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# Faithful Translations? Cross-Cultural Communications in Canadian Religious Freedom Litigation

Howard Kislowicz

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### **Faithful Translations? Cross-Cultural Communications in Canadian Religious Freedom Litigation**

*Osgoode Hall Law Journal*, 52(1), Forthcoming 2014.

Howard Kislowicz

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In three religious freedom cases pursued to the Supreme Court of Canada – *Amselem*, *Multani*, and *Hutterian Brethren of Wilson Colony* – religious freedom claimants engaged in litigation over a religious practice particular to their group. Some have argued that cases like these can be seen as cross-cultural encounters. How did the religious freedom claimants seek to make their practices – the *succah*, the *kirpan*, and the prohibition on being photographed – understood to the courts? And how did the courts respond to these claims? In this paper, I draw out two central values from the literature on cross-cultural communication: respect and self-awareness. I then use these values as lenses through which to view participant narratives collected in a qualitative study of litigants, lawyers, and an expert witness. I argue that courts are more likely to achieve a fuller understanding of minority religious practices when they are faithful to the values of respect and self-awareness. This, in turn, can strengthen their proportionality analyses. Of the three cases, the Supreme Court in *Multani* came the closest to realizing this ideal. The majority in *Wilson Colony* marked a low point in this regard, failing to fully appreciate the litigants' commitment to their collectivist worldview. *Amselem* was something of a middle ground, where the Court deliberately preferred to engage with a thinner account of the religious practice.

### **Keywords:**

Freedom of Religion -- Cross-cultural communication -- Multiculturalism -- Accommodation -- Litigation

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# Faithful Translations? Cross-Cultural Communication in Canadian Religious Freedom Litigation

*Submitted to the Osgoode Hall Law Journal on 25 October 2013*

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## **Abstract:**

In three religious freedom cases pursued to the Supreme Court of Canada – *Amselem*, *Multani*, and *Hutterian Brethren of Wilson Colony* – religious freedom claimants engaged in litigation over a religious practice particular to their group. Some have argued that cases like these can be seen as cross-cultural encounters. How did the religious freedom claimants seek to make their practices – the *sucrah*, the *kirpan*, and the prohibition on being photographed – understood to the courts? And how did the courts respond to these claims? In this paper, I draw out two central values from the literature on cross-cultural communication: respect and self-awareness. I then use these values as lenses through which to view participant narratives collected in a qualitative study of litigants, lawyers, and an expert witness. I argue that courts are more likely to achieve a fuller understanding of minority religious practices when they are faithful to the values of respect and self-awareness. This, in turn, can strengthen their proportionality analyses. Of the three cases, the Supreme Court in *Multani* came the closest to realizing this ideal. The majority in *Wilson Colony* marked a low point in this regard, failing to fully appreciate the litigants' commitment to their collectivist worldview. *Amselem* was something of a middle ground, where the Court deliberately preferred to engage with a thinner account of the religious practice.

**Faithful Translations?**  
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**1. Introduction**

It is autumn in Montreal, and the Jewish festival of *Succoth* is about to begin. In celebration, three Orthodox Jewish families in an upscale condominium complex have installed *succoth* (singular: *succah*) on their balconies, temporary huts with leafy coverings where they

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\* I owe an enormous debt to Ayelet Shachar for her comments and guidance in the supervision of the doctoral project on which this paper is based. I am very grateful to Ping-Chun Hsiung and Jean-François Gaudreault-Desbiens for their wisdom and comments on earlier drafts. Many thanks go to the participants in the 2013 Harvard-Stanford International Junior Faculty Forum for their insights, in particular to Helen Irving and Deborah Hensler for their helpful commentary. Thanks also to Benjamin Berger and Yasmin Dawood for their critical insights and suggestions, and to Gail Henderson, Nicole O’Byrne, Zoë Sinel, and Hilary Young for helpful comments. Thanks to Matthew Reinhart for his able editorial assistance, and to three anonymous reviewers for their helpful suggestions. I thank the Social Sciences and Humanities Research Council of Canada for the funding that allowed me to complete this project. As always, special thanks to Dr. Naomi Lear and Gabriel Kislowicz. Mistakes are mine.

will take their meals for the duration of the eight-day holiday. Other co-owners are upset; the huts are in direct contravention of the complex's bylaws, which prohibit the installation of anything on balconies. The condo board commences injunction proceedings. The matter proceeds to the Supreme Court of Canada, where a narrowly divided Court favours the arguments of the Orthodox Jewish families, granting that the bylaws could not infringe their religious freedom.<sup>1</sup>

Another autumn in a suburb of Montreal, some years later, a high school student, having recently immigrated to Canada from India, is walking up the stairs to his classroom. His *kirpan*, an article of faith in the form of a dagger carried by many baptized Sikhs, accidentally drops from his clothing. After being called to the principal's office, the student's family reaches a compromise with the school principal whereby the *kirpan* would be secured tightly under his clothing at all times. The school's governing board, unhappy with the compromise, informs the student that he may not bring his *kirpan* to school. The student's family initiates litigation and is ultimately successful before a unanimous Supreme Court.<sup>2</sup>

More years later, summertime in Alberta, a Hutterite farmer is pulled over for speeding. The police officer notes that the farmer's licence is expired and bears no photograph. Alberta had recently made driver's licence photos universally mandatory, eliminating a longstanding religious exemption. The farmer is given a ticket. He and his community initiate proceedings challenging the constitutionality of the mandatory photo, claiming their religious obligations prohibit them from having their photos taken. Though they have success in the lower courts, a

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<sup>1</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*].

<sup>2</sup> *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [*Multani*].

narrowly divided Supreme Court holds in favour of the province, ruling that the mandatory photo requirement is constitutional.<sup>3</sup>

These are the basic narratives of three landmark religious freedom cases decided by the Supreme Court of Canada in the last two decades. They have generated much interest and scholarly commentary. This paper returns to these cases to examine in detail the way the litigants and their counsel told their stories and the way these stories were received by courts and opposing counsel. I analyze these exchanges as episodes of cross-cultural communication in which members of religious cultural communities sought to make themselves understood to participants in the Canadian legal culture.<sup>4</sup> The primary aim of this paper is to develop a set of criteria to evaluate the success of those moments of cross-cultural communication, and to apply those criteria to episodes observed in the documentary records of the cases and in narratives told by litigants, lawyers, and an expert witness. I argue that courts are more likely to achieve a fuller understanding of minority religious practices when they are faithful to the values of respect and self-awareness that emerge from the scholarship on cross-cultural communication.

This paper is based on an interdisciplinary project employing legal analysis and qualitative sociological methods.<sup>5</sup> It contributes to the developing empirical literature on religious freedom

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<sup>3</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Wilson Colony*].

<sup>4</sup> I recognize that the legal culture in Quebec is significantly different from that in the rest of Canada, explained in part by its civil law tradition and identification as a distinct, French-speaking society: see Sébastien Grammond, "Conceptions canadienne et québécoise des droits fondamentaux et de la religion: convergence ou conflit?" (2009) 43 RJT 83. My aim here is to capture the moments of communication between a religious culture and a state legal culture; that all the cases were pursued to the Supreme Court of Canada adds a common element that justifies a comparison amongst the three cases. Thanks to Nicole O'Byrne for raising this point.

<sup>5</sup> The project was the basis of my doctoral dissertation, successfully defended at the University of Toronto's Faculty of Law in December 2012. The dissertation supervision committee was Ayelet Shachar (chair, Law and Political Science, Toronto), Ping-Chun Hsiung (sociology, Toronto), and Jean-François Gaudreault-Desbiens (Law, Université de Montréal). The defence committee also included Benjamin Berger (Osgoode Hall Law School), Yasmin Dawood (Law, Toronto) and Ben Schlesinger (Social Work, Toronto) served as chair for the defence.

in Canada.<sup>6</sup> Unlike previous research, it centres on participant experiences of litigation and compares results across multiple case studies.

The paper is organized as follows: Section 2 outlines the project's methods and explains the rationale for case selection. Section 3 provides an overview of scholarship on cross-cultural communication and distils two main values that cut across the literature: respect, and self-awareness. Section 4 considers the prospects for cross-cultural communication in courtroom settings, paying particular attention to the unequal power relationships between state actors and non-state actors. Section 5 represents this paper's main contribution, providing a detailed analysis of interview transcripts and court documents through the lenses developed in sections 3 and 4. Section 6 concludes by comparing the results across the three cases under review, which had varying levels of success in terms of cross-cultural communication. It also develops the argument that judges are more likely to have a full appreciation of the relevant facts when they demonstrate the values of respect and self-awareness emphasized in the literature on cross-cultural communication.

## 2. Methods

Qualitative inquiry, a methodology familiar to disciplines like anthropology and sociology, is less common in legal scholarship.<sup>7</sup> Qualitative methods employ inductive logic, allowing

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<sup>6</sup> Angela Campbell, "Bountiful Voices" (2009) 47 Osgoode Hall LJ 183; Shauna Van Praagh, "The *Chutzpah* of Chasidism" 11 Can J L & Soc 193; Anne Saris & Jean-Mathieu Potvin, "Canadian Muslim Women and Resolution of Family Conflicts: An Empirical Qualitative Study (2005-2007)" in Silvio Ferrari & Rinaldo Cristofori, eds, *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing Limited, 2010) 337.

<sup>7</sup> For an overview of the use of qualitative methods in legal scholarship, see Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in Peter Cane & Herbert M. Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010) 926. See also 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); Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978). The Journal of Legal Pluralism and Unofficial Law has also published ethnographic accounts of legal practices, particularly in post-colonial environments.



research concepts to emerge from the data rather than setting out to test a particular hypothesis.<sup>8</sup>

Typically, qualitative research is concerned with gathering and analyzing rich data not accessible through quantitative methods such as surveys. By focusing on the subtle processes of interpretation at play in a particular social setting, a qualitative approach provides an ideal way to study the individualized experiences of participants in court processes surrounding religious freedom.

The primary sources for this project are in-depth interviews. I interviewed 10 participants in three cases decided by the Supreme Court of Canada:<sup>9</sup> 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 participant's direct knowledge of the organization's involvement in the litigation was limited. I interviewed each participant once for 60-90 minutes. The interviews were conducted in a semi-structured format, allowing participants to construct their own narratives.

This project also contains a second data set comprised of documents more familiar to legal analysis: transcripts of testimony, written submissions, and transcripts of oral arguments. These texts are used as a source of "triangulation": an additional data set used to verify or challenge the conclusions drawn from the analysis of interview transcripts.<sup>10</sup>

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<sup>8</sup> See Ping-Chun Hsiung, *Lives and Legacies* (2010), online: <http://www.utoronto.ca/~pchsiung/LAL/>

<sup>9</sup> Case selection is explained in section 2.1.

<sup>10</sup> I began to analyze the data using the method of "open coding," reading the transcripts and documents line by line, and generating as many "codes" as possible. The codes describe the thoughts, feelings, and intentions in the document at a slightly higher level of abstraction, in order to allow for comparison to other data. One of the codes generated during open-coding of interview transcripts was "cross-cultural communication." With this in mind, I revisited all the data using the method of "focused" coding, in searching for more instances of cross-cultural communication. This prompted further theoretical research which I then brought back into conversation with the data. See Hsiung, *ibid.*

Once the interview data were gathered, I began the process of “open coding.” Open coding involves reading the transcripts and documents line-by-line, and generating as many “codes” as possible.<sup>11</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. Once the open coding process was complete and I had generated a set of stable codes, I revisited all the data using the method of “focused” coding. In this method, data are re-coded in the light of a specific theme.<sup>12</sup> 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. I used a computer application designed for qualitative research, Weft QDA,<sup>13</sup> to assist with the aggregation of the coded data and allow for easier comparison across interviews.

To be sure, this is a small sample; however, the size of the sample is less relevant in qualitative inquiry than the depth of the data collected. The goal here is to generate new theoretical insights steeped in real life experiences and provide detailed pictures of a particular context rather than to posit general conclusions. Another limitation of the study is that interview participants were all, with one exception, on the side of those claiming religious freedom. However, the perspectives opposing parties and judges are brought to light through the textual sources discussed above. The judicial decisions, oral arguments of the parties, and exchanges during cross-examination are all communicative acts that can be analyzed.

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<sup>11</sup> Hsiung, *supra* note 8, online: <<http://www.utoronto.ca/~pchsiung/LAL/analysis/opencoding>>.

<sup>12</sup> *Ibid*, <<http://www.utoronto.ca/~pchsiung/LAL/analysis/focusedcoding>>.

<sup>13</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/>>.

## 2.1. Case Selection

As noted above, this project focuses on three religious freedom cases brought to the Supreme Court of Canada. I chose these cases for four reasons. First, because these cases had several rounds of trial and appeal, participants had multiple interactions with the state legal system on a question of religious importance. Second, 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. Third, in all cases, the religious freedom claimants sought an exception from a generally applicable rule, making comparisons across cases more fruitful. Finally, because these cases were pursued to the Supreme Court, each has a large and centralized documentary record.<sup>14</sup>

## 3. Cross-Cultural Communication and its Relevance for Religious Freedom

Most scholarly “definitions agree that communication is a symbolic process by which people create shared meanings.”<sup>15</sup> Cross-cultural communication involves the creation of shared meanings across cultural boundaries. Following Parekh, I view culture as a

historically created system of meaning and significance or... a system of beliefs and practices in terms of which a group of human beings understand, regulate and

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<sup>14</sup> Other notable cases involving religious issues decided in the last 20 years include *R v NS*, 2012 SCC 72, where the Court set guidelines for determining whether a sexual assault complainant can wear a *niqab* while testifying, and *SL v Commission scolaire des Chênes*, 2012 SCC 7, which held that a mandatory public school course in “Ethics and Religious Culture” did not violate a student’s religious freedom. The Supreme Court had not decided these cases when the study began, and were excluded on this basis. However, the decision to exclude *Bruker v Marcovitz*, 2007 SCC 54, holding that the failure to provide a religious divorce is compensable in damages, was more complicated. Ultimately, I excluded this case because it did not fit the pattern of a minority group seeking an exemption from a generally applicable policy. I judged that this would make comparison more difficult. The case, however, merits further study, raising complicated issues of religious freedom on both sides of the dispute. I also chose to exclude *B (R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, which upheld a wardship order over an infant when her parents refused blood transfusions on the basis of their religious beliefs. This case falls less clearly into the pattern of a minority religious group seeking an exemption from a generally applicable policy.

<sup>15</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 10.

structure their individual and collective lives. It is a way of both understanding and organizing human life.<sup>16</sup>

Culture pervades all communicative activities;<sup>17</sup> moral concepts and political and economic institutions are all situated in a particular cultural context.<sup>18</sup> It follows that notions of justice and legality and their associated institutions are embedded in a particular culture and given shape by their historical context. This is not to say, however, that communicative acts are culturally determined. Rather, this project assumes a dynamic relationship between individuals and the multiple cultures in which they are situated. When individuals communicate they are active agents, drawing on the languages, ideas, forms, and other aspects of these cultures.<sup>19</sup> Moreover, many have noted that cultural communities have always already begun to communicate with each other at some level.<sup>20</sup>

Cross-cultural communication is inherent in much religious freedom litigation. Benjamin Berger argues that “the meeting of law and religion is not a juridical or technical problem but, rather, an instance of cross-cultural encounter.”<sup>21</sup> According to Berger, most accounts fail to see that “the constitutional rule of law is, itself, a cultural system... composed of sets of symbols, categories of thought, and particular practices that lend meaning to experience.”<sup>22</sup> The individual participants in activities within Canadian legal culture, represented in this paper primarily by the judges who wrote the decisions, no doubt have complex cultural identities of their own. They

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<sup>16</sup> Bhiku Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Houndmills: Macmillan Press Ltd., 2000) at 143.

<sup>17</sup> *Ibid* at 143-144.

<sup>18</sup> *Ibid* at 151.

<sup>19</sup> Parekh, *supra* note 16 at 157. See also Martha-Marie Kleinhans & Roderick A Macdonald, “What is a *Critical Legal Pluralism?*” (1997) 12 *Can JL & Soc* 25.

<sup>20</sup> See, e.g., Parkeh, *supra* note 16 at 163:

Every 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>21</sup> Berger, “Cultural Limits” *supra* note 40 at 246.

<sup>22</sup> *Ibid* at 246. See also Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2008) at 4-5: “even where specialization intense, law does not exist in isolation. To understand how a culture is put together and operates, therefore, one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture.”

likely even shared some cultural elements with the litigants before them – they may have had some familiarity with a religious tradition, they certainly shared a language, and they may have lived in or near the places where the disputes arose. However, while there is some cultural diversity on the bench,<sup>23</sup> superior court judges in Canada must generally be members of a provincial bar for 10 years, and it is likely that they received their legal education in Canada.<sup>24</sup> When they write their decisions, they speak principally according to the conventions of the legal culture, using the rules and symbols of that culture to decide how to legally classify the practices and then explain that classification in its judgments in a manner consistent with precedent.

To put this more concretely, in the cases under review, prior to the litigation, litigants ascribed a meaning to an object of religious faith based on their particular religious and cultural background. These practices were mostly unfamiliar to the Canadian legal system, and would likely not have figured in the legal education or discourse of the relevant judges prior to these cases. In order to make these practices intelligible to the courts, litigants (through their counsel) were required to communicate across a cultural boundary with the judges deciding upon the validity of the restriction and regulation of the practices.<sup>25</sup> Accordingly, it is worthwhile to re-examine the cases and experiences of participants through the theoretical and practical considerations developed in the field of cross-cultural communication.<sup>26</sup> Before moving on to look at these, some further discussion of the term “culture” is required.

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<sup>23</sup> Rosemary Cairns Way, however, conducted a study of 94 judicial appointments made between April 2012 and March 2014. Only one of these was non-white (though the respective races of 12 of the judges was not known) and only 37 were women: Sean Fine, “Tories chastised for lack of racial diversity in judicial appointments” *The Globe and Mail* (10 April 2014), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

<sup>24</sup> *Judges Act*, RSC 1985, c J-1, s 3. Alternatively, a person may be named a judge if, “after becoming a barrister or advocate at the bar of any province, [he or she] exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a province.”

<sup>25</sup> The considerations of cross-cultural communication specific to the litigation context are further explored below in section 4.

<sup>26</sup> Notably, the participants did not frame their experiences using the term “cross-cultural communication,” nor was term suggested to them in interviews because I did not want to impose my own conceptual frame on their narratives

### 3.1. What is *Good Cross-Cultural Communication*?

#### 3.1.1. Typology of Cross-Cultural Encounters

Fred Dallmayr's work provides a helpful starting point for distinguishing successful from unsuccessful cross-cultural communication. He posits six modes of encounter: conquest, conversion, assimilation, enculturation, relative indifference, and dialogical engagement.<sup>27</sup> These modes may appear separately or they may overlap. According to Dallmayr, cultural hegemony is exercised in domestic settings under the terms "assimilation" or "enculturation."<sup>28</sup> In some cases, 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>29</sup> Dallmayr terms this form of engagement "relative indifference," and argues that modern liberalism often results in this kind of encounter. 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>30</sup> This has the effect of stifling cross-cultural engagement as so-called private matters are no longer appropriate subjects for public discussion.<sup>31</sup>

Dallmayr holds out dialogical engagement as an ideal type of cross-cultural encounter 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

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while they were recounting them. The labeling of these encounters as cross-cultural derives from my own analysis of the data and engagement with the literature.

<sup>27</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 section 4.

<sup>28</sup> *Ibid* at 14.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* at 24.

<sup>31</sup> *Ibid* at 26.

modes of life.”<sup>32</sup> Charles Taylor takes a similar approach, arguing that, in the course of successful cross-cultural communication,

[w]e 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.<sup>33</sup>

The end result is a “fusion of horizons,” a term Taylor borrows from Hans-Georg Gadamer.

Gadamer construes the comprehension of texts and historical events “not on the model of the

‘scientific’ grasp of an object but rather on that of speech partners who come to an

understanding.”<sup>34</sup> For Taylor, this conversational approach applies to “all knowledge of the other

as such.”<sup>35</sup> Every partner in dialogue carries his or her own basic understandings of human life<sup>36</sup>

and must take a “frequently painful” journey that “passes through the patient identification and

undoing of those facets of our implicit understanding that distort the reality of the other.”<sup>37</sup> A

fruitful encounter creates “a language that bridges those of both knower and known... The

‘fusion’ comes about when one (or both) undergo a shift; the horizon is extended to make room

for the object that before did not fit within it.”<sup>38</sup>

### 3.1.2. Analytic Tools

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<sup>32</sup> *Ibid* at 18.

<sup>33</sup> Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992) at 67.

<sup>34</sup> Charles Taylor, “Understanding the Other: A Gadamerian View on Conceptual Schemes” in Jeff Malpas *et al*, eds, *Gadamer’s Century: Essays in Honor of Hans-Georg Gadamer* (Cambridge, Mass: MIT Press, 2002) 279 at 280. Dallmayr is also influenced by Gadamer, which helps explain the resonance in Dallmayr and Taylor’s work. See Fred Dallmayr, “Hermeneutics and inter-cultural dialog: linking theory and practice” (2009) 2(1) *Ethics and Global Politics* 23 (arguing that Gadamer’s approach can be helpful in the field of cross-cultural communication as a means of combating the “clash of civilizations” hypothesis).

<sup>35</sup> Taylor, “Understanding”, *ibid* at 280.

<sup>36</sup> *E.g.*, “our ordinary understanding of what it is to be a human agent, live in society, have moral convictions, aspire to happiness,” *ibid* at 284.

<sup>37</sup> *Ibid* at 285, 296.

<sup>38</sup> Taylor, “Understanding the Other,” at 287.

To aid in this process, Taylor argues, “[w]e need... a threefold distinction: norms, legal forms, and background justifications.”<sup>39</sup> These analytical distinctions allow for greater clarity in dialogue and 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, most would likely agree with the norm that the law should treat all individuals equally. But this 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. Some believe that equal treatment is justified on the basis that all are God’s creatures, while others prefer a non-theological justification. A successful dialogue around the shared norm would allow each participant insight into the other’s background justification, leading to a legal form that could accommodate them all while remaining open to future changes.

Dwight Newman expands upon Taylor’s distinction between norms and background justifications by differentiating “values” from “concepts.” Value-based differences represent a choice among values that may be incommensurable. On the other hand, concept-based differences deal with prior questions about how notions like “law” are conceived. 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>40</sup> How should those engaged in the dialogue

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<sup>39</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>40</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 as regards Catholics and Protestants. Arguably, this longstanding recognition that Canada has always been a country in which members of different religions came



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>41</sup> When it comes to value-based disagreements, after an attempt to “carefully understand the values of the other culture and seek ways of reconciling these values with one’s own,”<sup>42</sup> it may be that dialogue partners must leave their differences unresolved at a given time.<sup>43</sup> In other words, success in cross-cultural communication does not imply agreement. Rather, success turns on all parties maintaining two key values: respect for their partners and awareness of their own culturally contingent notions.

### 3.1.3. Respect

Authors from various disciplines emphasize the important role that mutual respect plays in facilitating cross-cultural communication.<sup>44</sup> Writing about translation—itsself a form of cross-cultural communication—James Boyd White emphasizes the importance of maintaining respect for diverging perspectives and recognizing their value. For White, the act of translation

recognizes the other... as a center of meaning apart from oneself... Good translation thus proceeds not by the motives of dominance or acquisition, but by respect. It is a

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together, provides a constitutional bedrock on which to build a theory of cross-cultural communication in the area of religious freedom. See Benjamin Berger, “The Cultural Limits of Legal Tolerance” (2008) 21 Can JL & Juris 245. at 248-249; see also Lori Beaman, “Is Religious Freedom Impossible in Canada?” (2012) 8(2) Law, Culture and the Humanities 266.

<sup>41</sup> Newman, *ibid* at 740.

<sup>42</sup> *Ibid* at 743.

<sup>43</sup> Ayelet Shachar has given detailed consideration to the institutional structures that might encourage such dialogues to be most sensitive to the needs of the most vulnerable members of minority groups, usually women and children, suggesting an approach she calls “transformative accommodation”: see Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001).

<sup>44</sup> See eg Ken Tsutsumibayashi, “Fusion of Horizons or Confusion of Horizons? Intercultural Dialogue and Its Risks” (2005) 11 Global Governance 103 at 111: “[m]utual trust and respect are the key to achieving a meaningful intercultural dialogue”; Parekh, *supra* note 16 at 240-241: “[w]e 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.” 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”: Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992) at 66.

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>45</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 different sets of concepts, values, and norms.

Respect, however, does not imply that those engaged in dialogue must refrain from all criticism of other cultures' norms. Rather, it requires an attempt to understand other background justifications and concepts before deciding to reject differing norms or legal forms.<sup>46</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 mould another in one's own image. For example, 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>47</sup> Maintaining the balance between legitimate criticism and a culturally specific standard requires those engaged in cross-cultural communication to have a strong sense of self-awareness, the value to which I turn next.

#### **3.1.4. Self-Awareness**

There is no individual who operates without culture, and remaining aware of one's own culturally contingent views is integral to effective cross-cultural communication.<sup>48</sup> Richard

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<sup>45</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>46</sup> Parekh, *supra* note 16 at 176-177.

<sup>47</sup> *Ibid.*

<sup>48</sup> Though this is something of a truism in contemporary discussions of multiculturalism, Wendy Brown argues that 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." Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006) at 150; Taylor, "Unforced Consensus," *supra* note 39 at 143; Sherene H. Razack, "The 'Sharia Law Debate' in

Brislin and Tomok Yoshida take a practical approach to developing and maintaining self-awareness.<sup>49</sup> They emphasize that those engaged in cross-cultural encounters must learn to be at ease with ongoing disagreement and multiple ways of seeing a similar issue.<sup>50</sup>

The ability to maintain awareness of one's own culture also requires the rejection of the notion of cultural purity, *i.e.* that one culture has developed in isolation from others. "[C]ultures have always been in contact,"<sup>51</sup> and levels of cultural hybridity are multiplied in countries with high rates of immigration.<sup>52</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. The notion of cultural purity can also serve to essentialize and oversimplify cultures that are not one's own, embedding the assumption that another's culture determines his/her behaviour, or that an individual or community is best understood with reference to their "culture." This line of thought exaggerates the distances between cultures and makes barriers to communication seem more overwhelming. Thus, though the field of cross-cultural communication studies owes its existence to cultural differences, a crucial aspect of maintaining self-awareness is being careful not to overstate those differences to the point of reification.

This detailed concept of self-awareness allows for more refined analysis in section 5 below. Before turning to that analysis, I develop the argument that cross-cultural communication provides a useful framework for analyzing legal disputes.

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Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture" (2007) 15 Fem Legal Stud 3 at 27.

<sup>49</sup> Other practically-minded authors also emphasize the importance of self-awareness and tolerance for ambiguity, sometimes under the labels of mindfulness and tolerance for uncertainty, see Brooks Peterson, *Cultural Intelligence: A Guide to Working with People from other Cultures* (Yarmouth: Nicholas Brealey Publishing, 2004) at 89-92; David C Thomas & Kerr Inkson, *Cultural intelligence: Living and working globally* (San Francisco: Berrett-Koehler Publishers, 2009) at chapter 3.

<sup>50</sup> *Ibid* at 31, 40.

<sup>51</sup> Martin & Nakayama, *ibid* at 59

<sup>52</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.

#### 4. Legal Culture as Participant in Cross-Cultural Communication

In this section, I build on Berger's claim that the meeting of law and religion is a cross-cultural encounter, examining the power relationships at stake in these dialogues and considering ways judges might best respond to religious freedom claims that involve alternative cultural viewpoints.

##### 4.1. The Nature of the Dialogue

When religious freedom claims are litigated, the dialogue about the claims involves several participants: the claimants, the opposing party (sometimes a government actor), the judge(s), witnesses called by the parties, and, sometimes, intervenors who provide the court with additional perspectives. The courts' power to enforce state norms makes any such dialogue asymmetrical.<sup>53</sup> The most obvious 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 often backed by the threat of the state's police power.

Relatedly, litigants and their counsel are required to observe particular requirements set by courts and legislatures when submitting their arguments and evidence to court. The court retains power over the parties to limit their representations throughout the case. This has a peculiar effect on dialogue. As Diana Eades notes,

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

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<sup>53</sup> Berger, *ibid* at 276.

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>54</sup>

The power relation also plays out through a set of prior commitments that serve to limit the range of successful arguments that can be made to courts. One such prior commitment of Canadian constitutional 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, by treating religion as a matter of choice, and by treating religion as essentially private.<sup>55</sup> When contrasted with alternative worldviews emerging from other cultural origins, it becomes clear that this individualistic approach is a facet of Canadian legal culture rather than an objective, neutral interpretation of religion. First, the deep collectivism of the Hutterite worldview, discussed in more detail below, reveals a view of religion at odds with the Court's focus on the individual aspects of religious practice. Employing Taylor's terminology,<sup>56</sup> the differences here arise both at the level of background justification and at the level of norms. Second, those who conceive of religion as a matter of choice approach the concept of religion quite differently from adherents of faith who ascribe spiritual consequences to matters outside their control, such as certain indigenous American religious traditions.<sup>57</sup> Third, the notion that religion should be restricted to the private sphere represents a value-based difference for those who believe that faith permeates all aspects of their lives and should govern their public and private selves, or for whom the

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<sup>54</sup> Diana Eades, "Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications" (2008) 20 *Current Issues in Criminal Justice* 209 at 211-212 (emphasis in original).

<sup>55</sup> Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45 *Osgoode Hall LJ* 277; see also Howard Kislowicz, "Freedom of Religion and Canada's Commitments to Multiculturalism" (2012) 31 *NJCL* 1. Lori Beaman presents an alternative vision, drawing a distinction between the subjectivization of religion and its individualization, see Beaman, *supra* note 40 at 277-279.

<sup>56</sup> See section 3.1.2.

<sup>57</sup> See David C Williams & Susan H Williams, "Volitionalism and Religious Liberty" (1991) 76 *Cornell L Rev* 769.

public/private distinction takes on a different meaning.<sup>58</sup> Indeed, in many parts of the world, religion is an integral part of public legal discourse.<sup>59</sup> Accordingly, Canadian law's individualistic approach is hardly a universal or neutral way to understand religion.<sup>60</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 religious practices, the legal tests associated with religious freedom (developed in *Amselem*) require that claimants first and foremost demonstrate a sincere belief, and then connect the practice at issue to that belief.<sup>61</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>62</sup> Following Winnifred Sullivan,<sup>63</sup> Beaman argues that this understanding has roots in Protestant Christianity. However, such a neat distinction between belief and practice is at odds with more practice-based religions or, more commonly, situations in which practice and belief are interwoven and neither is truly prior to the other.<sup>64</sup> Admittedly, there are significant distinctions between beliefs and practices;<sup>65</sup> however, the conceptual distinction and sense of sequence

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<sup>58</sup> Parekh, *supra* note 16 at 181-182, 201-202, 324.

<sup>59</sup> See Ran Hirschl, *Constitutional Theocracy* (Cambridge, U.S.A.: Harvard University Press, 2010).

<sup>60</sup> Brislin and Yoshida note that “[b]eliefs regarding the importance of the individual and importance of the group... tend to be highly emotional.” 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, Ascanio 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>61</sup> Beaman, *supra* note 40 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>62</sup> Beaman, *ibid* at 16.

<sup>63</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005).

<sup>64</sup> Beaman, *supra* note 40 at 17; see also James Boyd White, *From Expectation to Experience: essays on law and legal education* (Ann Arbor: University of Michigan Press, 1999) at 133-134.

<sup>65</sup> Parekh, *supra* note 58 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

(practices follow from beliefs) operates as an unspoken assumption that structures cross-cultural dialogues in religious freedom litigation, and the assumption is not shared equally by all participants.

In sum, the power imbalance between courts and litigants is played out on several levels. Courts can tell litigants what to do, and their orders can come with significant coercive threats. Courts also regulate the way in which the dialogue can be carried out by controlling the rules of evidence and procedure and by setting the terms of the discussion.

Is it possible to give voice to alternative expressions when the power relations are so imbalanced? James Boyd White draws attention to the role of the lawyer, who guides her client in crafting a story that is (ideally) 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... between them 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>66</sup>

In section 5.2.1 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 case studies, however, I examine the ways judges might best respond in the context of a cross-cultural encounter.

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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>66</sup> White, *Justice as Translation*, *supra* note 45 at 260-261.

#### 4.2. How is a Judge to respond?

Given the structural power imbalances of litigation, can judges act in a way that gives greater expression to the ideals of respect and self-awareness? Jeremy Webber proposes a judicial ethic designed to avoid claims of gender and cultural bias. He argues that the process of judgment ought to reflect a “rational search for normative reconciliation,”<sup>67</sup> ultimately producing a synthesis of the multiple perspectives relevant to the case. Webber notes that the reconciliation of opposing viewpoints “will often be impossible.”<sup>68</sup> His view of judgment, however, is not meant to produce a single conception of justice, once and for all. Rather, he self-consciously aspires to achieve that which he says is unattainable: a view of justice “that comprehends human experience in its entire range and diversity.”<sup>69</sup> When judges remain open to alternative normative perspectives, they are constantly reshaping the conception of justice to more closely approximate this ideal.

Webber’s judicial ethic assumes a process wherein norms are constantly contested and evolving.<sup>70</sup> From this vantage point, even though a 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. While judges may have powerful voices, other actors can nonetheless continue the conversation 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

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<sup>67</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>68</sup> *Ibid* at 87-88.

<sup>69</sup> *Ibid* at 93.

<sup>70</sup> This echoes Taylor’s work described in section 3.1.1. There is also a resonance here with cross-cultural communication scholars who take either a “co-culturation” or dialectical approach to cultural production. In both these views, cultures are constantly evolving, see Curtin, *supra* note 52 at 277-278; 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



government-sponsored initiatives.<sup>71</sup> The contest extends further still, as cultural communities, professional associations, academic commentators, media organizations, and other social groups respond to the judicial decisions in their own ways.<sup>72</sup>

This ongoing contest may reflect the “inherently indeterminate” nature of the complex reasoning involved in resolving normative conflicts linked to cultural differences.<sup>73</sup> More optimistically, it can also be taken to indicate openness to new ideas and potential for mutual change arising from dialogue. Becoming comfortable with this ongoing contest may be a key to participating effectively in the dialogue. In this respect, one lesson of cross-cultural communication for judges is that their decisions are final only as far as the law is concerned. The impact of the particular decision and its future applications will likely be a matter of further contest and dialogue between legal institutions, communities, and individuals. Maintaining this humility stems from the more general values of respect and self-awareness identified above; courts must respect the independent agency of the parties before them, and remain aware that the authority of their decisions is an aspect of the prevailing constitutional culture rather than a culturally neutral attribute.

## **5. Cross-Cultural Communication in the Data**

Having examined general considerations related to cross-cultural dialogue and some concerns more specific to the legal context, I now apply these insights to the data collected for

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<sup>71</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>72</sup> See Martha Minow, “Pluralisms” (1988) 21 *Conn L Rev* 965; Shauna Van Praagh, “Identity’s Importance: Reflections of – and on – Diversity” (2001) 80 *Can Bar Rev* 605.

<sup>73</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 31.

the three cases under review. The discussion below will consider some of the cross-cultural encounters leading up to litigation, and analyze the dialogue that occurred in the context of the litigation process. The very nature of this process creates a structural obstacle for meaningful exchange as parties are expected to behave as adversaries; for this reason, the encounters that occurred between the opposing parties were often marked by a lack of respect or self-awareness. Nevertheless, exploring in detail how religious freedom claimants sought to make themselves understood to opposing parties and to the courts reveals significant moments of cross-cultural communication. I will argue that the values of respect and self-awareness were crucial in determining the success of a cross-cultural exchange. A consideration of these narratives demonstrates that litigants often attribute their lack of success to a court's misunderstanding of their cultural practices. It can be challenging to distinguish a litigation failure from a communication failure. One might expect an unsuccessful litigant in any case, whether or not it involves cross-cultural communication, might feel that the court did not understand their perspective. For this article, a failure of cross-cultural communication is found when there is evidence that a Court has deliberately avoided engaging with an unfamiliar cultural practice or demonstrates that it does not take the practice – rather than its regulation – on the terms presented by the practitioners. In other words, I believe it possible for a court to communicate effectively across a cultural barrier while finding against a religious freedom claimant. In the cases under review, however, I find that the more effective cross-cultural communication is to be found where the religious freedom claimants were successful.

### ***5.1. Amselem***

As noted above, *Amselem* centred on the installation of *succhoth* in a condominium complex in apparent contravention of the complex's bylaws. *Succhoth* are huts with leafy or other

vegetative roof coverings, a remembrance of the temporary dwellings the Israelites used en route from Egypt to Canaan. Some Jews erect *succhoth* during the annual eight-day holiday of *Succhoth*. A central dispute at trial was whether there was a Jewish obligation to erect one's own *succah* or whether using a communal *succah* would suffice.

One litigant described his experience at a meeting of the co-owners of his building prior to the litigation in *Amselem* in profoundly negative terms. He felt that he had been treated as a religious fundamentalist, a “Khomeini.”<sup>74</sup> He viewed this as a moment of misrecognition by the other co-owners that made him wish never to return to a co-owners meeting. It is apparent that the litigant did not feel that he had been accorded respect required for a successful cross-cultural exchange. This may partially account for the escalation of the dispute. Indeed, according to the litigant, his interactions with the condo board of co-owners left him feeling a “scent of anti-Semitism,”<sup>75</sup> which contributed to his decision to pursue litigation. As an example of this, he pointed to the condo board'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>76</sup> Interestingly, as can be seen in these passages, the litigant drew on his own culturally-based perceptions of who qualifies as a villain, *ie* Hussein and Khomeini, to communicate to the interviewer his feeling of having been treated unfairly.

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<sup>74</sup> Litigant 2 Interview. This interview was conducted in French, hence the absence of direct quotations in this article.

<sup>75</sup> *Ibid* (author's translation).

<sup>76</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, a transcript of a co-owners' meeting submitted to the courts supports the litigant's claim that the condo board took this position in the events leading to the litigation. There, the condo board 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*).

### 5.1.1. Adversarial Dialogues

The litigation began with the parties exchanging affidavits, and each witness was then cross-examined by opposing counsel. In this context, counsel for condo board demonstrated some of the skills and values associated with successful cross-cultural communication. 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>77</sup>

Displaying his inquisitiveness, counsel sought clarification regarding the internal complexities of Montreal's Jewish community, specifically the differences in *succah* practices between Sephardic and Ashkenazi Jews.<sup>78</sup> This spirit of openness led to some poignant moments of cross-cultural communication. For example, in order to explain the holiday of *Shemini Atzereth*, which immediately follows the *Succoth* holiday but is not technically part of *Succoth*,<sup>79</sup> one litigant explained that he continued to use the *succah* during those days to express his desire to be near to God. This element of his practice is meant to express: "we want to stay one more day with You, God... we don't want to leave abruptly... like someone accompanying a departing king."<sup>80</sup> The analogy to the departing king makes an unfamiliar cultural practice accessible to opposing counsel.

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<sup>77</sup> *Amselem*, *supra* note 1 (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 Klein, 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). Counsel went on to ask a series of questions about the history of each litigant's *succah* practice. 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>78</sup> *Ibid* (Cross-examination of Moïse Amselem, 3 February 1998, Respondent's Record Vol 1, at 281-283), author's translation.

<sup>79</sup> See *ibid* (Expert Report of Rabbi B. Barry Levy, Ph.D., at 2, Appellants' Record Vol 2 at 323).

<sup>80</sup> *Ibid* (Cross-examination of Moïse Amselem, 3 February 1998, Respondent's Record Vol 1, at 308) author's translation.

If these conversations were held outside the litigation context, counsel for the condo board might be read simply as curious, seeking to understand the meaning of the *succah* to the litigant. But the litigation context alters that dynamic. In addition to learning about the holiday and community,<sup>81</sup> opposing counsel sought to draw out inconsistencies in the litigants' religious practice or other weaknesses in their case. For example, counsel for the condo board 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 *succoth*.<sup>82</sup> Of course, the condo board's counsel cannot be faulted for all this. It was his professional obligation 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.

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 in section 4.1, that practices and beliefs are neatly distinguishable. He

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<sup>81</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 *Succoth* 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>82</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).

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 condo board’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>83</sup> A similar exchange occurred when opposing counsel asked a different witness about the *mezuzah*<sup>84</sup> he has affixed to his doorpost:

Q- What message does [the *mezuzah*] 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>85</sup>

The communication difficulties in these exchanges suggest that the “belief before practice” paradigm was not a perfect fit for at least some of the litigants. In Newman’s terminology, this represents a conceptual difference regarding the relationship between norms and their background justifications. Though the two are related in the litigants’ accounts, the relationship is not linear; practice and belief reinforce one another, neither is prior to the other.

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 some variations in approach amongst the *succah*-building litigants, with at least one narrative

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<sup>83</sup> *Ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent’s Record Vol 1, at 205-206).

<sup>84</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>85</sup> *Amselem*, *supra* note 1 (Cross-examination of Thomas Klein, 29 January 1998, Respondent’s Record Vol 1, at 264).

fitting more closely into the belief-begetting-practice paradigm. However, the litigant and opposing counsel also engaged in a prolonged discussion regarding whether the litigant had a religious obligation to eat warm food on *Succoth* or if he could rather satisfy his religious obligations by eating cold food. After a series of oblique answers, finally the litigant said: “It’s part of the holiday . . . On a holiday you must make things as pleasant as possible for you and for the Lord.”<sup>86</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, “the *succah* envelops the human being in its entirety, in its body and in its soul.”<sup>87</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>88</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>89</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 that “there is no symbolic meal,” and went on to discuss

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<sup>86</sup> *Ibid* at 344, author’s translation.

<sup>87</sup> *Ibid* at 286, author’s translation.

<sup>88</sup> *Amselem, ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent’s Record Vol 1, at 211).

<sup>89</sup> *Ibid*.

some of the minutiae of what constitutes a meal in Jewish law (30 grams of bread, in the litigant's account).<sup>90</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>91</sup> The exchanges in these instances suffer because the condo board's counsel attempted to impose categories from the state legal culture's understanding of religion onto the litigants' religious practices.

Once the matter moved to the courts, the litigants' counsel 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 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>92</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... of what a Catholic

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<sup>90</sup> *Ibid* (Cross-examination of Moïse Amselem, 3 February 1998, Respondent's Record Vol 1 at 300, author's translation). The litigant reiterated his view several times that "il n'y a pas de symbolisme dans le judaïsme," at 302, 303.

<sup>91</sup> *Ibid* (Cross-examination of Thomas Klein, 29 January 1998, Respondent's Record, Vol 1 at 236-237).

<sup>92</sup> *Ibid* (Transcript of Oral Argument, Steven Slimovitch for B'nai Brith Canada at 23).



obligation is.”<sup>93</sup> Here, 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. Nonetheless, the reference to Catholicism might have helped judges with a Catholic or other Christian background understand what was at stake for the Jewish 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.” Opposing counsel’s adoption of overly simplistic accounts of Jewish rituals resulted in communicative failures in some of these exchanges. For instance, after one rabbi 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 condo board countered that another rabbi lived in the condominium complex in just such a situation.<sup>94</sup> Counsel here implied that the rabbi serving as an expert witness adopted an unusual interpretation of the *succah* obligation. Applying a converse tactic, counsel for B’nai Brith Canada asked a question to the condo board’s expert witness that emphasized the differences between Sephardic and Ashkenazi observances of *Succhoth*.<sup>95</sup> To this, the condo board’s rabbi replied: “There are frequently minor differences... I think that what we’re talking about is basically applicable in both communities.”<sup>96</sup> Both of these lines of questioning demonstrate an oversimplification of practices within the Jewish community; the first glosses over the internal diversity of Jewish practice, the second overstates the differences found along

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<sup>93</sup> *Ibid.*

<sup>94</sup> *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>95</sup> *Ibid* (Cross Examination of Barry Levy, 17 March 1998, Appellants’ Record Vol 2 at 306).

<sup>96</sup> *Ibid* at 306-307.

intra-communal lines. Perhaps unconsciously, these reductionist accounts represent both a lack of respect and a lack of self-awareness. In a more ideal form of cross-cultural communication counsel would have reflected on their own cultures and realized that such easy narratives fail to capture most lived cultural experiences.

The Supreme Court's position on expert testimony in religious freedom cases may limit opportunities for cross-cultural dialogue. In *Amselem*, 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 to avoid a dispute regarding religious doctrine, it has also impoverished the opportunity for cross-cultural dialogue in litigation. On balance, I agree with Supreme Court's choice in *Amselem*; nevertheless, it is worthwhile to reflect on its costs.

### **5.1.2. Judicial Responses**

In some instances, counsel experienced difficulty in explaining religious practices to the bench. One lawyer explained:

especially in the Superior Court, you got the impression that the judge was saying, "Look... is there not a rule book? Give me the damn 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... yes, there are hierarchy of rules, but... there is no hierarchy

of rule-making, or rule-deciding... So we don't have the same system, so what do you do?<sup>97</sup>

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 measured against the standard of rationality. I suggest that the trial judge's effort to come to terms with Jewish law was an unsuccessful moment of cross-cultural communication. In his encounter with a religious legal culture, he used his position of power to define the "objective" limits of the *succah* practice, concluding that the installation of a *succah* on one's own property is an optional practice in Judaism.<sup>98</sup> By imagining that such an objective limit exists, the trial judge neglects the fluidity of cultural practices within religious groups and, I believe, shows insufficient respect and openness to the religious claimants' perspectives. The decision therefore does not embody the values of successful cross-cultural communication. It is perhaps precisely because of the risk that deeper engagement with an unfamiliar cultural will lead courts into making this kind of pronouncement at this kind of conclusion that the Supreme Court preferred the thinner dialogue described above.

But what does the Supreme Court's 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 *succoth*.<sup>99</sup> It would be troubling, from the perspective of cross-cultural communication, to imagine that the court applied this individualist paradigm to 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

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<sup>97</sup> Lawyer 1 Interview.

<sup>98</sup> *Syndicat Northcrest c Amselem*, [1998] RJQ 1892 at para 94.

<sup>99</sup> Berger, "Cultural Limits", *supra* note 40 at 265-266.

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>100</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>101</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 as well as 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 practitioners and more about the fact that the practice mattered to them at all. Cross-cultural communication in *Amselem* is deliberately thin and remains unconcerned about the nuances of religious experience. While this does leave some “real liberty” for religious practitioners,<sup>102</sup> it is disconcerting that success depends in part on framing a religious practice as consistent with a liberal ethos.

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<sup>100</sup> *Amselem*, *supra* note 1 (Transcript of Oral Argument, Julius Grey for *Amselem et al*, at 2).

<sup>101</sup> *Ibid* (Transcript of Oral Argument, David Matas for B’nai Brith Canada, at 16).

<sup>102</sup> Berger, “Cultural Limits,” *supra* note 40 at 266.

### 5.1.3. 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: “all of the judges who rendered judgments in this case were right.”<sup>103</sup> The 13 judges<sup>104</sup> who heard this case at its various stages of appeal 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 internalizing the judgments, the litigant put them into his own culturally familiar terms: “when we read the judgment, it was a course in Talmud, a course in Gemarrah, it’s extraordinary the way that one says yes, the other [says no], I find the justice in this country magnificent. People are well informed, and bravo! ... One must be proud of this.”<sup>105</sup> This framing of the judgments reiterates the necessary translation that individuals perform on texts in order to ascribe them meaning.<sup>106</sup> It is likely that this positive attitude was influenced 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 condo board of co-owners.

## 5.2. *Multani*

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<sup>103</sup> Litigant 2 Interview, author’s translation.

<sup>104</sup> 14 if the judge presiding over the interim injunction proceedings is included.

<sup>105</sup> Litigant 2 Interview, author’s translation.

<sup>106</sup> See Robert Cover, “*Nomos and Narrative*” in Martha Minow *et al*, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) 95.

Whereas the dispute in *Amselem* focused on the existence of a particular religious obligation, the communicative difficulties faced by the *Multani* litigants related principally to the characterization of the *kirpan* as a weapon. This difficulty was experienced from the moment that the school principal became aware of the *kirpan*:

the principal came up to me... she called me out of the class... and she started asking me if I have a knife on me. I was like, I don't have any knife... 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>107</sup>

Following this exchange, 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>108</sup>

This dialogue proved fruitful. The principal and the family reached an agreement that the *kirpan* would be secured in a particular way. 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... 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... if we accept that, then I'm giving up... [the] whole thing.<sup>109</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 gurudwara committee... we believe we can solve things by talking, right, dialogue? So, they tried to talk 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>110</sup>

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<sup>107</sup> Litigant 1 Interview.

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

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

<sup>110</sup> *Ibid.*

### 5.2.1. Adversarial Dialogues

Communication problems continued after the *Multani* litigants retained counsel. 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... 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 they just didn't listen to us.<sup>111</sup>

Though school officials certainly 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.

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>112</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>113</sup> Moreover, in an apparent effort to bridge the 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>114</sup>

The oral arguments put forth by the Multanis' counsel contained similar themes. In his narrative of the emergence of the Sikh religion, he emphasized the values Sikhism shares with

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

<sup>112</sup> See Valerie Stoker, "Zero Tolerance? Sikh Swords, School Safety, and Secularism in Québec" (2007) 75(4) *Journal of the American Academy of Religion* 814.

<sup>113</sup> *Multani*, *supra* note 2 (Affidavit of Manjit Singh, March 25, 2002, Application for Leave to Appeal, Vol 1 at 61).

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

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>115</sup> Moreover, Sikhs are in favour of integration, rather than separation.<sup>116</sup> 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 school's governing body for not attempting to have a dialogue with Sikh students. 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 that Brousseau had not attempted to speak with Sikh students before reaching this conclusion.<sup>117</sup> In other words, the Multanis' counsel characterized the school officials' behaviour, in part, as a failure of cross-cultural communication.

In addition, it was significant that counsel who represented the intervening World Sikh Organization (WSO) was personally familiar 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 lawyer.<sup>118</sup> Counsel for the WSO noted that sharing common ground with both the litigants and their counsel helped make the litigants more comfortable. This also aided in the development of the legal case:

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<sup>115</sup> *Ibid* (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* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 15, Appellant's Record before SCC Vol 2 at 262).

<sup>117</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>118</sup> Litigant 1 Interview. The litigant also noted that this served to help limit the legal fees payable to his own counsel.



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... [the litigant's counsel] and I had a close enough relationship that we understood that... we were both on the same side and we trusted each other's instincts... I could guide [the litigant's counsel] and direct him, or where there were holes that he needed I would help him or... where there were things that... he thought I was missing we would talk about those.<sup>119</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... 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>120</sup>

Borrowing from Newman and Taylor's terminology discussed in section 3.1.2, the WSO's effort at cross-cultural communication emphasized that what may have appeared to be a concept-based difference regarding the classification of the *kirpan* was actually a category mistake made by the school officials. In their argument, the shared values between the two cultures should lead to the adoption of a legal form that would allow students to wear their *kirpans*.

### **5.2.2. Engaging Judges**

It is difficult to gauge the effectiveness of efforts to bridge the cultural gaps between Sikh culture and the state legal culture at the trial level. The ruling from Justice Grenier is short and contains only the terms of an apparent settlement between the parties.<sup>121</sup> However, in one exchange between the trial judge and counsel, it is possible to detect the court's impatience for

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<sup>119</sup> Lawyer 3 Interview.

<sup>120</sup> *Ibid.*

<sup>121</sup> The Council of Commissioners nonetheless appealed, arguing that it had never actually agreed to the accommodation contained in the judgment.

the perceived ambiguities in Sikhism. When counsel displayed 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>122</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 community,<sup>123</sup> and he had also argued that religious beliefs were not subject to rational scrutiny.<sup>124</sup> In responding to this particular question, counsel merely asked for time to confer with his clients.<sup>125</sup> In this instance counsel 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: "perhaps for your clients a *kirpan* is not a knife, but it is primarily a knife."<sup>126</sup> Nevertheless, Justice Grenier encouraged the parties to arrive at a mutually acceptable solution,<sup>127</sup> withdrawing herself from the dialogue to some degree and inviting the parties to dialogue directly with each other.

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<sup>122</sup> *Multani*, *supra* note 2 (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).

<sup>123</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>124</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>125</sup> *Multani*, *ibid* (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 134, Appellant's Record before SCC Vol 2 at 381).

<sup>126</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), author's translation.

<sup>127</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.

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>128</sup> it rejected the proposition that a *kirpan* is not a weapon. The majority remarked that the *kirpan*, “[s]tripped of its symbolic religious significance... has all of the physical characteristics of an edged weapon.”<sup>129</sup> This stripping of context 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, demonstrating a lack of self-awareness.

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 assist the Court in maintaining self-awareness. This was achieved mainly 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...: a compass, a baseball bat, gym equipment, lab equipment which may be used to set fires, an automobile which is used for excursions.”<sup>130</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>131</sup> Counsel responded by reiterating the culturally contingent attitudes towards sharp objects:

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<sup>128</sup> *Commission Scolaire Marguerite-Bourgeois v Singh Multani*, [2004] RJQ 824, 241 DLR (4th) 336 (Qc CA) at para 70.

<sup>129</sup> *Ibid* at para 89.

<sup>130</sup> *Multani*, *supra* note 2 (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>131</sup> *Ibid*.

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 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>132</sup>

Later, the Multanis' counsel again used analogies as a means of cross-cultural communication. Counsel described the *kirpan* as symbolizing resistance to oppression, drawing links to cultural artefacts with which judges of the Court would be familiar, such as the lyrics to *O Canada* and *La Marseillaise*.<sup>133</sup> Further, echoing an argument advanced in *Amselem*,<sup>134</sup> 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 [a police officer] wore a turban then, somehow, Canadians would not have respect for him.<sup>135</sup>

### 5.2.3. 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>136</sup> For the *Multani* litigants, the Supreme Court functioned as a translator to the general public:

Before... 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>137</sup>

Perhaps because of his eventual success, the litigant was able to frame the longer narrative in similarly positive terms, including cross-cultural encounters he experienced after the decision:

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid* at 22-23.

<sup>134</sup> See section 5.1.1.

<sup>135</sup> *Ibid* at 11.

<sup>136</sup> *Multani*, *supra* note 2 at para 3.

<sup>137</sup> Litigant 1 Interview.

I went to few shops... 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>138</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 afterwards 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... 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 eight 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.

...

I thought they did it, and we were profoundly grateful that we lived in a country where we could make such arguments and have such depth of understanding with judges who... [are] not necessarily living with Joe Average and all that but who understood what Joga Singh Average was thinking and feeling.<sup>139</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>140</sup> Beaman underlines the Court's separation of belief and practice.<sup>141</sup> However, the participant narratives explored here

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<sup>138</sup> *Ibid.*

<sup>139</sup> Lawyer 3 Interview.

<sup>140</sup> Berger, "Cultural Limits," *supra* note 40 at 260.

<sup>141</sup> Beaman, *supra* note **Error! Bookmark not defined.** at 283.

<sup>142</sup> This unusual pattern of property ownership has emphasized Hutterite difference and led to some disputes with

demonstrate 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 treated 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 be viewed as a significant moment in cross-cultural communication.

### **5.3. *Wilson Colony***

In *Wilson Colony*, a group of Hutterian Brethren challenged a provincial regulation that made driver's licence photos universally mandatory. For some 27 years the province had maintained a religious exemption to this requirement. Some Hutterites, including the Wilson Colony members, believe that the Biblical Second Commandment prohibiting graven images applies to all imagery. On this basis, they refrain from taking photographs or being photographed. They had long availed themselves of the religious exemption to photography. This allowed Colony members to conduct all aspects of the colony's agribusiness, an instantiation of their collectivist worldview.

Of the three cases under review, *Wilson Colony* represents the most challenging instance of cross-cultural communication. While Hutterite scriptures are likely familiar to many members of the Canadian judiciary, their interpretative differences from mainstream Christianity set them apart. Their religious worldview leads Colony members to live in purposeful isolation, and their collectivist lifestyle is expressed in communal property ownership,<sup>142</sup> accomplished through the

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<sup>142</sup> This unusual pattern of property ownership has emphasized Hutterite difference and led to some disputes with neighbouring landowners. A publication from the 1960s included in the litigation documents is a remnant from such a dispute: *Wilson Colony*, *supra* note 3 (Exhibit B to the Affidavit of Samuel Wurz, Affirmed 10 August 2005,

legal form of the corporation.<sup>143</sup> Though land ownership was not at issue here, Hutterite collectivism was, and was not given full respect by the majority of the Supreme Court. Before addressing judicial responses, however, I examine the dialogue that occurred between the Wilson Colony and the government of Alberta.

### 5.3.1. Adversarial Dialogues

A first challenge for the Wilson Colony's counsel was to locate an appropriate source text. This was literally a problem of translation, as the Hutterites use German language biblical texts for prayer and study. It was crucial, according to counsel, to find an English version that accurately reflected the content of the German text:

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 I understood what their interpretation was and which edition... it was that they followed. Of course they had the German one, but it is roughly translated out by the King James version... the difference between the King James [version] of the Second Commandment and some of the other versions... was fairly critical.<sup>144</sup>

The affidavits display efforts to explain the Colony's religious beliefs and practices to the courts. Notably, before dealing with the prohibition on photographs, one litigant's affidavit described the communal nature of the colony:

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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. 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>143</sup> For a case holding that Hutterite colony members can be validly excluded from the colony without compensation, see *Hofer et al. v. Hofer et al.*, [1970] SCR 958; see also Howard Kislowicz, "Judging the Rules of Belonging" (2011) 44(2) UBC L Rev 287.

<sup>144</sup> Lawyer 4 Interview. This issue also arose in cross-examination. The Wilson Colony materials 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... But in our German bible there is the Wisdom of Solomon in there." *Wilson Colony, 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.

I am a member in good standing of the Hutterian Brethren of Wilson Colony, which is a religious communal organization... 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>145</sup>

In a later affidavit, the litigant explained further:

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>146</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 affidavit provides a more detailed description of the religious import of communal living to the Hutterites:

the idea of love –brotherly togetherness and sharing... was at the very center of Jacob Hutter's [the founding figure of the group for whom it is named] 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>147</sup>

The affidavit then explains the specific prohibition on photography with direct reference to biblical text:

the Hutterian Brethren believe that Commandment No. 2 of The Ten Commandments prohibits the capture of one's image... [and] allowing their photographs to be taken willingly... 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>148</sup>

The litigant also noted that at one point some Colony members had photo driver's licences, an apparent inconsistency in the Wilson Colony's religious practice. The litigant stated that he

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<sup>145</sup> *Ibid* (Affidavit of Samuel Wurz, 10 August 2005, Appellant's Record at 191).

<sup>146</sup> *Ibid* (Affidavit of S. Samuel Wurz, 10 November 2005, Appellant's Record at 215).

<sup>147</sup> *Ibid* (Robert Friedmann, *The Christian Communism of the Hutterite Brethren*, Exhibit "A" to the Affidavit of Affidavit of Samuel Wurz, 10 August 2005, Appellant's Record at 200-201).

<sup>148</sup> *Ibid* (Affidavit of Samuel Wurz, 10 August 2005, Appellant's Record at 192).



was “shocked to learn” of this.<sup>149</sup> He explained 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 with 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>150</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>151</sup> One might surmise that this paragraph was drafted in conjunction with legal counsel. This leads to a claim more intelligible to a state court, especially when contrasted with an earlier letter drafted by a group of Hutterites that relied principally on biblical verses to construct an argument against the universal photo requirement.<sup>152</sup>

Despite these efforts to make the Hutterite claim comprehensible, 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>153</sup> He then applied this distinction to the driver’s licence context:

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<sup>149</sup> *Ibid* (Affidavit of Samuel Wurz, 18 January 2006, Appellant’s Record at 303).

<sup>150</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>151</sup> *Ibid* (Affidavit of Samuel Wurz, 10 August 2005, Appellant’s Record at 193).

<sup>152</sup> *Ibid* (Exhibit “F” to the Affidavit of Samuel Wurz, 10 August 2005, Appellant’s Record at 207).

<sup>153</sup> *Ibid* (Cross-Examination of Samuel Wurz, 2 February 2006, Appellant’s Record, Vol 5, at 670).

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... and that ... having a license with your photo on it... would not contradict that aspect of your concerns about idolatry and images?<sup>154</sup>

The Hutterite witness resisted these analytical categories, saying: “if you contradict one Commandment you are trespassing the rest of the Commandments.”<sup>155</sup> Counsel pursued the notion further, and was met by the same resistance:

Q: ... 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?...

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>156</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 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>157</sup>

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<sup>154</sup> *Ibid* at 674.

<sup>155</sup> *Ibid* (Appellant's Record, Vol 5, at 675, 681-684).

<sup>156</sup> *Ibid* (Cross-Examination of Samuel Wurz, 2 February 2006, Appellant's Record, Vol 5, at 679, 681).

<sup>157</sup> *Ibid* at 690.

In argument before the Supreme Court, counsel for the Albertan government did demonstrate 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.<sup>158</sup>

At other points in the argument, counsel attempted to discredit the evidence of the Wilson Colony members, who claimed that having driver's licences was essential for their community's survival. 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... [W]e 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>159</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* (the "reasonable limits" provision).<sup>160</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.

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<sup>158</sup> *Wilson Colony, ibid* (Transcript of Oral Argument, Rod Wiltshire for Alberta, at 2).

<sup>159</sup> *Ibid* at 13. This echoes the technique applied by counsel for the condo board in the *Amselem* litigation, discussed in Section 5.1.1.

<sup>160</sup> *Wilson Colony, ibid* (Transcript of Oral Argument, K Gregory Senda for Wilson Colony, 46-75).

Indeed, counsel for the Wilson Colony also spent a significant portion of their written submissions pursuing the argument that fundamental freedoms should not be infringed without debate in the legislature. In this view, the abolition of the religious exemption to the driver's licence photo requirement was invalid because the executive implemented it by regulation without legislative debate.<sup>161</sup> The Supreme Court rejected this argument. That counsel would spend so much time on this point when their clients find engagement in the democratic process problematic (for example, they do not vote)<sup>162</sup> suggests that counsel felt compelled to pursue an argument that would have made little sense to their clients.<sup>163</sup>

Interestingly, counsel for two of the intervener organizations—the Evangelical Fellowship of Canada and the Christian Legal Fellowship<sup>164</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>165</sup> Such a 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's articulation, those values share liberalism's concern for the individual; counsel for the interveners sought to

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<sup>161</sup> *Ibid* (Wilson Colony Factum at 14-18).

<sup>162</sup> Litigant 4 Interview.

<sup>163</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.

<sup>164</sup> According to an interview participant, these organizations did not make contact with the Hutterian Brethren before making their submissions: Litigant 4 Interview.

<sup>165</sup> *Wilson Colony*, *supra* note 3 (Transcript of Oral Argument, Charles Gibson for the Evangelical Fellowship of Canada and the Christian Legal Fellowship at 88).

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 in a religious text or artefact.

### **5.3.2. Judicial Responses**

The Court of Queen's Bench was attentive to the Wilson Colony's concern with being photographed. Justice Lovecchio noted two accommodations proposed by the province. The first 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>166</sup> Justice Lovecchio was not impressed with these proposals, 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>167</sup> At the same time, however, he offered only an abbreviated discussion in his decision of the Hutterites' communalism.<sup>168</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 self-awareness, the Court of Queen's Bench was sceptical of the government's description of the legislation's objective. Of course, courts frequently adopt such a posture, and being sceptical 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

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<sup>166</sup> *Hutterian Brethren of Wilson Colony v Alberta*, 2006 ABQB 338 at paras 21-22.

<sup>167</sup> *Ibid* at para 23.

<sup>168</sup> *Ibid* at para 2.

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 can 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 sceptical 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...

Given their communal way of life, the inability to drive would... 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>169</sup>

In contrast, Justice Slatter's dissenting judgment at the Court of Appeal was less sceptical of the government's position, pointing out that its evidence on identity fraud was uncontradicted.<sup>170</sup> Moreover, Justice Slatter supported his decision by referring to other jurisdictions where photos are required on driver's licences and no exemption exists.<sup>171</sup> In this way, Justice Slatter's opinion took comfort in views from the legal cultures of other liberal states which are likely congruent in a broad sense with the court's own cultural background. The dissenting judgment's largest failure of cross-cultural communication, however, is the manner of

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<sup>169</sup> *Hutterian Brethren of Wilson Colony v Alberta*, 2007 ABCA 160 at paras 6, 54.

<sup>170</sup> *Ibid* at paras 65-68.

<sup>171</sup> *Ibid* at para 80.

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... 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>172</sup>

Though Justice Slatter purported to deal with the religious obligation "on its own terms,"<sup>173</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, the effects of the photo requirement on Hutterite communalism were not considered as an infringement of religious freedom, but as a factor to take into account in the proportionality analysis.<sup>174</sup> In this way, the majority failed to fully understand and respect the religious dimensions of the Wilson Colony's communalism. This demonstrates that the Wilson Colony's loss at the Supreme Court was about miscommunication in addition to disagreement. Perhaps in part because of this communicative failure, the majority did not properly anticipate the colony's reaction to its ruling. The majority opined that the costs on the Colony would be financial: hiring non-members to perform the necessary driving tasks for the colony.<sup>175</sup> However, instead of contracting out driving services,

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<sup>172</sup> *Ibid* at para 116.

<sup>173</sup> *Ibid* at para 118.

<sup>174</sup> *Wilson Colony*, *supra* note 3 at para 31. In contrast, at para 118, Justice Abella's dissenting opinion emphasized the religious nature of both aspects of Hutterite belief and practice.

<sup>175</sup> *Ibid* at para 97.

some colony members decided to compromise their religious beliefs and have their photos taken, while others chose to accept the penalties associated with driving with expired licences.<sup>176</sup>

Perhaps more worrisome for future cases is that the majority decision in *Wilson Colony* sets up a legal 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.<sup>177</sup> 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. There may be political reasons for compromise, but this prospect is cold comfort for minority populations with little political clout. In contrast, Justice LeBel's dissenting opinion held that courts should 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>178</sup> This framework is more likely to encourage dialogue between governments and minority religious groups as legislatures will expect judicial review to involve more scrutiny.

### 5.3.3. Litigant Reflections

The litigants interviewed attributed their loss at the Supreme Court to a failure of communication. One litigant explained:

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>179</sup>

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<sup>176</sup> Litigant 3 Interview; Litigant 4 Interview.

<sup>177</sup> See Benjamin L Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 SCLR (2d) 25; Sara Weinrib, "An Exemption for Sincere Believers: The Challenge of *Alberta v. Hutterian Brethren of Wilson Colony*" (2011) 56 McGill LJ 719.

<sup>178</sup> *Wilson Colony*, *supra* note 3 at para 196.

<sup>179</sup> Litigant 3 Interview.



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>180</sup> In this perspective, to be treated "just like everyone else" represents a failure to take into account the Hutterites' religious and cultural needs.<sup>181</sup> In an alternative formulation provided by another litigant: "it seems like we're a nobody."<sup>182</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.

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... we would gladly do that."<sup>183</sup> In other words, though the Wilson Colony members prefer an isolated life in many respects, they are pleased to engage with non-Hutterites 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>184</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:

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<sup>180</sup> *Ibid.* On the particular harm attendant on such misrecognition, see Charles Taylor, *Multiculturalism and the Politics of Recognition*, *supra* note 33 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>181</sup> In the context of an analysis of the concept of relative difference, Martha Minow notes: "Accommodation 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": Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) at 11.

<sup>182</sup> Litigant 4 Interview.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.* There is a diversity of opinion among Hutterites regarding the appropriateness of access to technologies such as the Internet. There is even a blog maintained by and about Hutterites, online: "Hutterian Brethren", <[www.hutterites.org](http://www.hutterites.org)>.

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... the Supreme Court ruled that you have to have a photo on your driver's licence, and there's no other way out.<sup>185</sup>

For government officials, the Supreme Court's decision signalled 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:

“we're not gonna take a photo.”<sup>186</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... so maybe we can talk some sense into him.”<sup>187</sup> To my knowledge, no new agreement has been reached since Alberta's current premier, Alison Redford, took office in October 2011.

## 6. Conclusions

Participant narratives recurrently raised the theme of cross-cultural communication. This theme was also prominent in the litigation documents. In all the cases under review, litigants sought to explain a norm of religious practice by reference to the background justifications and values that underpinned them. In *Amsalem*, those who sought the right to build their own *succhoth* situated the practice against the background justification of a system of biblical commandments that orient their lives. The values offered to make sense of the practice included anti-materialism and humility before a supreme being. The claimants addressed the dispute between the parties about the nature of the practice – whether one was obliged to build a *succah* on one's own

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<sup>185</sup> Litigant 4 Interview (emphasis added). While the language here is perhaps ableist, the expression conveys the litigant's perception of not being heard or understood.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

balcony – with reference to the value of maintaining a joyous atmosphere around the holiday. In *Multani*, the claimants presented the *kirpan* practice as congruent with values adopted by Canadian constitutional culture: resistance to oppression, defending the defenseless, and the protection of minorities. More general values associated with Sikhism – sexual equality and cultural integration – were also drawn on to situate and familiarize the *kirpan*. In *Wilson Colony*, the practice of avoiding photographs and imagery was explained in reference to a shared cultural artefact – the Ten Commandments – but also with reference to the value of anti-idolatry and the background justification of obedience to God. The Colony members also sought to connect this practice to the value of communalism that orients their daily lives.

In addition to dialogues about specific religious practices, all three cases involved dialogues around the norm of religious freedom. In *Amselem*, the litigants put forward an expert witness to emphasize the obligatory nature of their *sucrah* practice and insisted on the inappropriateness of state courts ruling on matters of religious doctrine. The former was aimed at bringing the practice within the ambit of religious freedom, and the latter at appealing to notions of the separation of religion and state to give content to the norm of religious freedom. In *Multani*, the litigants were concerned more specifically with the norm of reasonableness as it applies to religious freedom and sought to paint the *kirpan*'s exclusion as unreasonable in light of the other potentially dangerous objects routinely allowed into public schools. In *Wilson Colony*, the primary thrust of the Colony's argument was to minimize the potential benefit of a universal licence requirement, playing out their claim according to the value of cost-benefit analysis. However, by emphasizing the collective aspects of their practice, the claimants displayed a value-based difference with the prevailing Canadian jurisprudence of religious freedom.

With respect to the Supreme Court of Canada's responses to these efforts at cross-cultural communication, the majority decision in *Wilson Colony* represents a low point of cross-cultural communication. There, the majority failed to properly appreciate the centrality of collectivism to the religious life of the Hutterite community. This can be seen as both a failure of respect for the litigants and a failure of self-awareness regarding Canadian law's normative commitments to individualism. The Court's decision in *Multani* stands out as a success by refusing to paint the *kirpan* as a weapon, treating it instead as a religious object. This was a central concern of the litigants and the intervening World Sikh Organization, and both were gratified by the Court's reasons in this regard. In my view, this success is explained in large measure by the way the litigants emphasized the affinity in values between Sikh and Canadian constitutional cultures. It was also the case in which the Supreme Court demonstrated the highest degree of self-awareness, taking seriously the comparison between the *kirpan* and other potentially dangerous objects that are accepted in schools. The *Amselem* case represents something of a middle ground. While the Court showed a good understanding of the significance of the *succah* practice in the litigants' lives, it adopted a highly individualistic view of religion that may fail to capture the communal aspects of some religious practices. In sum, the three cases under review show the courts' potential to be both successful and unsuccessful at cross-cultural communication. Though courts and counsel tended to present their views as culturally neutral, they also demonstrated the capacity for both self-awareness and respect leading to a greater understanding of minority practices and a greater sense on the part of participants that the courts recognized their identities.

It is striking in this study that the litigants who felt the courts understood them were also the litigants who were successful in the final result. It is likely that the ultimate result in the cases

coloured litigants' perceptions of their experiences. I do not mean to suggest here that successful cross-cultural communication will always lead to religious freedom claimants obtaining their desired outcome from the courts. The *Multani* court may have come to a different if, for example, there was persuasive evidence about the *kirpan*'s dangerousness in comparison to other sharp objects. The *Wilson Colony* court could have arrived at the same result while giving stronger recognition to the collective aspects of Hutterite religious experience. This may have left the claimants feeling they had been misunderstood, but not due to a failure of communication. The values of cross-cultural communication do not require agreement but rather on maintaining respect and humility in attempting to understand one another.

This being said, there is good reason to believe that this better cross-cultural communication leads to better decision-making. An incomplete understanding of the practice necessarily means an incomplete analysis of the impact of a particular policy on religious freedom. In *Amselem*, such a complete understanding may have been unnecessary because of the weakness of the other co-owners' interests. *Multani* and *Wilson Colony*, however, show the impact of cross-cultural communication on proportionality analyses. The *Multani* Court was able to appreciate the costs of not wearing a *kirpan* to baptized Sikhs, and thus was able to place the school's arguments in proper perspective. The majority of the *Wilson Colony* Court, on the other hand, was unable to appreciate the full effects of enforcing a universal photo requirement on driver's licences, in part because it failed to bridge the difference between individualist and collectivist understandings of religious obligation. In contrast, the dissenting judges in *Wilson Colony* showed a deeper appreciation of the Hutterites' collectivist worldview.<sup>188</sup> This suggests that the values of cross-cultural communication may not require a change in the law, but rather

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<sup>188</sup> *Wilson Colony*, *supra* note 3 at paras 130-132, 164-170.

vigilance on the part of judges to maintain respect and self-awareness when interpreting evidence about religious practices.