freely and too loosely. That *Dignitas Connubii* enjoins the use of experts particularly for cases of this kind could give some assurance that there might be a stricter interpretation of 'grave lack of discretionary judgement', and answer Mrs Kennedy's concern on this point. That certain aspects of the Code have been made more explicit in *Dignitas Connubii*, such as the right to appoint or dismiss one's own advocate, gives the hope that the problems that Mrs Kennedy raised in terms of the starting point of the process have been somewhat addressed. Finally, from the Articles in *Dignitas Connubii*, we can see that the crucial role of the Defender of the Bond has been highlighted, as has the fact that any Defender is required to take his or her role very seriously indeed. *Dignitas Connubii* does not address Mrs Kennedy's concern on the whole process per se, but that is a subject for a further discussion.

doi: 10.1017/S095661 8X0800118X

And Then There Was One: Freedom of Religion in Canada – the Incredible Shrinking Concept

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Defining religion for the purposes of constitutional or human rights protection is a challenge shared by UK and Canadian courts in this era after the enactment of the Human Rights Act 1988[1] and the Canadian Charter of Rights and Freedoms 1985,[2] respectively: neither defines what is to be protected. Canadian courts have been impressed with this task since 1982 and, unsurprisingly, the Supreme Court of Canada (SCC) has considered the content and scope of section 2(a), the fundamental right to freedom of conscience and religion, on a number of occasions,[3] most recently in *Syndicat Northcrest v Amselem*.[4] The outcome in *Amselem* is a salutary reminder that, for post-modern courts, religion can be whatever they want it to be,[5] and, indeed, be nothing in particular, which merits protection or not at the whim of these courts. In *Amselem*, a 5–4 majority

1 Human Rights Act 1998, Sch 1, incorporating European Convention on Human Rights, Article 9.
2 RSC 1985, App II, no 44.
3 *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC); *R v Edwards Books & Art Ltd* (1986) 35 DLR (4th) 1 (SCC); *R v Jones* (1986) 31 DLR (4th) 569 (SCC); *Ross v New Brunswick School District No 15* (1996) 133 DLR (4th) 1 (SCC); *Trinity Western University v BCCT* (2001) 199 DLR (4th) 1 (SCC).
4 (2005) 241 DLR (4th) 1 (SCC).
5 With apologies to Lewis Carroll, *Through the Looking Glass*, ch 6.

of the SCC reduced religion for Charter purposes to any beliefs which the complainant calls religion and persuades a court to be sincerely held. A court then has the discretion to decide whether to extend legal protection to those beliefs (and their allegedly offensive practice) without giving credible reasons beyond the complainant's sincere belief in them. *Amselem* may, therefore, be of considerable interest to British lawyers regarding the potential lurking within ostensibly generous constitutional protections for religion ultimately to reduce religion to nonsense undeserving of legal protection.

The four complainants in *Amselem* were Orthodox Jewish co-owners of units in a luxury syndicat (or condominium) in Montreal, who decided to build succahs on their balconies in fulfilment of an obligation associated with the Jewish festival of Succot.[6] Several provisions in the declaration of co-ownership (a contract) clearly prohibited any constructions or obstructions on balconies and common spaces without the prior permission of the board of directors of the syndicat. These were designed both as a safety measure and to preserve the austere architectural style of the building. Both construction and demolition also involved tying up common elevators to move construction materials in and out of the building. The board had refused permission and offered to erect a communal succah in the syndicat grounds, an offer approved by the Canadian Jewish Congress, but rejected by the complainants as insufficient to satisfy their religious obligations. The syndicat sought an injunction to prohibit the succahs and, if required, an order to permit their demolition.

The Quebec Superior Court granted the application on the ground that the syndicat's bylaws clearly prohibited construction on the balconies and also, after hearing expert religious testimony, on the ground that personal succahs were neither a mandatory religious obligation per se nor was the practice mandatory for Jews generally, only a small minority of whom in Quebec built succahs. The Quebec Court of Appeal upheld this decision and further found that the syndicat's offer of a communal succah neutralised complaints about religious discrimination. The SCC reversed the outcome in the lower Quebec courts. In the SCC, the case was considered by the majority as if under the Charter, although the minority considered it under the Quebec Charter of Human Rights and Freedoms.[7] There was agreement that 'freedom of religion' is subject to the same analysis under each Charter and this reflects a wide consensus on the matter in Canada.

6 Nehemiah 8:2–3, 13–15.

7 RSQC C-12: '1. Every human being has a right . . . to personal security . . . 2. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion . . . . 6. Every person has the right to the peaceful enjoyment . . . of his property . . . 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. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law'.

For the majority, Iacobucci J conceded at the outset that a precise definition of religion is 'perhaps not possible',[8] but offered one in which transcendence is optional:

> 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.[9]

This emphasis on personal choice, autonomy, subjectivity and self-definition is reflected in the majority's view that sincerity of belief is sufficient to found a successful section 2(a) claim; beliefs objectively recognised by religious experts as tenets of a particular religion are not required.[10] The reason given by the court for this approach is an alleged difficulty in proving mandatory doctrines, which might require a court to become an 'arbiter of religious dogma'.[11] Apparently, it is easier to determine whether a complainant sincerely believes a self-defined belief than the content of, say, the Nicene Creed! The majority's distaste for 'dogma' is further demonstrated by their gratuitously but deeply revealing expressed view that religious beliefs are 'fluid and rarely static'[12] and of a 'vacillating nature'.[13] Expert evidence about what any recognised religion might believe or require of its professed followers is deemed to be unnecessary in section 2(a) cases.[14]

Once the test for religion is a subjective sincerity in any self-concocted beliefs whatsoever, the scope of the exercise of those beliefs is at issue and the majority relied here on its favourite Charter philosopher, JS Mill,[15] to decide that freedom of 'religion' is limited when it impacts on others. It then concluded that the complainants were entitled to build their succahs without stating why. The majority dismissed the syndicat's arguments based on contract and on the rights of the other co-owners to the peaceful enjoyment of their property under both the Quebec Charter and under the contract. The majority opined that the complainants could only have been found to have waived their religious freedom by an express provision to that effect in the contract and seemed to think that, because they had admitted in evidence that they had not read the contract prior to signing

8 (2005) 241 DLR (4th) 1 (SCC) at 22.
9 Ibid.
10 Ibid, at 23–26.
11 Ibid, at 26.
12 Ibid, at 27.
13 Ibid.
14 Ibid, at 28.
15 Ibid, at 29–30; JS Mill, *On Liberty and Considerations on Representative Government* (ed RB McCallum, Oxford, 1949), p 11.

https://doi.org/10.1017/S0956618X08001191 Published online by Cambridge University Press

it, the complainants were not bound by its provisions at all insofar as those provisions related to their religious exercise.[16]

Binnie J, who dissented on the final outcome by virtue of his preference for enforcing the declaration of co-ownership, agreed with the test for religion propounded by the majority. However, he would have restricted Charter arguments to litigation with the state rather than as between private parties, and his decision was one of contract: that is, there was a legal duty on prospective purchasers of units in the syndicat to determine whether the terms would accommodate their religious beliefs and to abide by the agreement should they purchase a unit.[17]

A diametrically opposite understanding of religion was proposed by Bastarache J, speaking for the minority, who defined religion as a set of 'precepts' objectively identifiable and shared by other followers of that religion. Religion is more than an individual's beliefs and choices; rather it is objectively identifiable, with the result that the only way to establish sincerity is to assess objectively the relationship between the complainant's beliefs and the precepts of the religion to which the complainant subscribes.[18] The minority proposed a three-step process for claims of religious freedom:

i. The complainant must prove that the threatened belief or practice is based upon a religious precept and expert evidence is useful to the court's assessment;
ii. The complainant must prove sincerity as a matter of personal credibility as a witness and by evidence of current religious practices; and
iii. There must be a substantial conflict between the practice and the alleged restriction on that practice.[19]

The minority did not doubt the sincerity of Amselem himself, but accepted the trial judge's findings that a personal succah was not a mandatory religious duty for Jews, a position to which the other three complainants had admitted in evidence. The minority balanced Amselem's belief against the other co-owners' peaceful enjoyment of their property and contractual rights to conclude that these rights should be favoured. The minority also noted a number of fact findings completely ignored in the majority judgement, including the potential withdrawal of insurance coverage if the succahs were permitted; the fact that the balconies were common portions to which the other co-owners had access under the bylaws; and that the succahs were built so as to obstruct an emergency exit from the building. Nevertheless, by a 5–4 decision, they were permitted.[20]

16 (2005) 241 DLR (4th) 1 (SCC) at 39–42.
17 Ibid, at 72–82.
18 Ibid, at 52–53.
19 Ibid, at 53–58.
20 Ibid, at 62–71.

https://doi.org/10.1017/S0956618X08001191 Published online by Cambridge University Press

The division between the majority and minority positions in *Amselem* is profound and irreconcilable; that division also reflects divergent understandings about how the law should address claims of religious discrimination today in relation to three general issues:

i. The meaning of 'religion';
ii. The perspective from which a court ought to adjudicate disputes about religion; and
iii. The role of the private law, in particular contract law, in determinations about alleged discrimination.

The characterisation of religion under section 2(a) of the Charter has, since the first case of *R v Big M Drug Mart*, focused on the individual rather than on religious institutions. The courts have assumed that their role was to protect the individual believer from the state and have emphasised personal autonomy, personal choice of beliefs, subjective notions of religion and the importance of self-definition. The earliest cases were concerned with Sunday closing legislation,[21] and therefore did not require the courts to consider whether Sabbath observance resonated within a religious institution, since it clearly did for both Jewish complainants and formerly Christian legislators. The definition of religion under section 2(a), of beliefs giving meaning to an individual's life, was asserted in relation to the state, and the courts did not consider religion in any traditional sense of *religion*, meaning being bound to another in a manner which gives definition.

This trajectory comes to its logical conclusion in the majority decision in *Amselem* in which the earlier emphasis of Dickson CJC on the individual, in contradistinction to a powerful state, is transformed into an emphasis on an individual asserting a subjective 'religious' belief, in contradistinction to other individuals asserting conflicting rights to contract and property. Once *Big M* removed from the state the historical privilege of preferring one religion over others, the state was required to become religiously neutral and to act as a neutral arbiter among belief systems, whether or not religious, in the last resort. Thus, the state becomes a threat to all religions since litigation produces winners and losers. Once the protection of freedom of religion is re-conceptualised as that of deciding which belief systems, whether religious or secular, are worthy of protection, the court must choose one for section 2(a) protection. Thus, the state in its judicial disguise privileges one set of beliefs over another and once again takes on the role of privileging belief that the SCC had attempted to discard in the earlier section 2(a) cases.

21 *R v Big M Drug Mart Ltd*; *R v Edwards Books & Art Ltd*.

https://doi.org/10.1017/S0956618X08001191 Published online by Cambridge University Press

After *Anselem*, the only 'religion' protected is the 'religion' of one, that is, the one favoured for the moment by the court. The majority denied protection for religious institutions qua institution under section 2(a), suggesting an animosity to religious institutions also reflected in the rejection of expert evidence as to 'mandatory' doctrines and the characterisation of belief as 'fluid' and 'vacillating'. On the other hand, the minority eschewed this thoroughly post modern understanding of religion in favour of religion as a community or as a communal affair. It assumed that the fundamental beliefs of a religious community can be objectively identified and stated in a comprehensive and comprehensible manner to those outside those communities, even to the courts.

The minority suggested a new starting point for section 2(a) analyses: religion as a recognisable set of beliefs of a religious institution to which the complainant sincerely adheres. Some objective proof of the binding nature of the belief asserted by the complainant is required beyond mere sincerity. This reflects the fact that individuals come to religious belief within a religious community and derive their beliefs from that community rather than from thin air or their own imaginations. Such a requirement for the protection of section 2(a) would not preclude the protection of self-defined beliefs under the freedom of conscience part of section 2(a). It would, however, demonstrate that the courts and the state take religion seriously as a good to be protected in its own right. But when a religious and a secular belief clash, the courts will still have to choose which to protect at the end of the day, because religion has no constitutionally privileged position under the Charter. This is the dilemma of contemporary constitutions in which no belief systems are accorded unique protection.

Once the minority posited religion as a formal set of beliefs taught by a religious institution, the question became how a court is to identify those beliefs. The majority discredited expert evidence on the fallacious and illogical ground that to determine a religious belief for litigation purposes was an impermissible attempt to define belief for that religious institution. The minority rightly distinguished definition from intervention and regarded the courts as perfectly capable of coming to a decision on the basis of assessing expert witnesses. This may be overly optimistic. As *Amselem* demonstrated, expert rabbinical evidence was called on both sides of the question of whether building a succah was mandatory, and the majority and minority divided on which expert to believe. Moreover, the earlier case of *Hall v Powers*[22] suggests judicial scepticism about authoritative texts or teachers in religious communities. In that case, an interlocutory motions judge preferred the views of Roman Catholic lay parishioners about what Roman Catholicism teaches about homosexuality over the expert evidence of a bishop who is regarded as an authoritative teacher within

22 (2002) 59 OR (3d) 423 (SCJ).

https://doi.org/10.1017/S0956618X08001191 Published online by Cambridge University Press

his diocese by the Roman Catholic Church, and of the *Catechism of the Catholic Church*,[23] which is the approved universal statement of the Roman Catholic faith. The Roman Catholic Church is probably the easiest church for which it is possible to state definitively what is to be believed because of its well established teaching hierarchy, code of canon law and defined procedures for promulgating and teaching the faith. If a contemporary court will not accept expert evidence from this source, it is highly unlikely that other religious institutions will be treated with greater credibility.

Notwithstanding the minority's attempt to put religion back into religion in the Charter, the net effect of *Amselem* is that the judiciary is the definitive religious authority for the purposes of awarding section 2(a) protection, by virtue of its power to choose what a religious institution teaches for civil legal purposes. When no religion enjoys a constitutionally protected position in the state, this outcome is predictable. Moreover, courts facing a dilemma of which beliefs to choose to protect will almost inevitably resort to sincerity: what other test is available? If there are no external standards by which to judge, then internal needs will be asserted. This is the dilemma of post-modernity: God is dead so we can do or believe whatever we like. In the through-the-looking-glass world of the judiciary, nothing is sacred any more.

Sincerity as a basis for defining a 'religious' belief as meriting protection under section 2(a) is a flimsy and unstable basis for protecting religion. Sincerity is in the eyes of the beholder and a sceptical, secular judiciary is unlikely to accept the existence of sincerity when it finds the beliefs asserted to be ridiculous.[24] In the language of section 1 of the Charter, a court may find the beliefs to be neither 'reasonable nor demonstrably justifiable' and therefore unworthy of protection. The fact that the majority in *Amselem* gave no reasons for accepting the sincerity of the complainant about the binding nature of building a succah on his balcony, suggests that no reasons need be given in the future for denying a right to religious expression to a complainant on the basis of alleged sincerity.

Equally whimsical is the fact that the majority of the SCC permitted a minority position within a minority religion to trump majority civil law rights in Quebec. By permitting the succah, the court defeated not only the contractual and property rights of the majority co-owners in the syndicat but also the rights, entrenched in the Quebec Charter, of all other citizens of Quebec to have those rights upheld.[25] This goes far beyond the earlier section 2(a), cases where striking down Sunday closing legislation left all Canadians free to spend Sunday as they wished: some could go to church and others could go to the mall. No one was stripped of their

23 Many editions. See, for example, Toronto, 1995.
24 For an extended study of 'sincerity' prior to *Amselem*, see: MH Ogilvie, 'Who do you say that you are? Courts, creeds and Christian identity', (2000) 3 *Journal of the Church Law Association* 146.
25 RSQC, ss 6, 9.1.

https://doi.org/10.1017/S0956618X08001191 Published online by Cambridge University Press

constitutional, contract and property rights to protect the alleged religious freedom of a tiny minority as happened in *Amselem*.

Confirmation that the majority cared little for the role of contract and property as means for organising life on a consensual basis in civil society is also evident in the willingness to override the clear terms of the declaration of co-ownership by abandoning the most fundamental principles for the construction and interpretation of contracts, thereby creating uncertainty and instability in contracts generally as a means for private self-governance. Suffice it to say, for present purposes, that the principles of contract law at issue in both Quebec civil law and Canadian common law are familiar to UK readers and this aspect of the case will not be discussed here. Since the property market in Montreal has been depressed and under-priced for many decades, the complainants had considerable choice (as well as considerable funds) to purchase a property where they could exercise their religious freedom without impacting on the contract and property rights of others. There are simply no marketplace monopolistic reasons for the SCC to override the express provisions of the contract and the civil rights of the other co-owners, nor to treat the complainants as anything less than well-to-do adults of full legal capacity, who should be expected to assume normal standards of personal responsibility for their choices in life.

Syndicat Northcrest v Amselem has been greeted as a significant advance in the protection of freedom of religion in Canada. And the outcome can be so read: even a religious minority of one can trump the constitutional, contractual and property rights of others. But, in fact, it is the exact opposite: religion is reduced to the private personal beliefs of one person, provided a court finds that person's sincerity credible. How lonely this position is in the face of an expanding state, a sceptical judiciary and an exceedingly hostile secularised society, in which all religious beliefs are treated as incredible. While *Amselem* might well be a turning point at which religion will begin to be treated more seriously by the courts, it seems more likely to be the point after which religious belief will be reduced to whimsy.

doi: 10.1017/S0956618X08001191