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Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*

Richard Moon*

I. INTRODUCTION

In the recent case of *Syndicat Northcrest v. Amselem*,[1] the Supreme Court of Canada held that a condominium association's refusal to permit Orthodox Jewish unit-owners (the appellants) to construct succahs on their balconies, as part of the Jewish festival of Succot, breached their freedom of religion under the Quebec *Charter of Human Rights and Freedoms*.[2] Because the restriction on religious practice was imposed by a non-state actor, the *Canadian Charter of Rights* was not applicable.[3] However, the majority judgment of Iacobucci J. was clear that "the principles ... applicable in cases where an individual alleges that his or her freedom of religion is infringed under the Quebec *Charter*" are also applicable to a claim under section 2(a) of the *Canadian Charter of Rights and Freedoms.*[4]

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1 [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 [hereinafter "*Amselem*"].

2 Section 3 of the *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12 [hereinafter "Quebec Charter"] provides as follows: "Every person is the possessor of fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association."

Other relevant sections of the Quebec Charter include:

Section 6: "Every person has a right to the peaceful enjoyment of and free disposition of his property, except to the extent provided by law".

Section 9.1: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec".

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

4 *Amselem*, *supra*, note 1, at para. 37. Justice Iacobucci in *Amselem*, *id*., at para. 36 acknowledged that while the content and scope of religious freedom is the same in both documents, "the interplay of the rights in the Quebec *Charter* is governed by its unique content and structure."

Justice Bastarache, in his dissenting judgment, made the same assumption:

In holding that the condominium association had violated the appellants' freedom of religion, the majority judgment of Iacobucci J. made two significant determinations concerning the scope of the freedom. First, Iacobucci J. held that freedom of religion under section 3/section 2(a) protects practices that are not part of an established religious belief system. A spiritual practice or belief will fall under the protection of section 3/section 2(a), even though it is entirely personal, and not part of a more widely-held religious belief system. Second, a practice will be protected under section 2(a)/section 3 even though it is not regarded as obligatory by the individual claimant. Freedom of religion protects cultural practices that have spiritual significance for the individual, "subjectively connecting" him or her to the divine.

I will argue that these two holdings do not sit easily together. The first suggests that religious beliefs/practices are a personal matter and should be protected under the single right to freedom of conscience and religion, because they have been chosen by the individual or because they are the outcome of his or her autonomous judgment. The second holding suggests that spiritual beliefs are different from other moral and fundamental beliefs and practices and should receive special protection because they are part of an individual's deeply-rooted cultural identity, and connect him or her to a larger cultural/religious community. I will also argue that this tension or ambiguity in the court's approach to religious freedom, and more deeply in its conception of religious commitment, runs through the section 2(a) jurisprudence of the Supreme Court of Canada. Finally, I will suggest that this tension may be unavoidable — that religion is both a matter of personal commitment and cultural identity and that the challenge for the courts is to fit this complex understanding of religion into a rights model that seems to make a firm distinction between choices that are protected as a matter of human liberty (and subject to the rights and interests of others) and (unchangeable)

Freedom of conscience and religion is guaranteed by s. 3 of the Quebec *Charter* and s. 2(a) of the Canadian *Charter*. Although most, if not all, of this Court's decisions relating to freedom of religion have interpreted s. 2(a) of the Canadian *Charter*, it is appropriate to refer to them in interpreting s. 3 of the Quebec *Charter*, given the similarity in the wording of the two provisions.

(*Amselem*, *id*., at para. 132).

Section 2 provides that "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion".

traits or attributes that must be respected as part of a commitment to human equality.

II. THE MAJORITY JUDGMENT OF IACOBUCCI J.: RELIGION AS PERSONAL AND CULTURAL

The appellants were unit owners in the Northcrest condominium in Montreal. They wished to construct succahs on their balconies, to fulfil what they regarded as their biblically-mandated obligation to dwell in a small, enclosed, temporary hut during the nine-day festival of Succot.[5] The condominium by-laws, to which all unit owners formally agreed prior to purchasing or occupying their particular unit, prohibited decorations, alterations and constructions on their balconies.[6] However, the by-laws also provided that an individual owner might apply to the condominium association for an exemption from this general prohibition. The appellants applied for permission to construct their succahs. The association, though, was unwilling to grant the exemption and instead proposed that a communal succah be erected in the condominium gardens. The appellants did not regard the communal succah as an acceptable alternative. They rejected the association's proposal and proceeded to erect succahs on their balconies. The association applied to the courts for an order requiring the removal of the shelters.

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[5] Justice Iacobucci in *Amselem, id*., at paras. 5 and 6 described the practice:

> A succah is a small enclosed temporary hut or booth, traditionally made of wood or other materials such as fastened canvas, and open to the heavens, in which, it has been acknowledged, Jews are commanded to 'dwell' temporarily during the festival of Succot, which commences annually with nightfall on the fifteenth day of the Jewish month of Tishrei. This nine-day festival, which begins in late September or early- to mid-October, commemorates the 40 year period during which, according to Jewish tradition, the Children of Israel wandered in the desert, living in temporary shelters. ....
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> …
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> Orthodox Jews observe this biblically mandated commandment of 'dwelling' in a succah by transforming the succah into the practioner's primary residence for the entire holiday period. They are required to take all their meals in the succah; they customarily conduct certain religious ceremonies in the succah; they are required, weather permitting, to sleep in the succah; and they are otherwise required to generally make the succah their primary abode for the entirety of the festival period, health and weather permitting.

[6] Paragraph 9.3 of the condominium by-laws provided, among other things, that "No balcony or porch may be decorated, covered, enclosed or painted in any way whatsoever without the prior written permission of the co-owners or the Board of Directors, as the case may be." (*Amselem*, at para. 9.)

Justice Iacobucci, writing for the majority, held that the application of the condominium by-law in this case amounted to a restriction on the appellants' freedom of religion. Significantly, he held that the by-law restricted their freedom, even though several of them did not believe that they were under a religious obligation to erect a succah on their own property and accepted that their spiritual obligations could be met by residing in a communal succah, or a succah at the home of a friend or relative. Only one of the appellants, Mr. Amselem, believed he was under an obligation to reside in his own succah, but he also accepted that this obligation ceased if a personal succah was not available. Justice Iacobucci held that "both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*."[7] According to Iacobucci J., "[i]t is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection."[8] Even though not all of the appellants regarded the practice of erecting, and residing in, a succah on their own property as a religious obligation, the practice was protected as a matter of religious freedom, because it connected them with the divine. It had for them a "nexus with religion ... either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of the individual's spiritual faith."[9]

Justice Iacobucci recognized that the same result might have been reached in this case without holding that non-mandatory spiritual practices were protected under section 3/section 2(a). While the appellants believed that they were obligated to reside in a succah, they did not believe that they were under a more specific duty to reside in a personal succah. However, they argued that, in the circumstances, preventing them from constructing their own succahs, and, in effect, requiring them to reside in a far less convenient communal succah, placed a significant

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7 *Amselem*, *supra*, note 1, at para. 47.

8 *Id.*, at para. 47.

9 *Id.*, at para. 56. According to Iacobucci J.: "freedom of religion encompasses not only what adherents feel sincerely obliged to do, but also includes what an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to engender a connection with the divine or with the subject or object of his or her spiritual faith." (*id.*, at para.72.) Justice Iacobucci concluded that the proper test is "whether the appellants sincerely believe that dwelling in or setting up their own individual succah is of religious significance to them, irrespective of whether they subjectively believe that their religion requires them to build their own succah. This is because it is hard to qualify the value of religious experience." (*id.*, at para.72) (emphasis omitted).

burden on their religious practice, and so represented an *indirect* restriction on their religious practice.[10] The by-law prohibition made their religious practice significantly more onerous or burdensome, and so discouraged them from fulfilling their obligation.

According to Iacobucci J., if the appellants' argument was that they must build their own succahs, because the alternative "[would] subjectively lead to extreme distress" then they must prove that the alternatives would "result in more than trivial or insubstantial interferences and non-trivial distress."[11] Justice Iacobucci thought that this had been established. He noted that the appellants would have to carry their food for every meal from their unit to the communal succah. He also accepted that an intimate family celebration would be impossible in a communal succah, because the different appellants would have to eat their meals together.[12] Moreover, Iacobucci J. recognized that the obligation to reside in a succah had a subjective or experiential dimension. The obligation "must be complied with festively and joyously," which might not be possible if the appellants were "forced" to relocate to a communal succah.[13]

According to Iacobucci J., the appellants' claim that the condominium by-law (and the proposed communal alternative) amounted to an *indirect* restriction on their religious practice was distinct from the argument that residence in a personal succah, while not obligatory, should be protected because it connected the appellants to the spiritual realm. He accepted that:

> [t]o some, the religious and spiritual significance of building and eating in one's own succah could vastly outweigh the significance of a

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[10] See *e.g.*, *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713. In that case, the Supreme Court of Canada held that s. 2(a) was breached by an *indirect* restriction on religious practice. The Court accepted that an Ontario law, which prohibited retailers from operating on Sundays, did not have a religious purpose but was intended simply to create a common pause day. Nevertheless, the Court recognized that a prohibition on Sunday retailing would put significant pressure on the religious practice of those storekeepers, who wished to keep Saturday as the Sabbath. A store that was closed on both Saturday and Sunday might not be commercially viable and so a retailer who believed herself or himself to be under a religious obligation to keep Saturday as the Sabbath would be faced with the difficult choice of either losing his or her business or operating on Saturday contrary to her/his faith. The Court, however, went on to uphold the law under s. 1.

[11] *Supra*, note 1, at para. 75.

[12] *Id.*, at para. 77.

[13] *Id.*, at para. 73.

> strict fulfilment of the biblical commandment of 'dwelling' in a succah, and that, in and of itself would suffice in grounding a claim of freedom of religion.[14]

Yet the only obvious reason why residing in a personal succah would connect the appellants with the divine more fully or powerfully was that a personal succah would be a more convenient, or less burdensome, place of residence than the communal alternative.

Justice Iacobucci further held that a religious practice is protected under section 2(a), even though it is not part of an established belief system or a belief system that is shared by others. According to Iacobucci J., a practice is protected "irrespective of whether [it] is required by official religious dogma or is in conformity with the position of religious officials." In his view, "[r]eligious fulfilment is by its very nature subjective and personal" and so the only issue for the court, when determining whether an act is protected under section 2(a) of the Canadian Charter or section 3 of the Quebec Charter, is whether the claimant is sincere in her or his belief.[15]

In this case, said Iacobucci J., preventing the appellants from erecting their own succahs amounted to a non-trivial interference with their religious practice. While the appellants might dwell in a communal succah or in a succah at the home of friends or relatives, these alternatives would not have the same spiritual significance or would be highly inconvenient. Justice Iacobucci went on to hold that the condominium association had not established the need for restriction. In his view, the interests of the other unit owners in the peaceful enjoyment of their property and in personal security were insufficient to justify the limit on the appellants' freedom of religion. In response to the safety concerns raised by the association, Iacobucci J. noted that the appellants had agreed to set up their succahs so that they would not obstruct the fire escape routes. The aesthetic concerns raised by the appellants, he regarded as insignificant. He noted that only a small number of succahs would be erected for nine days in the year. Moreover, the association

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[14] *Id.*, at para. 72.

[15] *Id.*, at para. 52, *per* Iacobucci J.:

> the court's role in assessing sincerity is intended to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings.

could require that the succahs be constructed so as to blend in, as much as possible, with the general appearance of the building. Justice Iacobucci concluded that:

> In the final analysis ... the alleged intrusions or deleterious effects on the respondent's rights or interests under the circumstances are, at best, minimal and thus cannot be reasonably considered as imposing valid limits on the exercise of the appellant's religious freedom.[16]

III. The Dissenting Judgment of Bastarache J.: Religion as Parochial and Catholic

The dissenting judgment of Bastarache J. adopted a much narrower approach to the scope of freedom of religion. Justice Bastarache argued that a practice is protected under section 3/section 2(a) only if it is part of an established religious belief system and only if it is regarded by the individual claimant as a mandatory part of that system.

While Bastarache J. acknowledged the personal and private nature of religious belief, he also accepted that "religion is a system of beliefs and practices based on certain religious precepts."[17] In his view, an individual who claims that his or her beliefs or practices fall within the protection of section 3/section 2(a) must show a "nexus" between his or her personal beliefs and the precepts of his or her religion.[18] This connection between personal belief and established religious precepts that "constitute a body of objectively identifiable data" enabled Bastarache J. to distinguish between "genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience."[19]

In the case of those appellants (all but Mr. Amselem), who did not believe that they had a particular obligation to reside in a personal succah, Bastarache J. found no breach of section 3 of the Quebec Charter.

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16 *Id.*, at para. 84.

17 *Id.*, at para. 135.

18 *Id.*, at para. 135.

19 *Id.*, at para. 135. Justice Bastarache continued, at para. 135:

> Connecting freedom of religion to precepts provides a basis for establishing objectively whether the fundamental right in issue has been violated. By identifying with a religion, an individual makes it known that he or she shares a number of precepts with other followers of the religion. The approach I have adopted here requires not only a personal belief, but also a genuine connection between the belief and the person's religion.

In his view, the inconvenience suffered by the appellants, because they were prohibited from erecting their own succahs, was not enough to "elevate the preference [for their own succahs] to the status of a mandatory practice."[20]

Mr. Amselem, however, believed he was under an obligation to construct his own succah (although not if it was impossible to do so) and so Bastarache J. went on to consider section 9.1 of the Quebec Charter, which provided that, "in exercising his/her fundamental freedom and rights" an individual was to "maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec."[21] While Bastarache J. accepted that "the communal succah would be a source of inconvenience for Mr. Amselem," he also recognized that the individual succah would be "a source of genuine inconvenience for the other co-owners."[22] For Bastarache J., it was particularly significant that an individual succah erected on a balcony might block emergency routes. He concluded that since Mr. Amselem's freedom of religion could not be exercised in harmony with the rights and freedoms of others, the infringement of his right was legitimate.[23]

Justice Bastarache's requirement, under section 3/section 2(a), that the individual's belief be part of an established religious belief system may rest on the view that freedom of religion protects religious or cultural minorities within the community, and not, or not simply, individual conscience in moral or spiritual matters. But if cultural/religious identity or diversity is the focus of section 3/section 2(a) then it is unclear why non-mandatory religious/cultural practices should be denied protection. Moreover, if the purpose of section 3/section 2(a) is to protect religious/cultural minorities, some accommodation of minority practices should be granted, more perhaps than Bastarache J. was willing to allow.

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[20] *Id.*, at para. 162.

[21] As Bastarache J. noted in *Amselem, id.*, at para. 152, s. 9.1 of the Quebec Charter is not simply a limitations provision — an equivalent to s. 1 of the Canadian Charter — particularly in its application to infringements by private individuals.

[22] *Id.*, at para. 177. Yet, according to the trial judge, this was more than an inconvenience for Mr. Amselem, who believed that he was obligated to erect his own succah.

[23] *Id.*, at para. 180. According to Bastarache J., at para. 177, Mr. Amselem had been unwilling to compromise in any way:

> ... the application of s. 9.1 does not simply presuppose an accommodation approaching extreme tolerance by all rights holders other than Mr. Amselem. He, too, is part of the multicultural society that demands reconciliation of the rights of all.

Another possibility is that Basatarche J.'s approach is based on a very specific understanding of religion. The justification and scope of freedom of religion was initially shaped by a Protestant conception of religious adherence, which saw religious belief as a personal and private commitment based on individual reason and judgment. Justice Bastarache may be drawing on a different conception of religion, and religious commitment; one that emphasizes the social and institutional character of religion, and regards religious belief not simply as a personal matter, but as tied to an established system and an institutional structure.[24]

IV. JUSTICE BINNIE'S DISSENTING JUDGMENT: RELIGIOUS FREEDOM AS SHIELD AND SWORD

Justice Iacobucci rejected the condominium association's argument that the appellants waived their freedom of religion rights when they purchased their units and agreed to the by-laws. In his view, even if it was possible for an individual to waive her or his right to religious freedom, the appellants could not be understood to have done so in this case. While they signed the Declaration of Co-ownership, which included the by-law restricting the use of the unit balconies, this did not amount to a waiver of their right to practice their religion. First, the waiver was not unconditional, since the prohibition was subject to exemptions. Second, it was not voluntary, since the appellants had no choice but to sign the declaration, if they wanted to reside in the building. Moreover, they had not read the by-laws and so did not know to what they were agreeing. Third, the waiver was not explicit, since it did not make specific reference to the affected Charter right.

Justice Binnie, dissenting, did not think it necessary for the association to establish that the appellants had *waived* their freedom of religion, when they formally agreed to the condominium by-laws. In his view, when the appellants agreed to the by-laws, the other unit owners were entitled to conclude that the practice of their religion was compatible with these rules. "There is a vast difference," said Binnie J., "between

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[24] In this regard, I note also that in *Amselem*, *id.*, at para. 137, Bastarache J. described a secular justification (of religious freedom) as one that is "free of moral considerations." One explanation for this odd description of the secular is that Bastarache J. believes that morality is inseparable from religion so that there is no such thing as a secular or non-religious morality.

using freedom of religion as a shield against interference with religious freedoms by the State and as a sword against co-contractors in a private building."[25] In holding the appellants to their agreement, Binnie J. stressed the following factors: that the appellants were in the best position to determine, prior to their purchase of a unit in the building, what their religion required; that they could have purchased a unit in another building; that they had chosen not to read the by-laws when they entered into the contract with the other unit owners; and, finally, that they had rejected the accommodation of a communal succah, offered by the association, even though this accommodation was not inconsistent with their religious beliefs.

If religious commitment is, as the majority judgment described it, personal and individual, then Binnie J.'s response seems the right one. A particular religious practice has no intrinsic value, at least from a public perspective external to the belief system. An individual's religious practice or belief is valuable because he or she has chosen it or made a personal commitment to it. As Binnie J. recognized, who better to determine the content of an individual's personal religious commitment than the individual personally? When an individual undertakes not to perform a particular act or practice, others might reasonably assume that he or she is not, or at least not deeply, committed to the particular practice. Since religion is a personal matter (a matter of conscience) others can only rely on the individual's statements about what is important to him or her — about what he or she thinks he or she can and cannot do without. More fundamentally, if religious practice is personal, and protected as a matter of autonomy or liberty, then an individual should be free to decide that he or she does not want or need to take certain actions, or he or she should be free to bind himself/or herself contractually not to take certain actions. Provided it is given voluntarily, an individual's undertaking not to act on a particular belief or judgment is also an expression of his or her autonomous judgment.

However, the issue of waiver or consent may be less straightforward, if religious belief or practice is regarded as a matter of cultural identity that must be accommodated or treated with equal respect by both public and private actors. Justice Binnie seemed to assume that the condominium association could refuse to sell a unit to anyone who for

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[25] *Id.*, at para. 185.

religious reasons objected to the by-laws. In his view, prospective purchasers, who were unwilling or unable to agree to the by-laws, could choose to purchase a unit in another building. But if the condominium association is obligated to accommodate minority religious practices, then it cannot condition the sale of one of its units on the purchaser's agreement not to practice his or her religion, or more particularly not to erect a succah on the unit's balcony.

V. The Persistent Tension: Religion as Personal Commitment and Cultural Identity

While the formal defence of religious freedom in modern liberal democracies, such as Canada, emphasizes the value of individual autonomy or choice, the protection of religious freedom sometimes seems to rest on the idea that religion is a matter of social or cultural identity. Religious commitment is viewed by the courts, and by the general public, as not simply, or not always, a matter of individual choice or reasoned judgment. It is regarded also, or instead, as a deeply rooted part of the individual's identity or character that should be treated with equal respect.

This uncertainty about religious adherence, as a matter of personal choice, judgment or commitment or as a matter of identity manifests itself in a series of closely related doctrinal tensions in the Canadian religious freedom cases. First, it shows itself in judicial uncertainty about the scope of the freedom — about whether the freedom protects all deeply held views or beliefs or whether it protects only, or principally, religious beliefs and practices, which are in some way different from other (non-religious) beliefs/practices. If autonomy is the value that underlies our commitment to freedom of religion or conscience, then the freedom's protection should extend equally to religious and non-religious beliefs and practices. Yet despite the courts' formal holding that freedom of religion/conscience protects *secular* values/beliefs, *religious* beliefs and practices continue to be at the centre of the Canadian freedom of religion/conscience cases. The courts seem to regard religious beliefs and practices as different from other beliefs/practices, and as requiring special constitutional treatment.

Second, the courts' ambiguous view of religious commitment shows itself in their uncertainty about the nature of the wrong addressed by the freedom. The courts remain unclear whether the freedom simply prohibits

coercive state action (state restriction of religious belief/practice, or state compulsion to follow the practices of a particular faith) or whether it goes further and prohibits the state from supporting or favouring a particular religious belief system, because religious preference by the state signals to the members of the non-favoured religious groups that they do not deserve the same respect as others or are not fully part of the political community. Despite their frequent assertions that section 2(a) is breached only when the state engages in religious coercion, either restricting or compelling religious practices, the courts have held, on several occasions, that state support for a particular religious practice amounts to a breach of section 2(a). In these cases, religious freedom seems to require the equal or even-handed treatment of different belief systems and not simply the protection of the individual's freedom to make her or his own judgments about religious truth and to act in accordance with that truth.

Third, this ambiguity about religious commitment shows itself in the courts' uncertainty about the place of religion in public debate and decision-making. While the courts have sometimes said or assumed that religious beliefs/values have a role to play in public decision-making, at other times they seem to accept that religion is not properly part of public life or political decision-making and that state reliance on, or preference for, a particular religion, in the formulation of public policy, amounts to the imposition of religion on non-believers or to discrimination against the adherents of those religious belief systems that are not favoured. The courts remain uncertain whether religious belief should be seen as contestable opinion/judgment, an ordinary part of public debate and decision-making, or whether it should be seen as a matter of personal or cultural identity, as non-rational, and therefore outside the scope of legitimate public debate and action.

Finally, judicial ambiguity about the value of religion and the nature of religious commitment shows itself in the courts' uncertainty about the character of public secularism. Even when the courts accept or assume that public secularism involves the exclusion of religion from the public sphere, they are sometimes uncertain about its neutrality. They are uncertain whether *secularism* (understood as the exclusion of religion) represents a neutral ground that lies outside religious controversy (and provides the baseline against which religious restriction, compulsion and inequality are measured) or whether it should be seen as a partisan non-religious or anti-spiritual perspective that is in competition with religious world views.

This ambiguity about the character of religious commitment points to larger questions about individual agency and the distinction often

made between matters of identity, which are fixed or rooted, and matters of choice, which are revisable and not part of the individual's identity. Religious belief is not simply a fixed attribute or characteristic. The individual's commitment to a set of religious *beliefs* rests on her or his judgment or acceptance that they are true or right and that other views are false. As such these beliefs must, in theory at least, be open to reconsideration on the basis of evidence or argument. But religion is not simply a personal choice or preference. It is deeply rooted, and tied to the individual's social or cultural membership. It shapes the individual's understanding of himself or herself and the world around.

In *Amselem*, Iacobucci J. followed the Court's previous judgments and described freedom of religion as an individual choice: "This court has long articulated an expansive definition of religion, which revolves around the notion of personal choice and individual autonomy and freedom."[26] Yet, he also suggested that religious commitment is deeply rooted — an aspect of the individual's identity, "integrally linked to one's self-definition."[27] Indeed, it may be that religious commitment is both a personal choice and a deeply rooted part of the individual's identity that shapes his or her world-view and self-definition.[28] In the section that follows I will argue that this ambiguity about religious commitment, as a matter of choice or identity, surfaces in the *Amselem* court's definition of freedom of religion.

V. THE *AMSELEM* DECISION: INDIVIDUAL AUTONOMY AND CULTURAL ACCOMMODATION

The majority judgment of Iacobucci J. seemed to regard freedom of religion as a distinct right, and not simply as part of a more encompassing freedom of conscience and religion. As a consequence, it was

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[26] *Id.*, at para. 40. See also *id.*, at para. 40 where Iacobucci J. quoted Dickson C.J. in *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at 337:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination.

[27] *Id.*, at para. 39.

[28] While it may be that all religions can be viewed as resting on both personal commitment and cultural identity, we tend to see some religions more in terms of the former — as voluntaristic — and others in terms of the latter — as embedded in larger cultural or ethnic associations.

necessary for Iacobucci J. to distinguish religion from other belief systems. Early in his judgment, Iacobucci J. considered "what we mean by religion":

> While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[29]

The problem of distinguishing religious beliefs/practices from secular beliefs/practices, which has bedevilled the American courts, was something that Canadian courts and commentators thought section 2(a) had avoided by creating a single right to freedom of conscience and religion. Indeed, in *R. v. Big M Drug Mart*, Dickson C.J. said that "freedom of conscience and religion" in section 2(a) of the Charter formed a "single integrated concept."[30] But if freedom of conscience and religion are part of a single integrated right, that protects deeply-held commitments or beliefs about right and truth, there was no need for the Court to embark upon the difficult task of determining when a belief or practice is religious rather than secular.

One explanation for the Court's approach in *Amselem* may be that section 3 of the Quebec Charter lists freedom of religion and freedom of conscience separately, as two rights in a longer list that includes freedom of expression, freedom of association and freedom of assembly, no more linked to each other than to the other listed freedoms. In contrast, section 2(a) of the Canadian Charter appears to protect a single right to freedom of conscience and religion, which is distinct from the freedoms

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[29] *Id.*, at para. 39.

[30] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 346. While the issue in *Big M* was *religious* compulsion, Dickson C.J. was clear that fundamental beliefs or values that were *not* part of a religious belief system were also protected under s. 2(a) of the Charter.

listed under other subsections, such as freedom of expression, section 2(b), and freedom of association, section 2(d). Nevertheless, as noted above, Iacobucci J. insisted that his discussion of freedom of religion under the Quebec Charter was equally applicable to section 2(a) of the Canadian Charter.

Moreover, Iacobucci J.'s decision in *Amselem* to protect non-mandatory practices from state restriction is workable only if the protection of section 3/section 2(a) is confined to spiritual beliefs and practices or only if such beliefs/practices receive special protection under section 3/section 2(a). For it is difficult to see how a court could take such a broad approach to freedom of conscience, and extend protection to any belief/practice that an individual might consider important or valuable, but not obligatory. Indeed, an individual's objection to a particular law is characterized by the courts as "conscientious" only when the individual believes that he or she is morally bound not to conform with the law.[31] It simply cannot be the case that any practice (not tied to a religious belief system) that an individual considers important but not morally necessary, is protected under the Charter and subject to restriction by the state only on substantial and compelling grounds.

The implication of Iacobucci J.'s exclusive focus on *religious* beliefs/practices, in his discussion of section 3 of the Quebec Charter (and section 2(a) of the Canadian Charter), and his inclusion of *non-mandatory* religious practices within the scope of the freedom, is that religious beliefs/practices are different from secular or non-religious beliefs and deserve special protection. Most notably, in this and other cases, the courts have held that state and private actors have an obligation to accommodate minority *religious* practices, even if this involves some compromise of legitimate public goals or private interests. The state may restrict religious practices only for *compelling* reasons. State or private actors will sometimes be precluded from advancing otherwise legitimate purposes, such as the protection of property aesthetics and values, when these interfere with the religious practices of some community members. There does not seem to be any similar requirement that the state, or private property owners, accommodate non-religious beliefs and practices — at least to the extent of compromising their legitimate interests. In a democratic community, individuals are often

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[31] See *e.g.*, *Maurice v. Canada (Attorney General)*, [2002] F.C.J. No. 72, 210 D.L.R. (4th) 186 (T.D.) and *US v. Seeger* 380 U.S. 163 (1965).

subject to laws with which they disagree. The individual's liberty to act on his or her fundamental, but non-religious, beliefs must give way to democratically selected public purposes that advance or protect the rights and interests of others.[32]

Upon what does this special protection of religious belief/practice rest? If religious beliefs/practices are valuable because they have been chosen, or because they are the product of autonomous judgment, then non-religious moral or fundamental beliefs may be no less deserving of protection. It is sometimes argued that religious beliefs/practices are different because they address fundamental questions about existence and morality and because their adherents often believe that divine sanction will be imposed upon them if they fail to meet their spiritual obligations. While these factors certainly play a role in our intuition that religious beliefs or commitments are special or different, they may not provide a sufficient answer to those who argue that their non-religious beliefs about life and value are of central importance to them and are no less binding, and so no less deserving of respect and accommodation. In any event, according to the majority in *Amselem* the protection of section 3/section 2(a) extends to practices that are not binding on the individual.

Religious beliefs and practices may deserve special legal or constitutional protection not because they are an expression of individual autonomy or because they are divinely mandated but because they connect the individual to a cultural community or because they are part of his or her deeply-rooted cultural identity.[33] While the individual under-

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[32] Furthermore, when the courts protect non-religious beliefs from restriction or interference, it is almost always religious beliefs and practices from which they are protected. The courts have also held that the state may not favour or support the practices of one faith over another. Non-religious beliefs, however, do not generally receive the same protection from government interference or favouritism. Religion remains at the centre of the courts' understanding of the freedom, either as something that needs to be protected or something from which protection is needed. Religious beliefs/practices are viewed as both more threatening and more vulnerable that secular beliefs/practices in the life of the community.

[33] In *Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 at para. 87, *per* Iacobucci J.:

> In a multi-ethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities ....the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable.

In the opening sentence of his judgment, Iacobucci J. declared that "An important feature of our constitutional democracy is respect for minorities, which includes, of course, religious minorities." (*id.*, at para. 1).

stands his or her religious beliefs as true, and therefore, in theory at least, as open to revision in the face of evidence of another truth, these beliefs are shaped by his or her family and cultural community and represent an important part of his or her world-view and the ground upon which he or she takes action and makes judgments. If religion is part of an individual's identity, when the state treats different religious beliefs and practices unequally it also treats the adherents of these different belief systems unequally and when it bases public action on religious grounds it signals to those who do not adhere to the preferred faith that they are less worthy and are not fully part of the political community.

In upholding the right of the appellants to erect their own succahs, despite the condominium by-laws, Iacobucci J. emphasized not simply the value of individual autonomy in spiritual matters, but also the importance of cultural diversity and the multi-ethnic, multi-cultural, character of Canada. Justice Iacobucci's defence of a broad protection of religious practice, that extends beyond religious obligation to include "religious custom," seemed to rest on the importance of cultural identity. When defending the protection of non-mandatory religious practices, Iacobucci J. asked:

> Is Jewish yarmulke or Sikh turban worthy of less recognition simply because it may be borne out of religious custom, not obligation? Should an individual Jew, who may personally deny the modern relevance of literal biblical "obligation" or "commandment", be precluded from making a freedom of religion argument despite the fact that for some reason he or she sincerely derives a closeness to his or her God by sitting in a succah? Surely not.[34]

In Iacobucci J.'s reasoning, the protection of the individual's religious or cultural identity and the community's religious or cultural diversity, seemed to play as great a role as the protection of individual autonomy in spiritual matters.

Yet this view of religion, as a matter of deeply-rooted identity, or cultural practice, fits awkwardly with Iacobucci J.'s insistence that religion is "a function of personal autonomy and choice" and that a

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[34] *Id.*, at para. 68.

claimant under section 2(a) need only show that his or her spiritual belief is sincere.[35]

The two Rabbis, who gave evidence at trial, took different positions on the question of whether residing in a personal succah was a religious obligation. Justice Iacobucci, understandably, wanted to avoid having to resolve issues of religious doctrine.[36] The Court's role was not to decide what is required by a particular belief system or which interpretation of that system is correct or superior.[37] According to Iacobucci J. the Court should consider the sincerity of an individual's belief but not its validity — neither its objective truth, nor the extent of its acceptance within the particular religious community. The protection of an individual's religious belief/practice rests not on its truth, nor on its place in an established belief system, but instead on its connection to the individual, as a choice or judgment or as an expression of his or her autonomy. Justice Iacobucci did not simply acknowledge that religious beliefs and identities are contestable and changeable and that there is (at least from a public perspective) no single authentic version of Judaism or any other established religion. Instead, he held that "religious belief is intensely personal and can easily vary from one individual to another."[38] Freedom of religion, he said, is a matter of "personal choice and individual autonomy and freedom."[39] Each individual must be free to make his or her own judgment and hold to his or her own faith.

It should be noted that determining the sincerity of an individual's belief may be very difficult, if his or her belief is "intensely personal" and not tied to an established belief system or shared with others and if

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35 *Id.*, at para. 42.

36 *Id.*, at para. 55, *per* Iacobucci J.:

> This approach to freedom of religion effectively avoids the invidious interference of the State and its courts with religious belief. The alternative would undoubtedly result in unwarranted intrusions into the religious affairs of the synagogues, churches, mosques, temples and religious facilities of the nation with value-judgment indictments of those beliefs that may be unconventional or not mainstream.

37 *Id.*, at para. 50, *per* Iacobucci J.:

> In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

38 *Id.*, at para. 54.

39 *Id.*, at para. 40.

it is changeable or "vacillating" so that the court's inquiry "should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom." [40]

If religious commitment is a matter of individual choice, can it also be fundamental (a part of the individual's identity or "self-definition") and can it be distinguished from personal, deeply held, non-religious views? If freedom of religion is about individual autonomy, rather than cultural identity, it is difficult to explain why non-religious beliefs, which are also the product of individual choice or judgment, should not receive the same protection as religious beliefs/practices. It is also difficult to explain why public and private actors should sometimes be required to compromise their pursuit of legitimate purposes in order to accommodate minority religious practices. Or, from the other direction, it is difficult to explain why freedom of religion should protect more than the individual's liberty to make and follow moral judgments — a liberty that may be limited when it interferes with the rights and interests of others.

V. CONCLUSION

The court's ambiguity about the character of religious commitment, as either a matter of personal choice/judgment or cultural identity, may be unavoidable. Religious belief is not simply a fixed attribute or characteristic. The individual's commitment to a set of religious *beliefs* rests on his or her judgment or acceptance that they are true or right and that other views are false. As such these beliefs must, in theory at least, be open to reconsideration on the basis of evidence or argument. Moreover, religious beliefs or values often have public implications. Most religions have something to say about how we should live our lives in the larger community and, more generally, about the kind of society we should work to create. But religion is not simply a personal choice or preference. It is deeply rooted, and tied to the individual's social or cultural membership. It shapes the individual's understanding of himself/or herself and the world.

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[40] *Id.*, at para. 53. This reference to the "vacillating nature of religious belief" might suggest that an individual's religious commitment is weak or superficial.

The challenge for the courts is to fit this ambiguous, or complex, conception of religious commitment, and individual agency, into a rights model that distinguishes between choices that are protected as a matter of human liberty (subject to the rights and interests of others) and (immutable or unchangeable) traits or attributes that must be respected as part of a commitment to human equality. Religious commitment defies this choice/attribute dichotomy. Yet the courts seem forced to choose: either section 2(a) prohibits the state from interfering with the individual's freedom to make judgments about basic values and to live according to those values, subject to limits protecting the rights of others and the welfare of the community, or the section requires the state to treat different religious (and non-religious) belief systems with equal respect. Within the existing constitutional framework any attempt by the courts to find a middle ground, to treat religion as both choice and identity, protecting the individual's liberty to practice his or her religion, and at the same time, treating different religions with equal respect, may appear unprincipled, even incoherent.