and religious groups. Under this approach, when it comes to legislation, the government can simply articulate its purpose and expect that, so long as the objective is legitimate, it will not need to compromise, at least for legal purposes. There may, of course, be political reasons for compromise, but this prospect may be cold comfort for minority populations. In contrast, Justice LeBel’s dissenting opinion held that courts should

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<sup>150</sup> *Ibid* at para 118.

<sup>151</sup> *Wilson Colony SCC*, *supra* note 119 at para 31.

<sup>152</sup> *Ibid* at para 118.

<sup>153</sup> *Ibid* at para 97.

<sup>154</sup> Litigant 3 Interview; Litigant 4 Interview.

have more leeway “in determining how far the goal ought to be attained in order to achieve the proper balance between the objective of the state and the rights at stake.”<sup>155</sup> This framework is more likely, in my view, to encourage dialogue between governments and religious minority populations, as legislatures will expect judicial review to be more searching.

### 3.3.3 Litigant Reflections

The litigants interviewed attributed their loss at the Supreme Court to a failure of communication. One litigant articulated this as the failure of the Supreme Court to understand their “way of life”:

we figured we could explain everything to our lawyer, and [he] explained everything to the judge in Ottawa, but it seems like they didn’t really quite understand the way of life. And that’s why they made that decision.<sup>156</sup>

The same litigant also framed the communication breakdown as a failure to recognize the colony’s difference: “they figured we have to obey the law, like all other people do.”<sup>157</sup> In this perspective, to be treated “just like everyone else” represents a failure to take into account the Hutterites’ religious and cultural needs. In an alternative formulation provided by another litigant: “it seems like we’re a nobody.”<sup>158</sup> In other words, non-recognition of the Wilson Colony’s particular attributes felt to the litigant as if he wasn’t recognized as a full person.

One litigant also attributed communication difficulties to the internal diversity of Hutterite practice. As noted in Chapter 4, not all Hutterites interpret the Second Commandment to prohibit having one’s photo taken for a driver’s licence. The litigant opined: “if we [the

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<sup>155</sup> *Wilson Colony SCC*, *supra* note 119 at para 196.

<sup>156</sup> Litigant 3 Interview.

<sup>157</sup> *Ibid.* On the particular harm attendant on such misrecognition, see Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992) at 25: “Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.”

<sup>158</sup> Litigant 4 Interview.



Hutterites] would all have stayed together it would have been easier, I mean, to explain it to the government.”<sup>159</sup>

At another point in the interview, a litigant explained that he was glad to speak with journalists in order to explain his religion: “Any time we can explain our religion, our point of view on religion, we would gladly do that.”<sup>160</sup> In other words, though the Wilson Colony members prefer an isolated life in many respects, they are glad to engage in cross-cultural dialogue in order to make their particular perspective more widely understood. Significantly, though, this does not mean that Wilson Colony members are open to back-and-forth with other cultures. Indeed, participants noted restrictions they observe to keep their members away from the influence of popular culture; televisions, radios, and Internet access, for example, are forbidden on the Colony.<sup>161</sup>

Finally, one litigant also described some ongoing efforts to negotiate a photo exemption directly with the government. Similarly to his explanation of the Supreme Court’s decision, he attributed the failure to negotiate an exemption as a communication problem:

We have written numerous letters to our MLAs, we had a couple of meetings with the Minister of Government Services, we had a phone call with Premier Ed Stelmach, and I wrote him a couple letters, but seems like everything falls on deaf ears, they keep writing us back that this is the law now, the Supreme Court ruled that you have to have a photo on your driver’s licence, and there’s no other way out.<sup>162</sup>

For government officials, then, the Supreme Court’s decision signaled an end to the discussion. From this litigant’s perspective, however, the decision was neither final nor properly binding. At the time of the interview, the litigant explained that his community would not alter its practices:

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<sup>159</sup> Litigant 3 Interview.

<sup>160</sup> Litigant 4 Interview.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

“We’re still of the opinion that we drive without photos on our driver’s licences, we’re not gonna take a photo.”<sup>163</sup>

Moreover, the litigant was still hopeful for a change in policy. Alberta was set to have a new premier as the governing Progressive Conservative party was in the midst of a new leadership contest: “right now we’re waiting for a new premier in the province of Alberta, they’re gonna elect a new premier here in September, so maybe we can talk some sense into him.”<sup>164</sup> To my knowledge, no new agreement has been reached since Alberta’s current premier, Alison Redford, took office in October, 2011.

## 4 Conclusion

When approached through the lens of cross-cultural communication, exchanges made in the litigation process reveal a new set of meanings. As religious freedom claimants seek to have their religious practices protected by the courts, they and their counsel often perform acts of translation, deliberately speaking in terms that state actors will understand. This can take the form of embracing individualism, or drawing analogies to other cultural or religious practices to make the practice at issue more accessible to state judges. At other points in the process, litigants and their counsel speak more directly from their cultural frame of reference. Where these cross-cultural communications break down between litigants and courts, this is usually attributable, at least in part, to failures of respect or self-awareness.

Of course, the decisions written by judges, especially those of the Supreme Court, are not drafted only as responses to the litigants before them. They are written in conversation with the texts of the constitution, the relevant legislation, and the applicable bodies of precedent. Where judges are able to be participants in all of these conversations, including the dialogue with the different cultural perspectives presented by litigants, the cross-cultural communication is more successful. In *Amselem*, the litigants were able to find liberty in the court’s relative indifference to their religious practices. There, the Supreme Court was more concerned with the precedent it

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<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

was setting and less concerned with the particularities of the religious practice, restricting its inquiry to the claimants' sincerity of belief. Arguably, the cross-cultural encounter was thinner because of this, though perhaps the best the court could offer when faced with competing rabbinical accounts of the *succah*. In *Multani*, the litigants' primary concern was to have the *kirpan* recognized as an article of faith rather than a weapon. Because the Supreme Court respected the litigants' perspective, maintained a posture of self-awareness, and was able to integrate these values with the prevailing jurisprudence, the cross-cultural encounter was more successful, and bore more of the hallmarks of Dallmayr's dialogic ideal. In *Wilson Colony*, the majority of the Supreme Court was not prepared to treat Hutterian communalism as a matter of religious freedom, showing a reluctance to communicate across cultural divides. It neither granted full respect to the religious aspects of Hutterian communalism nor demonstrated self-awareness of individualism's cultural contingency. In contrast, the dissenting judgments and two lower court decisions were able to address this value-based difference and still provide a judgment that integrated the previous decisions of the Supreme Court.

When cross-cultural communication broke down and litigants felt that their perspectives were not accorded full respect, what does this say about their larger relationship with the Canadian state and their place in the civic community? This question animates the next chapter, which explores the relationship between religious freedom and Canadian citizenship.

# Chapter 6 Religious Freedom, Immigration, and Civic Belonging

## 1 Introduction

The two preceding chapters explored themes of legal multiplicity and cross-cultural communication that emerged from participant narratives. Arguably, the variety of legal systems at play in a social field is augmented in immigrant societies, where newcomers bring with them legal systems and sensibilities from other parts of the world. Likewise, episodes of cross-cultural communication are multiplied in such societies. It is likely related, then, that almost all participants told some form of immigration story in the course of the interviews in this study; some were first generation Canadians, while others were second generation.<sup>1</sup> In most cases, the narrative of religious freedom litigation was folded into participants' larger personal narrative of immigration and integration. This was true not only of litigants, but also of lawyers, who sometimes associated the character of their legal practices with their own immigration stories. The most poignant of all these narratives came from a litigant in *Multani*. As will be developed more fully below, this individual explained that he considered himself to be Canadian as of the day that the Supreme Court of Canada released its decision, rather than at a citizenship ceremony.

Though courts often make reference to the concept of multiculturalism in religious freedom cases, they do not often explicitly engage with the connections between immigration experiences and religious freedom claims. This chapter will make these connections explicit and explore their nuances. In Section 2 of this chapter, I unpack litigant narratives to explore links that participants drew between their stories of migration, their religious faith, and their experiences in litigation. In Section 3, I examine the role of court processes in litigant narratives of integration and civic belonging. In general, litigants interviewed who were successful before the Supreme Court of Canada felt more included in Canada's civic communities than those who were unsuccessful.

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<sup>1</sup> Lawyer 2 Interview, Lawyer 3 Interview, Litigant 1 Interview, Litigant 2 Interview, Expert Witness 1 Interview.

However, those litigants interviewed who were ultimately unsuccessful adopted highly divergent narratives of immigration, which did not culminate in the eventual integration of their communities into Canadian society. This complicates the question of the effect of litigation on civic belonging, and suggests that the relationship between religious freedom litigation and civic belonging is affected by multiple factors, not least of which is the particular history and outlook of the litigants in question.

## 2 Religion and Litigation within Immigration Stories

Interview participants drew close connections between their religious practices, stories of migration, and litigation experiences. In some cases, a litigant would begin by drawing a connection between a religious tradition and the decision to emigrate. For example, even though the Hutterite immigration to Canada was far removed in time (both Hutterite participants referred to 1918 as the date that Hutterites came to Canada), it was clear in their narratives that the motivation for this original move was religious. Their reason for leaving the United States related to mandatory conscription; as committed pacifists, Hutterites refused to serve in the American army and faced persecution on this account. John Bennett's historical study provides more detail, explaining that, "since conscientious objection was not legal until 1918, the United States government jailed many Hutterian youths as draft evaders; two of these young men died as a result of brutal treatment by prison guards, thus joining the long list of Hutterian 'martyrs.'"<sup>2</sup> Moreover, as noted in Chapter 4, this episode of migration fits into a larger Hutterite narrative of flight from religious persecution. In their factum before the Supreme Court of Canada, the Wilson Colony outlined this history as follows:

Religious intolerance forced the Brethren to flee their homes several times, Moravia to Slovakia and Transylvania (1622), then to Romania (1767) thence to Little Russia (1770), in search of religious freedom. Military conscription forced the Hutterian Brethren to move from Russia to the United States (1874 and 1877). Even in the United States, religious intolerance in the form of super patriotism forced the Brethren to seek a more tolerant society. They found that tolerant society in Canada

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<sup>2</sup> John W Bennett, *Hutterian Brethren: The Agricultural Economy and social Organization of a Communal People* (Stanford: Stanford University Press, 1967) at 32. See also Alvin Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004) at 6-7.

resulting in an exodus of a greater part of the Brethren into Alberta and Manitoba during World War I.<sup>3</sup>

Similarly, Mary-Ann Kirkby, a memoirist raised in a Hutterite community, puts the story in these words:

[the Hutterites'] belief in community life, adult baptism and pacifism provoked hatred and intolerance from the state and the predominant religions, forcing Hutterites to flee across Europe before settling in the United States in the late 1800's. During World War I, entire Hutterite communities moved to Canada to escape persecution as conscientious objectors.<sup>4</sup>

Hutterite participants were not alone in connecting their faith to their immigration experiences. A litigant in *Amselem* praised God for his ability to leave his country of origin, then explained that his decision to emigrate stemmed from his desire for his children to receive a religious education:

j'avais beaucoup d'amis, pourquoi [je] pars? Je pars parce que j'ai des problèmes avec les enfants qui n'ont pas école là où je suis. J'habite à Kenitra, il faut que je les envoie au rabbin au Casablanca pour faire le secondaire, je ne veux pas me séparer des enfants, ok? Ça c'est humain.<sup>5</sup>

Thus, though this litigant was not fleeing the kind of religious persecution faced by Hutterite conscientious objectors, he left his country of origin in search of a larger Jewish community with accessible institutions for religious instruction.

After explaining their reasons for immigrating, participants often connected their litigation and immigration experiences. A lawyer in the *Multani* case accentuated the difficulties faced by the litigants by putting the litigation in the context of the family's recent arrival in Canada. She noted, in particular, the hardships faced by an immigrant family trying to adapt to new circumstances while still maintaining its religious identity:

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<sup>3</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Wilson Colony SCC*] (Wilson Colony Factum at para 1).

<sup>4</sup> Mary-Ann Kirkby, *I Am Hutterite: The Fascinating True Story of a Young Woman's Journey to Reclaim her Heritage* (Prince Albert: Polka Dot Press, 2007) at 17.

<sup>5</sup> Litigant 2 Interview.

that whole case was very difficult for [Gurbaj Singh Multani] and his family, and I don't know that a lot of people understand that. I mean, to be a young kid, and to have people picketing your school and to say all these things about you, and you've just come to this country and... you don't even understand most of the language in this province and you're now trying to sort of pick up the pieces and all you want to do is go to school and maintain your identity.<sup>6</sup>

Interestingly, however, the litigant interviewed from the *Multani* litigation recalled that his family faced the litigation optimistically, based on their perception of Canada as a country that protects human rights: “we knew that we gonna win since it's a human right country... you know, according to Charter of rights and human rights, we knew, we were sure that we gonna win.”<sup>7</sup>

More significantly, as noted in this chapter's introduction, the litigant's narrative of becoming Canadian does not focus on the family's legal acquisition of citizenship, but on the family's eventual success in securing the right for Gurbaj Singh Multani to wear his *kirpan* in school:<sup>8</sup>

Well, I consider myself Canadian since I got my decision right? Obviously, they give the Canadian perspective of decision, like everybody... are free to practice their religion, that was the one thing I even told in the media that I am proud to be Canadian, that they gave a Canadian point of view decision, like everybody are equal, and they're supposed to be practicing their religion the way it is.<sup>9</sup>

This litigant's response parallels the reaction of a participant in the *Amselem* litigation. The *Amselem* claimants were, like the *Multani* claimants, eventually successful before the Supreme Court. As discussed in Chapter 4, the *Amselem* participant took pride in all of the judicial decisions in his case, likening them to Talmudic discourses. He connected this to a more general pride in his adopted country and its values, as he perceived them. In response to a question about

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<sup>6</sup> Lawyer 3 Interview.

<sup>7</sup> Litigant 1 Interview.

<sup>8</sup> Notably, by the time the Supreme Court's decision was handed down in *Multani v Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6 [*Multani SCC*]m Gurbaj Singh Multani had nearly finished high school at a private, Seventh Day Adventist school; he remained in that school until his graduation and thus did not personally benefit from the Supreme Court's decision: Litigant 1 Interview. See section 3.1.1 below.

<sup>9</sup> Litigant 1 Interview.

whether his views on Canada had changed when he was unsuccessful in the first rounds of litigation, the participant answered:

Non, non, jamais de la vie. . . Et puis, la manière qu'on est accueilli ici, la manière qu'on a été intégré, la manière on est train de s'épanouir dans une société qui est libre... c'est fabuleux, ce qu'il y a ici. Alors ici, non seulement ça, je peux être sioniste, je peux être religieux, je peux être un bon canadien, et personne m'empêche... On a ici ce pays qui est fabuleux, la liberté et ... joie de vivre, comprenez? C'est un exemple pour le monde... le Canada c'est extraordinaire... on a bâti ici une société, non seulement au Québec, dans tout le Canada, un société vraiment brave, extraordinaire.<sup>10</sup>

In the above narratives, there is a strong sense in which participants linked becoming and being Canadians to the freedom they were afforded to practice their religions. The next section takes up the related theme of the links between participants' narratives of belonging to Canada's political communities (federal and provincial) and their experiences in litigation.

### 3 Religious Freedom and Civic Belonging

Lorne Sossin argues that Canadian legal discourse contains two competing narratives about the connections between immigration and religious freedom: one of pluralism, and the other of exceptionalism. The pluralist narrative “begins with the founding of the Canadian state in 1867 as a compromise federation between the English Protestant and French Catholic communities” and runs through the adoption of the *Charter* to culminate in the “celebration of religious, ethnic, and cultural pluralism in Canada.”<sup>11</sup> The alternate narrative of exceptionalism asserts that as minority communities become established, they can be accommodated “but only within a paradigm that accepts English Protestants (or, post-1970s, French Catholics in Quebec) as the ‘norm’ and other religious communities as ‘minorities.’”<sup>12</sup>

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<sup>10</sup> Litigant 2 Interview.

<sup>11</sup> Lorne Sossin, “God at Work: Religion in the Workplace and the Limits of Pluralism in Canada” (2009) 30 *Comp Lab L & Pol’y J* 485 at 485-486.

<sup>12</sup> *Ibid* at 487.



At least in terms of their rhetoric, most contemporary decisions of the Supreme Court of Canada tend to resonate more strongly with Sossin’s pluralism narrative. The Court’s commitment to pluralism usually implies a high value placed on the integration of minority communities. Courts have recognized that religious freedom claims can raise issues of integration for minority populations, and have been particularly sensitive to integration issues for members of minority religious groups in the context of public schools. Thus, in *Multani*, Justice Charron held for the majority of the Supreme Court that an “absolute prohibition [of the *kirpan*] would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others.”<sup>13</sup> She went on to cite a passage from *Ross v. New Brunswick School District No. 15*, where the Supreme Court held that “[t]he school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.”<sup>14</sup>

In other words, with respect to public schools, the Supreme Court has advocated an environment that is inclusive of minority perspectives, integrating them into the institution. The legislative branch of government has also formally embraced this set of values in its immigration legislation. In the stated objectives of the *Immigration and Refugee Protection Act* (the *IRPA*), Parliament begins by recognizing that immigration can bring with it “social, cultural and economic benefits.”<sup>15</sup> Among other things, the *IRPA* goes on to include the following integration-related objectives:

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<sup>13</sup> *Multani SCC*, *supra* note 8 at para 78.

<sup>14</sup> [1996] 1 SCR 825 at para 42 [*Ross*]. See also *Zylberberg v Sudbury Board of Education* (1988), 65 OR (2d) 641 (CA) [*Zylberberg*], where, in addressing the constitutionality of religious exercises in a public school, Ontario’s Court of Appeal held:

The effect of religious exercises cannot be glossed over with the comment that the exercises may be “good” for minority pupils. This view was expressed, as we indicated above, by a psychologist in supporting the Board’s case who said that it was salutary for minority pupils to confront “the fact of their difference from the majority”. This insensitive approach, in our opinion, not only depreciates the position of religious minorities but also fails to take into account the feelings of young children. It is also inconsistent with the multicultural nature of our society as recognized by s. 27 of the Charter

<sup>15</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(a).

(b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

...

(e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society.<sup>16</sup>

These broadly framed objectives do not provide a great deal of guidance in terms of resolving specific disputes. Indeed, each of them could be said to recognize an ongoing tension in immigration countries. The first objective gestures at the struggle to balance the state's desire to build its own civic culture while allowing for the continued flourishing of minority identity groups.<sup>17</sup> The second alludes to the vital give-and-take between immigrant groups and those already established in Canada. Nevertheless, at their core, both provisions recognize that immigration requires ongoing adjustment on the part of "Canadian society." Further, that these provisions are enshrined in legislation signals that, at least in Parliament's view, state institutions play a significant role in this project.

Though both courts and legislatures have spoken in favour of integration, the role that courts themselves play in the integration experience of litigants remains an open question. Certainly, it is unlikely that the courts will play a direct role in most immigrants' lives, as most will never litigate. As seen above, however, litigants told the stories of their litigation as part of their larger narrative of moving to and living in Canada. Moreover, given the intervention of community organizations such as B'nai Brith Canada and the World Sikh Organization, there is good reason to believe that the Court's rulings will have practical or symbolic meaning that extends beyond the individuals named in the lawsuits. These factors provide an impetus to consider the kind of effects that religious freedom litigation can have on patterns of integration.

In the paragraphs that follow, I return to the narratives of litigants to examine the specific ways in which judicial decisions can draw boundaries of inclusion and exclusion within the

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<sup>16</sup> *Ibid*, s 3(b), (e).

<sup>17</sup> On this issue, see Jeremy Waldron, "Cultural Identity and Civic Responsibility" in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 155.

larger community of Canadians in the context of religious freedom claims. Moreover, in all the narratives, there was some evidence of the litigation resulting in some internal divisions within the relevant religious community. This latter is significant because, as shown in the objectives of the *IRPA* excerpted above, the Canadian state sees a value in “respecting the... multicultural character of Canada.”<sup>18</sup> Indeed, the *Charter* requires that all its rights and freedoms “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”<sup>19</sup> While the precise meaning of “multicultural character” or “multicultural heritage” is contested, I have argued elsewhere that the provisions necessarily imply the notion that non-civic (*i.e.* ethnic, religious, etc.) communities are deserving of the state’s respect.<sup>20</sup> Whether this translates into a requirement for group rights is a point of division among theorists.<sup>21</sup> However, given that Canada is constitutionally committed to promoting and enhancing some form of multiculturalism, it makes sense to investigate the impact of religious freedom decisions on the communities they affect. Notably, the limits of this project do not allow me to make generalized claims about those communities.<sup>22</sup> Rather, my focus is on the individual narratives, which, without exception, dwelled on the impact of the decision on a particular community. These narratives are significant because they shine a light on how litigation participants understand their relationships to their religious communities, and how those relationships were affected by the litigation.

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<sup>18</sup> *Immigration and Refugee Protection Act*, *supra* note 15, s 3(e).

<sup>19</sup> *The Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 27.

<sup>20</sup> See Howard Kislowicz, “Religious Freedom and Canadian Multiculturalism” (2012) 30 *NJCL* (forthcoming).

<sup>21</sup> See Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights held by Groups* (Oxford: Hart Publishing, 2011), for an overview of the debate and an extended argument that group rights are coherent. Newman’s book principally engages with Kymlicka, who opposes the notion of group rights.

<sup>22</sup> For a study of how litigation prompted organizational changes amongst Jehovah’s Witness communities, see Pauline Côté & James T Richardson, “Disciplined Litigation, Vigilant Litigation, and Deformation: Dramatic Organization Change in Jehovah’s Witnesses” (2001) 40(1) *Journal for the Scientific Study of Religion* 11.

### 3.1 *Multani*

The claim in *Multani* may be read as a claim to equal public services (the right to a state-funded education) and/or as a desire to be included within the province's social institutions. The latter characterization was more prevalent than the former in narratives from a litigant and two lawyers involved. Indeed, one aspect of the narratives mostly left out of the judicial accounts was that Gurbaj Singh Multani sought access to the public school system in order to learn French.<sup>23</sup> In contrast, this was central to the litigant's narrative: "Obviously living in Quebec you need to learn French, so that was the time [Gurbaj Singh] decided to learn French and went to French school."<sup>24</sup>

Given the social and political importance of the French language to Québécois identity,<sup>25</sup> this seems a crucially underemphasized aspect of the legal narrative. Moreover, when Gurbaj Singh Multani arrived in Quebec, he started his schooling in a private English language school because the local French language public school told his family that he had arrived too late in the school year to begin classes. Nonetheless, he maintained his desire to learn French and, in contrast with his older brother who remained in the private English language school, began classes in the French language public school after nearly a year in the private school.<sup>26</sup> This facet of the litigant's narrative makes clear that the litigation, for the participant, was about more than religious freedom *per se*. It was also about participating in Québec society in a way that allowed Gurbaj Singh to remain faithful to his Sikh traditions and identity. While the issue of learning

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<sup>23</sup> The importance of acquiring French language skills as a way of integrating into Quebec's society was noted in the interlocutory proceedings: *Multani (tuteur de) c Commission scolaire Marguerite-Bourgeois*, [2002] JQ No 619 (Qc SC) (QL) at para 25, but disappeared from the subsequent decisions.

<sup>24</sup> Litigant 1 Interview.

<sup>25</sup> For an exploration of the interplay between Québécois identity and the accommodation of religious differences, see Jean-François Gaudreault-Desbiens, "Religious Challenges to the Secularized Identity of an Insecure Polity: A Tentative Sociology of Québec's 'Reasonable Accommodation' Debate" in Ralph Grillo *et al*, eds, *Legal Practice and Cultural Diversity* (Surrey: Ashgate Publishing Limited, 2009) 151-175.

<sup>26</sup> Litigant 1 Interview. Interestingly, the private school that Gurbaj Singh Multani attended was a Seventh Day Adventist school, which allowed him to wear his *kirpan*. This may indicate a greater sense of empathy between religious adherents, even though they do not share the same religion. In any event, it is an interesting oddity of this case that a student who sought inclusion in a secular, public, French language school wound up being educated in a private, English language, confessional school whose faith he did not share.

French may not have figured prominently in the Supreme Court's decision in *Multani*, the Court was certainly aware of the implications that its decision would have for the integration of members of minority religious groups, as shown in the passages cited in the preceding section. Indeed, pointing to the *Multani* decision as an example, Richard Moon notes that, though Canadian religious freedom jurisprudence was initially focused on issues of coercion, "there has been a discernible shift from coercion to exclusion."<sup>27</sup>

Concerned as it is with the dangers of exclusion, this approach engages the notion of civic belonging, *i.e.*, of determining who belongs to Canada's federal and provincial communities.<sup>28</sup> These themes figured in participant narratives as well. With regard to his sense of acceptance in Québec society, a *Multani* litigant drew an interesting distinction between the period leading up to the decision of the Superior Court and the period that followed:

in [the] beginning you see it was always the school, the school had a problem... but when the court said ok, you know, you can well protect or close, it has to be tight enough not to go taken out very fast, you can go to school, then all of a sudden it changed that, oh, it's the parents now have a problem... I went back and there were whole, about 60 per cent of the school kids... were outside protesting against this thing, the ruling you know? That was just a turn, I was like, ok, it was school first and this thing you saw when all of a sudden parents are against it. A whole school about a hundred, two hundred, three, four hundred people just outside yelling, that was just a turning point of the case...

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<sup>27</sup> Richard Moon, "Government Support for Religious Practice" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press 2008) 217 at 221. According to Moon, this is because the Canadian courts now see "religious commitment [as] an aspect of identity rather than the outcome of choice or judgment": at 232.

<sup>28</sup> Interestingly, the connection between the *kirpan* practice and engaging in civic activities surfaced more recently at Quebec's National Assembly. The government had recently introduced a bill aimed at *niqab*- and *burqa*-wearing women, stating the "general practice" that people are to show their faces when providing or receiving government services: Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, online: <<http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html>>. There has been significant opposition to this bill, see *e.g.* Beverley Baines, "Bill 94: Quebec's Niqab Ban and Sex Equality" (12 May 2010) online: <<http://womenscourt.ca/2010/05/bill-94-quebec%E2%80%99s-niqab-ban-and-sex-equality/>>. After inviting a group of Sikhs to participate in legislative hearings on this bill, the legislature unanimously decided to exclude the *kirpan* from the National Assembly: "Kirpan banned at Que. National Assembly" *CBC News* (9 February 2011) online: <http://www.cbc.ca/news/canada/montreal/story/2011/02/09/pq-kirpan-measure.html>>. The bill has not yet been passed into law, and the government that introduced was defeated in the subsequent provincial election, so it remains to be seen whether the bill will be taken up again.

it was kind of shocking for me that was... first time experience that whole people are so much against me, I was young, I was a bit scared too that at home I was getting calls, threatening calls and everything, people were yelling. Well, my goal was that, I have to go to school with my rights, so it doesn't matter how I'm gonna get it, I'll fight it till end.<sup>29</sup>

For the participant, therefore, there was a meaningful difference between being opposed to a public institution and being opposed to the other individuals who used that institution. The participant felt more threatened when he was opposed to this group of individuals, who called, essentially, for the student's exclusion. This led to a sense of marginalization, making the litigant feel more compelled to pursue the litigation.

Ultimately, perhaps due to being successful in the litigation, the litigant's narrative depicts a tale of integration based on communication and understanding, consonant with Sossin's pluralist narrative discussed above. Thus, even when asked how he felt about the ruling of the Québec Court of Appeal, which held that the school board's prohibition on the *kirpan* was legitimate, the participant responded:

Oh, it doesn't matter... I never left, you know... It's not that everyone hates us, it's only few people ... I have met few people, their point of view towards it were very negative, but right after when I explained and everything, they are right after in five seconds they're changed. I went to few shops with my dad and they've been seeing us on TV, right? They see us, they react, they give us a bad look and stuff, but they do come up to us and ask, oh, you're the same guy, oh you know, you shouldn't do that, you're in the community like this, you're supposed to live the way they live, we explained them, and then we find that their point of view against the *kirpan* is changed right after we tell them.<sup>30</sup>

In this sense, the Supreme Court's decision in *Multani* was viewed by the litigant as a successful moment in the integration and acceptance of Orthodox Sikhs into Québécois and Canadian societies. This was consistent with the narrative expressed by a lawyer involved in the litigation, who put it in more distinctly national terms:

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<sup>29</sup> Litigant 1 Interview.

<sup>30</sup> *Ibid.* Notably, even though this response was to a question about the court's decision, the participant discussed how other non-judicial actors come to understand the *kirpan*.

we were profoundly grateful that, really, that we lived in a country where we could make such arguments and have such depth of understanding with judges... They're not necessarily living with Joe Average and all that but, who understood what Joga Singh Average was thinking and feeling.<sup>31</sup>

### 3.1.1 Intra-Communal Effects

Another narrative recounted in the interview process was that, in *Multani*, the litigant's involvement in religious freedom litigation strengthened his ties with his religious community. The litigant participant explained that,

because the press and media always asking questions, I had to study... more details about kirpan and all of our symbols of my religion. I had to ask people, elder people, more questions, because each day they ask me question I learn from it me too, because I was very young, I didn't know everything.<sup>32</sup>

Moreover, in the time that Gurbaj Singh Multani did not attend the public high school, he spent additional time at his gurudwara, the Sikh place of worship.<sup>33</sup> Thus, in a case where the litigant sought greater integration into public, non-religious institutions, participating in the litigation caused him to spend more time within his religious community's institutions. As the litigant explained:

you see before... I didn't even know the [gurudwara] committee... But once I started getting into community I used to know more people, they all like, they're always talking, media not always approaches me but other people at the gurudwara, they always come up to me too... So they were always asking me what's the position of the case, what should we say and everything. So there was better communication, I stated going to gurudwara more often, since for a whole year I was home, right, so the only thing I was doing was making a better communication among the media and try my best to be in the community, ask what they want, like if they need my help.<sup>34</sup>

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<sup>31</sup> Lawyer 3 Interview. This same passage is cited in Chapter 5 with regard to the lawyer's perception of a successful cross-cultural communication. Arguably, there is significant overlap in the feelings of being understood and of being included.

<sup>32</sup> Litigant 1 Interview.

<sup>33</sup> Though the Multani family was successful before the Quebec Superior Court, Gurbaj Singh did not resume classes at the public school because of the protests led by other parents at the school: *ibid.*

<sup>34</sup> *Ibid.*

Indeed, one of the most powerful facts about the *Multani* case is that, by the time the Supreme Court of Canada issued its decision, Gurbaj Singh was in his final year of secondary education and opted not to switch back into the public school for the final portion of the academic year. In the interview, the litigant explained that, as the litigation proceeded through the various levels of court, the focus shifted from the Multani family to the larger Sikh community:

I didn't care what's gonna happen to me, right? We were fighting, whole community was there, it was not only me that time, because we wanted to win not because of me but because of future, people who gonna study in schools now, like that was the main [reason for] us to go in Supreme Court.<sup>35</sup>

Thus, according to the participant, while the *Multani* ruling had implications for the relationship between the Sikh community and the broader community of public school users, the litigation process also affected life inside the Sikh community. It prompted one particular family to strengthen its ties with other community members, spending more time at their religious gathering place, learning more about religious traditions, and becoming *de facto* community leaders and spokespeople on Sikhism. Relatedly, the litigant's motives for pursuing the litigation to the Supreme Court were not for any personal gain, but for the interests of his community (as he understood them).

In addition, however, one lawyer participant perceived subtle rifts within the Sikh community regarding how the issue of the *kirpan* the classroom should be handled. She explained that she was not comfortable with the compromise that the Multani family had agreed to with respect to sheathing and sewing the *kirpan*:

one of the things that was important was I knew that Mr. Multani himself had agreed to an accommodation that I wouldn't necessarily have thought was in the best interests of the larger Sikh community.<sup>36</sup>

In the larger scheme of *Multani*, this difference was a small one, but it suggests that engagement in litigation might lead participants who identify as members of the same community to confront

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<sup>35</sup> *Ibid.*

<sup>36</sup> Lawyer 3 Interview.



their own differences. In *Amselem* and *Wilson Colony*, the intra-communal differences regarding the litigation were more pronounced; these are discussed below.

### 3.2 *Amselem*

The issues of integration in the *Amselem* case are more complicated than those in the *Multani* case. On one hand, the *Amselem* religious freedom claimants wished to carry out their religious practice in the shared space of a condominium complex.<sup>37</sup> They can thus be analogized to the *Multani* claimants: both sets of claimants wished to be integrated into a common space without sacrificing their particular religious practices. On the other hand, a condominium complex is different, in many respects, from a public school. Condominiums are not public institutions. While discrimination is prohibited in the private sector, citizens are not guaranteed the right to access a particular condominium, and can be legally excluded (on the basis of price, for example). More to the point, condominiums are not publicly funded, nor are they imagined as places in which civic values are taught.<sup>38</sup> Additionally, in *Amselem*, by signing the building's by-laws, the claimants had apparently agreed not to place anything on their balconies or terraces, notwithstanding their religious practices on the holiday of *Succoth*.

However, from the perspective of the claimants, one reason for pursuing the case was to combat what they saw as discrimination and exclusion. For this reason, one participant explained that, though he enjoyed celebrating the holiday at his child's home while he was enjoined from installing his own *succah*, he nevertheless decided to pursue the litigation. In his words, “c'est très bien chez mes enfants, c'est comme chez moi, mais j'étais frustré de voir, parce que, vous savez, j'ai ressenti un relent d'antisémitisme.”<sup>39</sup>

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<sup>37</sup> Indeed, as pointed out in the *Amselem* judgments, the balconies and terraces of the building's units were considered “common portions” of the building, though reserved to the exclusive use of the owner(s) of the unit: *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 4 [*Amselem SCC*].

<sup>38</sup> An example of this image of public schools is found in the *Multani* decision. Justice Charron held for the majority: “Religious tolerance is a very important value of Canadian society... it is incumbent on the schools to discharge their obligation to instil in their students this value that is... at the very foundation of our democracy (*Multani SCC*, *supra* note 8 at para 76).”

<sup>39</sup> Litigant 2 Interview (relent = stench).

For one lawyer participant, this form of discrimination became apparent in his cross-examination of the condominium's building manager:

And I said, now what's the big problem? ... [the building manager] said, this is under oath, well you know if we allow *succahs* we have to allow Christmas trees. Okay, so what's the problem? Well you know if we allow Christmas trees we're gonna have to allow the Muslim... whatever they have. I said, okay, so we allow that, I said, so what's the problem? As he's relaying this, he's becoming more and more exasperated, and he says, he looks at me as if I'm crazy, and he says to me, he says, you know maître, this is not, this is not *St. Urban* [gives English pronunciation – an area known as populated by immigrants and members of cultural minorities, including Hasidic Jews], this is *Outremont* [gives French pronunciation – an upper class, primarily Francophone area].<sup>40</sup>

The litigant interviewed recounted a similar experience a year before the litigation, when the condominium association's president asked him to be discreet about his *succah*: “Bon, alors le président du syndicat il m'a rencontré, il m'a dit... ‘... je ne vois pas l'inconvénient, mais je vous en prie, soyez discrets’.”<sup>41</sup> Perhaps unsurprisingly, given the litigant's perception of anti-Semitism, he presented his case as a triumph for integration and for Canada, depicting his victory in a dispute in the private context of a condominium as a success for the entire country:

moi je crois que le grand gagnant de cette affaire ça était le Canada... Ça montre que Canada, il accepte l'intégration des gens ici, la liberté de pratiquer, la liberté religieuse, c'était pas donnée à tous les pays du monde, comprenez? Ici le juif canadien il peut marcher avec la tête haute. Et ce qu'on fait, d'ailleurs, on la voit ce que faisait la communauté, comment on est apprécié, comment on est respecté c'est au crédit du Canada, comprenez?<sup>42</sup>

The litigant's framing of the case was not shared among all interview participants. One participant maintained that religious groups should make “reasonable” demands for accommodation, lest the unreasonable demands of religious groups increase resentment against them: “if it would turn out that [Jews seeking accommodations for religious reasons] would win all the time, then clearly this would... probably increase the anti-Semitism that's... coming down

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<sup>40</sup> Lawyer 1 Interview.

<sup>41</sup> Litigant 2 Interview.

<sup>42</sup> *Ibid.*

the pipe.”<sup>43</sup> From this participant’s perspective, the *Amselem* claimants were making a request that was not reasonable by Judaism’s own internal logic. By seeking an accommodation for more than the religion required (according to this participant’s understanding of the requirements), the *Amselem* claimants were inviting more anti-Semitism without a valid reason, and potentially complicating the integration of Jews into Québec.<sup>44</sup>

### 3.2.1 Intra-Communal Effects

According to several participants, the difference of opinion described in the previous paragraph reflected a tension that the *Amselem* litigation provoked within the Jewish community.<sup>45</sup> As noted in Chapter 3, expert witnesses were called on both sides of the dispute to offer contradictory testimony regarding the religious obligations associated with the *Succoth* holiday. The dispute came to be seen by many involved as a contest of interpretation, with the state courts responsible for choosing the best explanation of Jewish law. Perhaps because of this dynamic, participants explained that views were divided within the Jewish community on how the case should be handled. One expert witness recounted how other members of the community opposed his involvement in the case:

In terms of the Jewish community, there were people, some of the rabbis in town and so forth who were, bullied may be the wrong word, but influenced by the right wing rabbinate and the Va’ad Hair<sup>46</sup> and so forth who were very taken aback by the fact

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<sup>43</sup> Expert Witness 1 Interview.

<sup>44</sup> At the time of the interview, the public consultations and report of the Bouchard-Taylor Commission, tasked by the provincial government to investigate issues surrounding the accommodation of cultural differences, were still quite fresh in the public consciousness. In the Commission’s view, the “crisis” over the issue of “reasonable accommodation” was more a matter of perception than actual practice: Québec, Commission de consultation sur les pratiques d’accommodement reliées aux différences culturelles, *Building the Future: A Time for Reconciliation* (Québec: Gouvernement du Québec, 2008) at 19-20 (Co-Chairs: Gérard Bouchard & Charles Taylor) at 18. The participant’s use of the language of “reasonableness” should be approached in this context.

<sup>45</sup> Expert 1 Interview, Lawyer 1 Interview, Litigant 2 Interview.

<sup>46</sup> The Va’ad Hair, also known as the Jewish Community Council of Montreal, is an Orthodox Jewish Community organization. According to the organization’s website, it “has established itself as the leading players responsible for the certification of Kosher food products bearing the MK certification mark, the Beth Din of Montreal (Jewish ecclesiastical court), the Ruth Institute (conversion program), and many other aspects pertaining to Jewish life in Montreal.” Jewish Community Council of Montreal, online: <<http://www.mk.ca/>>.

that I had gotten involved, I don't have a reputation for doing that kind of thing, and they do, and so they felt that somehow or other their control over the Jewish community such as it is was usurped by my involvement and so they had to make sure that by the time they were finished I had been discredited along with my involvement so that nobody else would dare speak on a Jewish subject.<sup>47</sup>

Another participant believed that the *Amselem* litigation brought to the fore an existing division in the Jewish community:

There is this traditional rift in the community. There are those in the Jewish community, and I'm sure you have this in every cultural community, who believe when you see an injustice, you stand up for it – now! [banging table] There are others who believe, when you see the same injustice, try to work through it, quietly, that's the best way to do it. The best way is not to go to the Supreme Court of Canada, and settle it. Because the backlash of going to the Supreme Court of Canada is that more people are going to hate Jews... And that rift was never solved.<sup>48</sup>

Thus, though the litigant interviewed ultimately came to see the entire case in a positive light, there were also narratives of discord within the affected community, even once the case was resolved in favour of religious freedom. This indicates that the integration-related implications of the *Amselem* decision are complex. It also recalls some of the insights from the literature on cross-cultural communication explored in Chapter 2. That literature emphasizes that while cultural belonging is a significant marker of identity, cultural communities are rarely, if ever, monolithic in their views, and that the borders between and within communities are matters of constant negotiation.

### 3.3 *Wilson Colony*

As seen above, the claimants' narratives in *Multani* and *Amselem* explained their desire to practice their religion in a shared or public space consistent with the pluralist Canadian narrative identified by Sossin. They wished to be full participants in Canadian social institutions all the while celebrating their cultural differences. In contrast, the Wilson Colony members sought accommodation, but not for the purpose of integration. Quite the opposite: the Wilson Colony

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<sup>47</sup> Expert Witness 1 Interview.

<sup>48</sup> Lawyer 1 Interview.

participants explained that they seek an existence that is, to the extent possible, isolated from the rest of the world. As in the pluralist narrative, the Wilson Colony Hutterites seek to be accepted as they are, and highly value religious freedom. They resist the pluralist narrative, however, in that they do not wish to participate in public political institutions (such as elections), send their children to public schools, or engage in the cultural exchange that is a hallmark of multiculturalism in its idealized form.<sup>49</sup> Indeed, Hutterite participants noted on various occasions the ways in which they adopt a life that is insulated, to the degree possible, from other parts of society. One participant explained that the absence of televisions, radios, and computers on Hutterite colonies was an expression of this desire for isolation, rooted in a commitment to a particular religious way of life:

we want to shy away from all these worldly things like computers and cell phones and fax machines, the televisions and radios. We'd like to keep our young people away, if we'll start bringing in all these worldly things, pretty soon our church and our religion will collapse...

Because it's like televisions, it's mostly sin on there anyways, isn't there? And ungodly things which makes our young people forget our spiritual and temporal history. We must protect our young people from the twisted world around us.<sup>50</sup>

In contrast to the ideas of multiculturalism and integration that figure in Canada's religious freedom jurisprudence,<sup>51</sup> the narrative understanding of religious freedom presented by Hutterite interview participants was essentially contractual.<sup>52</sup> The defining feature of the participants' understanding of their relationship with the state was a *quid pro quo*: the government guaranteed

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<sup>49</sup> See *Canadian Multiculturalism Act*, RSC 1985, c 24 (4th Supp), ss 3(1)(g), 3(2)(b), 3(2)(e). There is a small caveat here. One of the Hutterite participants said that he was happy for the opportunity to explain his religion: Litigant 4 Interview. As seen below, however, the value that the Hutterite participants placed on cultural exchange appeared unidirectional, as they rejected outside cultural influences on their own colonies such as televisions, radios, and the internet.

<sup>50</sup> Litigant 3 Interview.

<sup>51</sup> In addition to the passages cited above with respect to public schools, see *Zylberberg*, *supra* note 14 at 656-657; *Canadian Civil Liberties Assn v Ontario (Minister of Education)* (1990), 71 OR (2d) 341 (CA) at 363; *Multani SCC*, *supra* note 8 at paras 71, 78; *Amselem SCC*, *supra* note 37 at paras 87, 177; *Wilson Colony SCC*, *supra* note 3 at paras 90, 130; *R v S(N)* (2009), 95 OR (3d) 735 (SCJ) at para 141, 2010 ONCA 670 at para 79.

<sup>52</sup> See Chapter 4, Section 4.

absolute religious freedom and the Hutterites promised to develop farmland.<sup>53</sup> According to historical accounts, there is some basis for this understanding. In his *History of the Hutterian Brethren, 1528-1958*, Victor John Peters discusses the first communications between Hutterian leaders and representatives of the Canadian government. These occurred in 1898, when Hutterites first considered moving to Canada in order to avoid military conscription during the Spanish-American War. In considering this move, Hutterite leaders sought assurances from the Canadian government, chiefly the promise that Hutterites would not be required to perform military service. Viewing the Hutterites as a “desirable class of settlers to locate upon vacant Dominion Lands,”<sup>54</sup> the Canadian government proposed to extend to Hutterites policies previously applied to Mennonite immigrants,<sup>55</sup> and gave the Hutterite leaders

assurances of freedom and exemption from military service... The Department of the Interior, which was also in charge of Immigration [wrote in its communication to Hutterites via their counsel]:

1. As to their request for exemption from military service, this question has already been dealt with, and I enclose you a copy of the Order-in-Council authorising their exemption.
2. These people will not be molested in any way in the practise of their religious services and principles, as full freedom of religious belief prevails throughout the country. They will also be allowed to establish independent schools...

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<sup>53</sup> This view was reflected in their submissions to the Supreme Court, where the Wilson Colony members argued that, when they immigrated, “[t]he Canadian government of the day guaranteed the Brethren’s right to religious freedom in Canada”: *Wilson Colony SCC, ibid* (Wilson Colony Factum, at para 1).

<sup>54</sup> Edwin L Pitt, *The Hutterian Brethren in Alberta* (Master’s Thesis, University of Alberta, 1949) [unpublished] at 103, citing an 1899 Report of the Committee of the Honourable Privy Council. I recognize that this report was made subsequent to the initial communications between the Canadian government and the Hutterites, but this phrasing helps explain the government’s motivation for encouraging Hutterite immigration.

<sup>55</sup> Pitt notes a Privy Council report from 1872 that shows that “both the British and the Canadian governments were engaged in a mutual effort to induce Russian Mennonites to come to Canada,” and that these governments planned to offer “Mennonites full immunity from military service”: Pitt, *ibid* at 97 [unpublished]. In addition, the Canadian government pledged to Mennonite leaders, *inter alia*, a free grant of land, the “privilege” to have religious schools of their own, and funds for travel: *ibid* at 100, citing the 1873 Report of the Honourable J.H. Pope, Minister of Agriculture. Pitt writes that “the Mennonites began emigrating to Canada in 1874, and, following their arrival, they were not slow in advising their co-religionists, the Hutterites, of the favourable conditions to be secured from the Dominion Government”: *ibid* at 101.

3. The law does not compel the taking of an oath in court by persons who have conscientious objections to doing so, and there is no compulsion as to voting or holding offices...
4. There will be no interference with their living as a commonwealth, if they desire to do so.<sup>56</sup>

In 1899, some Hutterites established a colony at Dominion City in Manitoba. That same year, an Order in Council was made granting the Hutterian Brethren an unconditional exemption from Canadian military service.<sup>57</sup> However, as Edwin Pitt notes, due to “flooding of the Red River, the land could not be farmed,” and this group returned to South Dakota in 1900.<sup>58</sup> The larger Hutterite migration into Canada began in 1918 when, as noted above, they fled mandatory conscription in the United States. The Wilson Colony was established as a result of this migration.<sup>59</sup> John Bennett notes that, at that time,

Both the [Canadian] government and the Canadian Pacific Railway were anxious to bring hard-working settlers to the parts of Alberta and Manitoba that had hitherto remained empty because of lack of resources or unfavourable climate. Assured that their pacifistic principles would be respected, the Brethren accepted the invitation.<sup>60</sup>

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<sup>56</sup> Victor John Peters, *A History of the Hutterian Brethren, 1528-1958*, (Ph.D Thesis, Georg August-Universität zu Göttingen, 1960) [unpublished] at 158-159, citing the records of EA Fletcher, QC, Winnipeg, solicitor for the Hutterians, letter dated 17 October 1899. Both Peters and Pitt draw on a collection of documents assembled in VJF Zieglschmid, *Das Klein-Geschichtsbuch Der Hutterischen Brüder* (Philadelphia: Carl Schurz Memorial Foundation, 1947).

<sup>57</sup> Pitt, *supra* note 54 at 105, citing Order-in-Council P.C. 1676, 12 Aug 1899.

<sup>58</sup> *Ibid* at 25.

<sup>59</sup> *Ibid* at 27.

<sup>60</sup> Bennett, *supra* note 2 at 32. Interestingly, Peters argues that the need for farmers stemmed from Canada’s own involvement in the war: “Not the least of Canada’s contribution to the war effort was her regular transport of food to Great Britain and the allied European countries. Consequently, when the Hutterian brethren were looking for a new home, the Canadian immigration officials did ‘what they could to encourage the Hutterite immigration’ to Canada”: Peters, *supra* note 56 at 157, citing *Winnipeg Free Press*, 16 October 1918.

This account rings true with the litigants' narrative that the Canadian government had promised "absolute religious freedom."<sup>61</sup> However, the careful historical studies of Peters and Pitt both complicate this narrative. Peters notes that, in 1918, the Canadian government

warned the brethren that "an understanding is being arrived at between the Government of Canada and that of the United States under which it will be possible to enforce the return to the United States of persons who under the laws of that country are subject to military service but who may have moved to Canada". Again, the Hutterians would be classed as Mennonites, and exempted from military service, but "we can promise exemption from Military Service only in so far as the Canadian Army is concerned..." Furthermore, the first communication drew the attention of the brethren to the fact that the formerly extended privileges were "really a matter of provincial control". This was a reference to the question of schools. But by now the Hutterian communities in the United States were desperate, and the exodus began in the same year.<sup>62</sup>

One year later, in response to public pressure, the federal government later reversed its position and, in 1919, prevented further Hutterite immigration. However, Peters writes that "this new policy barely affected the Hutterians. Except for one Colony, Bon Homme, they had by this time all transferred from South Dakota to Canada."<sup>63</sup>

Nevertheless, though there are reasons to qualify the claim that the Canadian government promised Hutterite immigrants absolute religious freedom, the contractual understanding described above predominated among *Wilson Colony* interview participants. Perhaps because of this, the Hutterite participants did not relate an integration-based narrative.<sup>64</sup> *Wilson Colony* was

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<sup>61</sup> Litigant 4 Interview; *Wilson Colony SCC*, *supra* note 3 (Exhibit B to the Affidavit of Samuel Wurz, Affirmed 10 August 2005, Appellant's Record, vol 2 at 204).

<sup>62</sup> Peters, *supra* note 56 at 160, citing Letter of 7 February 1918 from Office of the Deputy Minister of the Interior, Ottawa, to Michael Scott, Winnipeg.

<sup>63</sup> *Ibid* at 161-162.

<sup>64</sup> Before the Supreme Court, counsel for the Wilson Colony argued that "[t]he religious objector must also understand that they are part of this society, and the fact that they have a right of freedom of religion does not translate into their religious freedom allowing them to have a right to live outside of the society": *Wilson Colony SCC*, *supra* note 3 (Transcript of Oral Argument, K Gregory Senda for Wilson Colony, at 46). He later explained that the Wilson Colony members volunteer as firefighters in their area and believe they have a duty to obey civic authorities: at 47-48. Though counsel argued that "the respondents understand they are a part of our society," this does not seem to me to rise to the level of a narrative of integration. In any event, interview participants were consistent in their expression of a desire to live in isolation from the rest of society to the extent possible.



not a case where religious freedom claimants sought inclusion in a public institution that socializes young people (like *Multani*), or sought to join a private community without sacrificing a religious practice (like *Amselem*). *Wilson Colony* turned out to be a case about access to a public resource, namely, public roads and the driver's licencing system. It therefore does not fit comfortably with the familiar integration narrative that underlies Canada's jurisprudence of religious freedom. This may, to some extent, help explain why their claim was rejected. The Hutterites of Wilson Colony did not present an account congruent with the prevailing legal discourse, which understands the integration of diverse religious groups as a reason for religious freedom.<sup>65</sup>

The rejection of the Wilson Colony's claim put the participants' previously secure place within Alberta and Canada into question. Indeed, at some moments, litigant participants interpreted the holding of the Supreme Court as a rejection, confounding their image of Canada as a place where they could freely practice their religion without limitation. This was clear in the contrasting terms a litigant used to describe his previous image of Canada and his view of the Alberta government's position on driver's licence photos. He described Canada as having historically promised the Hutterites that they could practice their religion "till the end of time" with "no hindrance"; he summarized the Alberta government's position as follows: "if you don't do as I tell you... why, you haven't got anything, you're a nobody."<sup>66</sup> At the same time, participants expressed a continued faith in Canada and Alberta. One participant said that his view about Canada had not changed since the case, and predicted that the colony would likely respond to the ruling by remaining committed to their insular way of life:

I: And has your view about Canada changed since this court case?

R: Well, not really. What could change, it's been such a short time? What will come up next, maybe, see like we want to shy away from all these worldly things like computers and cell phones and fax machines, the televisions and radios. We'd like to,

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<sup>65</sup> On congruence, see Chapter 4, Section 5.

<sup>66</sup> Litigant 4 Interview.

keep our young people away if we'll start bringing in all these worldly things, pretty soon our church and our religion will collapse.<sup>67</sup>

Another participant expressed the view that, through God's intervention, the civic authorities would eventually restore their religious freedom. He explained how, in his understanding, political changes in Alberta could be explained through divine influence:

I: ... After going through the whole process... did your views about Canada change, or about Alberta change at all?

R: No, no. I'll tell you a little story that's going back a few years now. The government of Alberta, Alberta's been blessed by God, that's what we believe, for a number of years, but once Social Credit government come into power, that was about 30 years, and they started to discriminate the minority groups, religious minorities, like this land Act they put out, and then they wanted to take our children into public schools, close our schools down and take our children to public schools, and once that started why you could see that their popularity of the social government started to wane. And we firmly believe that God does that, if a government does not tolerate religion minorities, why God kind of punishes them. And then the Alberta progressive government come in, Peter Lougheed, and he did away with the land act and did away with all the discrimination, and ever since that the province of Alberta prospered, it's the richest province in Canada and are still up to now, and we have told our government here, kind of warned them that they better open their eyes and see what path they're going on.<sup>68</sup>

Thus, participants related somewhat conflicting narratives on their relationship with the state. They were bewildered by their loss at the Supreme Court of Canada and the position of the Alberta government. However, they maintained some belief that Canada would be a relatively hospitable place to practice their religion.

In sum, though the theme of belonging in Canada's civic community figured in participant narratives in the *Wilson Colony* case as it did in *Multani* and *Amselem*, it did so in a very different way. The Hutterite narratives revealed an attachment to Canada, but not in the ways typically associated with civic belonging, such as participation in civic processes and institutions. Rather, the narratives understood Canada as a haven of religious freedom, beginning with a

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<sup>67</sup> Litigant 3 Interview.

<sup>68</sup> Litigant 4 Interview.

historical exemption from military service. All the while, the Hutterite narrative is one of purposeful isolation from other parts of society.

### 3.3.1 Intra-Communal Effects

As in the cases discussed above, there was some intra-communal discord surrounding the litigation. In this case, it concerned the appropriate response to the Supreme Court's ruling. As noted in earlier chapters, some Hutterites involved have opted to drive with expired, non-photo licences. Others chose to have their photos taken in violation of their religious obligations.<sup>69</sup> These divergent responses were made possible by the fact that, when the litigation commenced, Wilson Colony was in the midst of splitting into two colonies; otherwise, a more uniform response would have been likely. Notably, this reflected an existing division among Hutterites, as other colonies had already submitted to being photographed for their driver's licences. One litigant explained the religious basis for this disagreement:

[The other colonies] have kind of made an allowance for photos, they figure they don't kneel down and pray to an idol, they figure it's not an idol. But we, we believe that it's just like... in Moses the twentieth chapter, it says in there that anybody that makes an image and hides it is just like as if he prays to it.<sup>70</sup>

Thus, while the litigation did not create a fresh division, it set the stage for the division to be performed anew, materially affecting the relationship amongst Hutterites.

## 4 Conclusion

The purpose of this chapter has been to trace the connections between religious freedom litigation and belonging in Canada's civic communities. These links emerged in litigant interviews, as participants expressed a feeling of belonging to Canada when courts recognized the justice of their religious freedom claims. By the same token, though the right of religious freedom is clearly intended to have limits, unsuccessful claimants came to feel that the country failed to make good on its historical promise of religious liberty. In addition, the judicial

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<sup>69</sup> Litigant 3 Interview; Litigant 4 Interview.

<sup>70</sup> Litigant 4 Interview.

decisions under review had significant impacts on participant narratives of intra-community relationships. These findings suggest that taking a closer look at the impacts on affected communities, and exploring the multiple narratives that may exist within those communities, would enrich academic analyses of religious freedom cases. This may also have a bearing on judicial analyses. To be clear, I do not mean to imply that all religious freedom claims should be granted, lest members of particular communities come to feel excluded or their communities experience some adverse effects. Rather, as I will develop further in the next chapter, I suggest that the cost of such exclusion should be explicitly taken into account in judicial rulings in order to have a more sensitive analysis of the effects of a particular policy. In the decisions under review, the Supreme Court of Canada's judgment *Multani* came closest to realizing this ideal, and the decision in *Wilson Colony* left the most to be desired.

## Chapter 7 Concluding Thoughts

### 1 Drawing Connections

The core motivation of this project has been to get closer to the perspectives of individuals who lend their names to the cases that form the jurisprudence of religious freedom in Canada. Engagement with the narratives of litigants, lawyers, and expert witnesses reminds us that the judicial decisions studied in law schools and the academic literature only tell a part of the story of each case. In order to expose some of the nuances at play in the rich social field of religious freedom litigation, Chapters 4, 5, and 6 each focused on a distinct theme in the data: overlapping legal systems, cross-cultural communication, and belonging to the Canadian civic community. How do these themes speak to one another?

Chapter 4 began by showing that participants spoke of their religious obligations using the language of law, sometimes specifically using the term, and other times using terms such as “commandment,” with legal resonances from a previous age. By using this language in interviews and in their submissions to the courts, litigants portrayed themselves as subjects of multiple legal systems. The “legal” force of religious obligations, and the concomitant way in which participants felt bound by these rules, goes some way to explicating how litigants interpreted their choices to pursue a lawsuit over a religious issue.

Further analysis revealed the complexity of interchanges between the Canadian state’s legal system and the participants’ religious legal systems. Litigants’ narratives revealed that state legal norms took on meaning for them through the lenses of their particular religions and communal histories. Court documents and lawyer interviews showed that the relevant religious norms were described in the language of the prevailing Canadian jurisprudence so that they could be made accessible to the courts. In addition to building on legal pluralist scholarship, observing these acts of translation opened a new avenue of reflection, developed in Chapter 5. The interaction between legal systems, I argued, can also be treated as a cross-cultural encounter (in addition to an inter-legal encounter) as participants’ religious legal systems emerge from different cultural contexts than does Canadian constitutional law. This shift in perspective allowed the analysis to

move across the spectrum from description to normative critique.<sup>1</sup> The values of respect and self-awareness, which emerge as central in the literature on cross-cultural communication, served as useful gauges for participant narratives and judicial decisions. I argued that the cases under review leave much to be desired from this perspective, but, nonetheless, contain significant moments in which judges and litigants were able to reach across cultural divides, often using lawyers as intermediaries.

The narratives of success and failure in cross-cultural communication revealed, respectively, themes of inclusion and exclusion. These particular litigant narratives of their encounters with the justice system prompted Chapter 6's more general reflection on the encounters between the state and religious individuals and communities in the context religious freedom litigation. Interviews revealed that feelings of civic belonging were linked to litigation experiences, as successful litigants spoke glowingly of their attachment to Canada, and unsuccessful litigants expressed disenchantment about their place in Canada. These narratives also connect to the narratives of overlapping legal systems described above. Being put to the choice of obeying a religious obligation or a state law led, in some cases, to a sense of dislocation.

## 2 Implications for the Law of Religious Freedom

Can the themes discussed above provide guidance for refinements to the Canadian law of religious freedom? My answer to this question must begin with the caveat that this dissertation is not, primarily, aimed at articulating suggestions for law reform. Moreover, such a discussion cannot proceed without the caution that the interview data gathered here comes from a very small sample of participants and does not allow for generalized conclusions about religious freedom litigants. Indeed, the number of religious freedom litigants in Canada may be so small, and their internal diversity so pronounced, that such conclusions might always be tenuous. On the other hand, the current law of religious freedom is not based on any broad empirical knowledge. It is shaped by a case-by-case judicial interpretation of the broad guarantee of religious freedom and the malleable concept of "reasonable limits." To the extent that it is factually based, these facts

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<sup>1</sup> I acknowledge that even in its more descriptive mode, this dissertation retains certain normative commitments, principally the value of recognizing the legal aspects of non-state normative orders.

come to the courts' attention through legal rather than social scientific processes. The establishment of general legal principles is, I suggest, more of a normative exercise than an empirical one. In this context, the experiences of interview participants may aid in critical reflection about the prevailing jurisprudence and inspire some adjustments.

A first adjustment is to refine proportionality analyses by increasing awareness of the force of religious obligations and improving courts' cross-cultural communication skills. This emerges most strongly from the narratives of Hutterite participants, drawn on in both Chapters 4 and 5, describing two diverging responses to the Supreme Court's ruling in *Wilson Colony*. One colony's response was to submit to being photographed for driver's licences;<sup>2</sup> another's was to drive with expired non-photo licences, in breach of provincial law.<sup>3</sup> These responses are significant in that neither is in line with the majority of the Supreme Court's prediction that the colony members would hire outside drivers.<sup>4</sup> In this way, the majority treated the cost of its ruling as financial, assuming that the colony members would obey the regulation and, perhaps, neglecting that state law does not always sit atop the normative hierarchy for Canada's legal subjects. For the colony that has opted to have its members continue driving with expired licences, the cost can indeed be measured in financial terms, but rather than the cost of contracting out its driving needs, the cost is the total of the fines it has been required to pay. For the colony that has opted to forsake its particular observance of the Second Commandment, the cost is much more difficult to quantify.

The above suggests that the majority's proportionality analysis, purporting to weigh the regulation's salutary and deleterious aspects, rested on some flawed assumptions. Both the observations discussed in Chapter 4 and the skills of cross-cultural communication discussed in Chapters 2 and 5 could have contributed to more reliable reasoning. Admittedly, by appreciating that Colony members would not adopt an alternate interpretation of the Second Commandment as suggested by Justice Slatter of the Alberta Court of Appeal, the majority of the Court took

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<sup>2</sup> Litigant 3 Interview.

<sup>3</sup> Litigant 4 Interview.

<sup>4</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 97 [*Wilson Colony SCC*].

seriously, in part, the Colony members' particular interpretive tradition and recognized the force it exerted in their lives. However, as shown in Chapter 4, participant narratives described the communal lifestyle as the central principle of their religious normative order. The majority of the Supreme Court refused to address this collectivism in its analysis of whether the Colony's religious freedom was infringed,<sup>5</sup> and, in its proportionality analysis, failed to give proper credence to the way in which Colony members are bound by this principle. Had the majority been more alive to the legal force of collectivism in the Colony's life, the proportionality analysis may have turned out differently. Moreover, the majority would have been more likely, in my view, to appreciate the force of Hutterite communalism if it had been more self-aware of the individualist assumptions that animate Canadian jurisprudence and approached the Hutterite worldview on its own terms, with a deeper sense of respect.

Second, the analysis offered in Chapter 6 suggests that judges could more explicitly consider the inclusionary and exclusionary consequences of their rulings. Courts have often been sensitive to the high stakes of religious freedom decisions, even where a dispute might appear less serious to an outside observer. In *Amselem*, for example, the ability to place objects on one's balcony would be unlikely to be judged an issue of public importance<sup>6</sup> unless the Court was attuned to the import of the litigants' religious obligations. Still, the links between the protection of religious freedom and belonging to the Canadian civic community in participant narratives add another dimension of importance that is not always addressed directly. Justice Iacobucci's decision in *Amselem*, which observes that Canada "accentuates and advertises its modern record

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<sup>5</sup> *Ibid.*, at para 31. Given the centrality of communal ownership to their religious tenets, it is difficult to imagine a religious community with stronger or clearer emphasis on the collective dimensions of religious practice than the Hutterian Brethren. If, in Chief Justice McLachlin's view, they could not make out a proper claim to a group right under religious freedom, it is hard to imagine who could. On the prevailing case law, then, religious freedom remains an individual right for practical purposes. For a comprehensive philosophical justification for the existence of collective rights, see Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011).

<sup>6</sup> The Supreme Court of Canada does not hear every appeal that is made from Canada's other appellate courts. Instead, it grants leave to appeal when it

is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it: *Supreme Court Act*, RSC 1985, c S-26, s 40(1).



of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities,”<sup>7</sup> offers a good first step in this direction, and the majority *Multani* decision takes this further by presenting public schools as places to teach acceptance of diverse religious practices. More explicit and detailed consideration of the potential exclusionary effects of an adverse decision for religious freedom claimants would provide a more thorough, and therefore stronger, proportionality analysis.

A final suggested adjustment to the law of religious freedom emerging from this study is to retain *Amselem*'s doctrine of approaching religion subjectively while leaving behind those aspects of the jurisprudence that tend toward religion's individualization. Lori Beaman suggests that the majority of the Supreme Court's holding in *Amselem* “is significant because the Court delves into the possibility of the subjective living out of religion.”<sup>8</sup> Indeed, the subjective approach to determining whether a practice falls under the *Charter*'s guarantee of religious freedom allows for wide variation in protected religious practice, and avoids unnecessarily involving the courts in debates over religious dogma.

On the other hand, Berger argues that Canada's constitutional law of religious freedom echoes liberalism's individualistic ontology by treating religion as (1) individual in nature, (2) a matter of choice, and (3) a matter for the private sphere.<sup>9</sup> I have argued elsewhere that these individualistic currents in Canada's jurisprudence of religious freedom are problematic in a constitutional order committed to multiculturalism of a particular kind.<sup>10</sup> In the context of the current discussion, similar concerns could be raised through the lens of cross-cultural communication. Allowing the individualistic values to influence judicial decisions without reflecting critically upon them amounts to a failure of self-awareness; participants in cross-cultural communication should acknowledge their prior commitments, even if they are not

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<sup>7</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 87 [*Amselem SCC*].

<sup>8</sup> Lori Beaman, “Is Religious Freedom Impossible in Canada?” (2012) 8(2) *Law, Culture and the Humanities* 266 at 278.

<sup>9</sup> Benjamin L Berger, “Law's Religion: Rendering Culture” (2007) 45 *Osgoode Hall LJ* 277.

<sup>10</sup> Howard Kislowicz, “Religious Freedom and Canadian Multiculturalism” (2012) 30 *NJCL* (forthcoming).

necessarily expected to come to an agreement with their partners in dialogue. Further, imposing individualist values on litigants who hold collectivist worldviews may also amount to a failure of respect. Indeed, in *Wilson Colony*, the majority and dissenting judges acknowledged that collective aspects of religious practice can, in principle, fall under the umbrella of the *Charter*'s religious freedom guarantee.<sup>11</sup> Nevertheless, the majority's decision arguably gives too short shrift to the Colony's collectivist commitments. Accordingly, judicial approaches ought to be altered, in my view, to give deeper recognition to alternative worldviews. One way of accomplishing this is to pursue the approach taken by Justice Abella's dissenting opinion in *Wilson Colony*, which addresses the Colony's communitarian religious belief at all stages of the legal analysis.

### 3 Suggestions for Future Research

This project has taken some first steps in adding a qualitative empirical foundation to religious freedom scholarship in Canada.<sup>12</sup> Because of logistical limitations, the number of participants was small and restricted to cases at the Supreme Court of Canada. Future studies could improve upon this work by expanding the scope beyond the Supreme Court, including a larger number of participants, and addressing regional variations across the country. Looking beyond Canada's borders, international comparative work could also shed new light on national particularities and inter-jurisdictional commonalities. Further, with a sufficiently large number of participants, some quantitative methods might be useful in detecting additional trends and triangulating the data gathered in qualitative studies.

I also hope this project will lead to more qualitative studies in other legal fields. The methodology employed here, with the appropriate project-specific adjustments, could be especially useful to assess the impact of legislation with more aspirational goals. Human rights

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<sup>11</sup> *Wilson Colony SCC*, *supra* note 4 at paras 31, 130.

<sup>12</sup> See also Angela Campbell, "Bountiful Voices" (2009) 47 Osgoode Hall LJ 183; Pierre Noreau, "Référénts Religieux et Rapport à la Normativité : Asymétrie des Rapports au Droit" in Jean-François-Gaudreault-Desbiens, ed, *Le Droit, La Religion et le « Raisonnable » : Le fait religieux entre monisme étatique et pluralisme juridique* (Montréal : Éditions Thémis, 2009) 383; Shauna Van Praagh, "The *Chutzpah* of Chasidism" (1996) 11 Can JL & Soc 193.

statutes, for example, typically associate themselves with amorphous and contested ideals such as dignity and equality. For example, British Columbia's *Human Rights Code* aims, *inter alia*, to "promote a climate of understanding and mutual respect where all are equal in dignity and rights."<sup>13</sup> Similarly, Ontario's *Human Rights Code* states that "it is public policy in Ontario to recognize the dignity and worth of every person,"<sup>14</sup> and Nova Scotia's *Human Rights Act* lists as one of its purposes "[to] recognize the inherent dignity and the equal and inalienable rights of all members of the human family."<sup>15</sup> Qualitative research could assess the extent to which the lived experiences of participants in the administrative processes attached to human rights legislation reflect these lofty goals. Further, as in this dissertation, participant interviews could add nuances to existing theories and inspire new avenues for theoretical research.

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<sup>13</sup> *Human Rights Code*, RSBC 1996, c 210, s 3(b).

<sup>14</sup> *Human Rights Code*, RSO 1990, c H.19, preamble.

<sup>15</sup> *Human Rights Act*, RSNS 1989, c 214, s 2(a).

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## Appendices

### APPENDIX 1: PARTICIPANT INFORMATION SHEET

DOCTORAL RESEARCH PROJECT  
PARTICIPANT INFORMATION SHEET

This study is being undertaken as part of a doctoral dissertation in the Faculty of Law at the University of Toronto. The supervisor of the methodological aspects of this project is Professor Ping-Chun Hsiung. Should you wish to contact the Professor or the student researcher, our contact information is located at the bottom of this sheet. If you have questions about your rights as a research participant, you may contact the Ethics Review Office at the University of Toronto. The student aims to defend his dissertation in the fall of 2012, but the completion of the project may extend longer than that.

The study that you are being asked to participate in is called “The Law of Religious Freedom and Canadian Identity.” If you agree, your participation in this study will consist of one semi-structured interview of approximately 60-90 minutes. We wish to discuss your participation in religious freedom litigation, leading to the case(s) you participated in at the Supreme Court of Canada.

By discussing these topics, we hope gain a better understanding of the social processes involved in religious freedom litigation in Canada. Thank you very much for assisting us. Research like this is crucial for the student and in contributing the discussion and development of legal ideas. We look forward to working with you.

Contact Information:

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PROJET DE RECHERCHE DOCTORALE

FICHE D'INFORMATION POUR PARTICIPANTS

Cette étude est réalisée dans le cadre d'une thèse de doctorat à la Faculté de droit de l'Université de Toronto. La superviseure des aspects méthodologiques de ce projet est la professeure Ping-Chun Hsiung. Si vous souhaitez prendre contact avec la professeure ou l'étudiant-chercheur, nos coordonnées se trouvent au bas de cette feuille. Si vous avez des questions concernant vos droits en tant que participant à la recherche, vous pouvez contacter le Bureau d'examen éthique à l'Université de Toronto. L'élève a pour but de défendre sa thèse à l'automne de 2012, mais l'achèvement du projet peut s'étendre plus que cela.

L'étude à laquelle vous êtes invités à participer s'appelle "La loi de la liberté religieuse et l'identité canadienne." Si vous acceptez, votre participation à cette étude consistera d'une entrevue semi-structurée d'environ 60-90 minutes. Nous souhaitons discuter votre participation dans la litige de la liberté religieuse.

En discutant de ces sujets, nous espérons avoir une meilleure compréhension des processus sociaux impliqués dans un litige liberté religieuse au Canada. Merci beaucoup de votre aide. La recherche de ce genre est cruciale pour l'élève et en contribuera au débat et au développement des notions juridiques. Nous sommes heureux de travailler avec vous.

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## APPENDIX 2: PARTICIPANT CONSENT FORM

### DISSERTATION RESEARCH PROJECT PARTICIPANT CONSENT FORM

I, \_\_\_\_\_, agree to participate in a study on THE LAW OF RELIGIOUS FREEDOM AND CANADIAN IDENTITY conducted as part of doctoral research at the Faculty of Law at the University of Toronto. The student, Howard Kislowicz, has discussed the project with me and shown me an information sheet with the names of the supervisors, and the purpose of the research project. I understand that the questions I am asked will be restricted to the areas discussed in the information sheet. I understand that I may contact the student or supervisor at any time before, during or after the study if I have questions or concerns. Contact information is provided on the information sheet.

I understand that all of my information will be held confidential. Apart from on this form, my name will appear nowhere in relation to the interview in the notes or final research paper that the student prepares. The student will substitute a pseudonym. I understand that I may be quoted in the student's paper but that my identity will not be given beyond general information. The information will be kept at least until the submission of the student's dissertation; if the student wishes to retain the information for longer than this, I will be contacted to provide an additional consent.

I understand that I have the right to withdraw from the study at any time up to three months following my interview. If I do so, the notes, transcripts and/or tapes of my interview to that point will be destroyed. I also have the right to refuse to answer any questions I feel uncomfortable answering.

I agree to participate in this study.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

I agree to have the interview audio-recorded

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

PROJET DE RECHERCHE DOCTORALE  
FORMULAIRE DE CONSENTEMENT DU PARTICIPANT

Je m'appelle \_\_\_\_\_, et je consens à participer à une étude sur le droit de la liberté religieuse et identité canadienne menée dans le cadre des recherches de doctorat à la Faculté de droit de l'Université de Toronto. L'étudiant, Howard Kislowicz, a discuté du projet avec moi et m'a montré une fiche de renseignements avec les noms de la superviseure, et le but du projet de recherche. Je comprends que les questions qu'on me demandera seront limitées aux domaines abordés dans la fiche d'information. Je comprends que je peux communiquer avec l'étudiant ou la superviseure à tout moment avant, pendant ou après l'étude si j'ai des questions ou des préoccupations. Les coordonnées sont indiquées sur la fiche d'information.

Je comprends que tous mes renseignements seront gardés confidentiels. Outre le présent formulaire, mon nom n'apparaîtra nulle part en ce qui concerne l'entrevue dans les notes ou les documents que l'étudiant préparera. L'étudiant devra remplacer mon nom par un pseudonyme. Je comprends que je puisse être cité dans le document de l'étudiant, mais que mon identité ne sera donnée au-delà des informations générales. Les informations seront conservés au moins jusqu'à la présentation du dissertation de l'étudiant; si l'étudiant souhaite conserver l'information plus de cela, je vais être contacté pour fournir un consentement supplémentaire.

Je comprends que j'ai le droit de retirer de l'étude à tout moment jusqu'à trois mois après mon entrevue. Si je le fais, les notes, transcriptions et / ou enregistrements de mon entrevue seront détruits. J'ai aussi le droit de refuser de répondre à toute question.

Je consens à participer à cette étude.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

Je consens à l'enregistrement de l'entrevue.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date