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

Moïse Amselem, Gladys Bouhadana,
Antal Klein and Gabriel Fonfeder *Appellants*

v.

Syndicat Northcrest *Respondent*

and

Evangelical Fellowship of Canada, Seventh-day
Adventist Church in Canada, World Sikh Organization
of Canada and Ontario Human Rights Commission *Interveners*

and

Miguel Bernfield and Edith Jaul *Mis en cause*

and between

League for Human Rights of B'Nai Brith Canada *Appellant*

v.

Syndicat Northcrest *Respondent*

and

Evangelical Fellowship of Canada, Seventh-day Adventist Church in Canada, World Sikh Organization of Canada and Ontario Human Rights Commission *Interveners*

and

Miguel Bernfield and Edith Jaul *Mis en cause*

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File Nos.: 29253, 29252.

2004: January 19; 2004: June 30.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for quebec

Civil rights — Freedom of religion — Definition of freedom of religion — Exercise of religious freedoms — Orthodox Jews setting up succahs in pursuit of their religious beliefs on balconies of their co-owned property — Syndicate of co-owners requesting removal of succahs because declaration of co-ownership prohibits decorations, alterations and constructions on balconies — Whether freedom of religion infringed by declaration of co-ownership — If so, whether refusal to permit setting up of succahs justified by reliance on right to enjoy property and right to personal security

— Whether Orthodox Jewish residents waived their right to freedom of religion by signing declaration of co-ownership — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 1, 3, 6.

Constitutional law — Charter of Rights — Freedom of religion — Definition of freedom of religion — Proper approach for freedom of religion analyses — Canadian Charter of Rights and Freedoms, s. 2(a).

The appellants A, B, K, and F, all Orthodox Jews, are divided co-owners of units in luxury buildings in Montréal. Under the terms of the by-laws in the declaration of co-ownership, the balconies of individual units, although constituting common portions of the immovable, are nonetheless reserved for the exclusive use of the co-owners of the units to which they are attached. The appellants set up "succahs" on their balconies for the purposes of fulfilling the biblically mandated obligation of dwelling in such small enclosed temporary huts during the annual nine-day Jewish religious festival of Succot. The respondent requested their removal, claiming that the succahs violated the by-laws, which, *inter alia*, prohibited decorations, alterations and constructions on the balconies. None of the appellants had read the declaration of co-ownership prior to purchasing or occupying their individual units. The respondent proposed to allow the appellants to set up a communal succah in the gardens. The appellants expressed their dissatisfaction with the proposed accommodation, explaining that a communal succah would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs, which, they claimed, called for the setting up of their own succahs on their own balconies. The respondent refused their request and filed an application for a permanent injunction prohibiting the appellants from setting up succahs and, if necessary, permitting their

demolition. The application was granted by the Superior Court and this decision was affirmed by the Court of Appeal.

Held (Bastarache, Binnie, LeBel and Deschamps JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Iacobucci, Major, Arbour and Fish JJ.: Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her 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.

Freedom of religion under the Quebec *Charter of Human Rights and Freedoms* (and the *Canadian Charter of Rights and Freedoms*) consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. As such, a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. The State is in no position to be, nor should it become, the arbiter of religious dogma. Although a court is not qualified to judicially interpret and determine the content of a

subjective understanding of a religious requirement, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue. Sincerity of belief simply implies an honesty of belief and the court's role is to ensure that a presently asserted belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Assessment of sincerity is a question of fact that can be based on criteria including the credibility of a claimant's testimony, as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions. It is also inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, 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.

Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Once religious freedom is triggered, a court must then ascertain whether there has been non-trivial or non-insubstantial interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*. However, even if the claimant successfully demonstrates non-trivial interference, religious conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

Here, the impugned stipulations in the declaration of co-ownership infringe upon the appellants' freedom of religion under s. 3 of the Quebec *Charter*. The trial judge's approach to freedom of religion was incorrect. First, he chose between two competing rabbinical authorities on a question of Jewish law. Second, he seems to have based his findings with respect to freedom of religion solely on what he perceived to be the objective obligatory requirements of Judaism, thus failing to recognize that freedom of religion under the Quebec (and the Canadian) *Charter* does not require a person to prove that his or her religious practices are supported by any mandatory doctrine of faith. Furthermore, any incorporation of distinctions between "obligation" and "custom" or, as made by the respondent and the courts below, between "objective obligation" and "subjective obligation or belief" within the framework of a religious freedom analysis is dubious, unwarranted and unduly restrictive. On the issue of sincerity, the trial judge correctly concluded that the appellant A sincerely believed that he was obliged to set up a succah on his own property. The appellants K and F submitted expert evidence of their sincere individual belief as to the inherently personal nature of fulfilling the commandment of dwelling in a succah. Such expert testimony, although not required, suffices in positively assessing the sincerity and honesty of their belief. Lastly, the interference with their right to freedom of religion is more than trivial and thus, leads to an infringement of that right. It is evident that in respect of A the impugned clauses of the declaration of co-ownership interfere with his right in a substantial way, as a prohibition against setting up his own succah obliterates the substance of his right. In the case of K and F, they have proven that the alternatives of either imposing on friends and family or celebrating in a communal succah as proposed by the respondent will subjectively lead to extreme distress and thus impermissibly detract from the joyous celebration of the holiday. In any event, there is no doubt that all the appellants sincerely believe they must fulfill the biblically mandated obligation, perhaps not of setting up

one's own succah, but of "dwelling in" a succah for the entire nine-day festival of Succot. Although the declaration of co-ownership does not overtly forbid the appellants to dwell in a succah — in that they are free to celebrate the holiday with relatives or in a proposed communal succah —, the burdens placed upon them as a result of the operation of the impugned clauses are evidently substantial. Preventing them from building their own succah therefore constitutes a non-trivial interference with and thus an infringement of their protected rights to dwell in a succah during the festival of Succot.

The alleged intrusions or deleterious effects on the co-owners' rights to peaceful enjoyment of their property and to personal security guaranteed by ss. 6 and 1 respectively of the Quebec *Charter* are, under the circumstances, at best minimal and thus cannot be reasonably considered as imposing valid limits on the exercise of the appellants' religious freedom. The respondent has not adduced enough evidence to conclude that allowing the appellants to set up such temporary succahs would cause the value of the units, or of the property, to decrease. Similarly, protecting the co-owners' enjoyment of the property by preserving the aesthetic appearance of the balconies and thus enhancing the harmonious external appearance of the building cannot be reconciled with a total ban imposed on the appellants' exercise of their religious freedom. The potential annoyance caused by a few succahs being set up for a period of nine days each year would undoubtedly be quite trivial. Finally, the appellants' offer to set up their succahs in such a way that they would not block any doors, would not obstruct fire lanes and would pose no threat to safety or security obviated any security concerns under the circumstances. In order to respect the co-owners' property interests, however, the appellants should set up their succahs in a manner that conforms, as much as possible, with the general aesthetics of the property.

Whether one can waive a constitutional right like freedom of religion is a question that is not free from doubt. However, even assuming that an individual can theoretically waive his or her right to freedom of religion, a waiver argument, or an argument analogous to waiver, cannot be maintained on the facts of this case. First, the prohibitions can properly be construed as falling under s. 9.3 of the declaration of co-ownership, which does not absolutely prohibit, but rather, simply requires soliciting the consent of the co-owners to enclose one's balcony. Second, the appellants did not voluntarily, clearly and expressly waive their rights to freedom of religion. They had no choice but to sign the declaration of co-ownership if they wanted to reside at that complex. It would be both insensitive and morally repugnant to intimate that the appellants simply move elsewhere if they take issue with a clause restricting their right to freedom of religion. Further, there is no evidence that the appellants were aware that signing the declaration amounted to a waiver of their rights to freedom of religion. Not only would a general prohibition on constructions, such as the one in the declaration of co-ownership, be insufficient to ground a finding of waiver, but arguably so would any document lacking an explicit reference to the affected *Charter* right.

Per Bastarache, LeBel and Deschamps JJ. (dissenting): Since a religion is a system of beliefs and practices based on certain religious precepts, a nexus between the believer's personal beliefs and the precepts of his or her religion must be established. To rely on his or her conscientious objection a claimant must demonstrate (1) the existence of a religious precept, (2) a sincere belief that the practice dependent on the precept is mandatory, and (3) the existence of a conflict between the practice and the rule.

The claimant must first show that the precept in question is genuinely religious and not secular. The test is reasonable belief in the existence of a religious precept. To this end, expert testimony will be useful, as it can serve to establish the fundamental practices and precepts of a religion the individual claims to practise. In the second step, the claimant must establish that he or she has a sincere belief and that this belief is objectively connected to a religious precept that follows from a text or another article of faith. It is not necessary to prove that the precept objectively creates an obligation, but it must be established that the claimant sincerely believes he or she is under an obligation that follows from the precept. The inquiry into the sincerity of beliefs must be as limited as possible, since it will expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting. The sincerity of a belief is examined on a case-by-case basis and must be supported by sufficient evidence, which comes mainly from the claimant. Although consistency in religious practice may be indicative of the sincerity of a claimant's beliefs, it is the claimant's overall personal credibility and evidence of his or her current religious practices that matter. The essential test must be the claimant's intention and serious desire to obey the fundamental precepts of his or her religion. Finally, unless the impugned provisions or standards infringe the claimant's rights in a manner that is more than trivial or insubstantial, the freedom of religion guaranteed by the *Charters* is not applicable.

Even if all religious conduct, practices or expression that could infringe or affect the rights of others in a private law context are protected *a priori* by the purpose of freedom of religion, they are not necessarily protected under the right to freedom of religion. According to the first paragraph of s. 9.1 of the Quebec *Charter*, the rights and freedoms subject to s. 9.1, including the right to freedom of religion, must be exercised

in relation to one another while maintaining proper regard for democratic values, public order and the general well-being of citizens. The *Civil Code of Québec* is the most important instrument for defining the principles governing public order and the general well-being of the citizens of Quebec. The first paragraph of s. 9.1 requires not merely a balancing of the respective rights of the parties; it is necessary to reconcile all the rights and values at issue and find a balance and a compromise consistent with the public interest in the specific context of the case. The court must ask itself two questions: (1) Has the purpose of the fundamental right been infringed? (2) If so, is this infringement legitimate, taking into account democratic values, public order, and the general well-being? A negative answer to the second question would indicate that a fundamental right has been violated. In the first step of the analysis, the person alleging the infringement must prove that it has occurred. In the second step, the onus is on the defendant to show that the infringement is consistent with the principles underlying s. 9.1. The reconciliation of rights is clearly different from the duty to accommodate in the context of an infringement of the right to equality guaranteed by s. 10 of the *Charter*.

In the case at bar, the prohibition against erecting their own succahs does not infringe the appellants' right to freedom of religion. Based on the evidence that was adduced and accepted, the appellants sincerely believe that, whenever possible, it would be preferable for them to erect their own succahs; however, it would not be a divergence from their religious precept to accept another solution, so long as the fundamental obligation of eating their meals in a succah was discharged. It cannot therefore be accepted that the appellants sincerely believe, based on the precepts of their religion that they are relying on, that they are under an obligation to erect their own succahs on their balconies. It is, rather, the practice of eating or celebrating Succot in a succah that is protected by the guarantee of freedom of religion set out in s. 3 of the Quebec *Charter*.

The declaration of co-ownership does not hinder this practice, as it does not bar the appellants from celebrating in a succah, in that they can celebrate Succot at the homes of friends or family or even in a communal succah, as proposed by the respondent.

Assuming that the belief of the appellant A that he must erect a succah on his own balcony is sincere and that it is based on a precept of his religion, the infringement of his right to freedom of religion is legitimate, since the right to erect succahs on balconies cannot be exercised in harmony with the rights and freedoms of others and the general well-being of citizens. The rights of each of the other co-owners to the peaceful enjoyment and free disposition of their property and to life and personal security under ss. 6 and 1, respectively, of the Quebec *Charter* are in conflict with the appellant's freedom of religion. In the case at bar, the right to the peaceful enjoyment and free disposition of one's property is included in the purpose of the restrictions provided for in the declaration of co-ownership. The restrictions are aimed first and foremost at preserving the market value of the dwelling units held in co-ownership. They also protect the co-owners' right to enjoy the common portions reserved for exclusive use while preserving the building's style and its aesthetic appearance of a luxury building and permitting the balconies to be used to evacuate the building in a dangerous situation. The restrictions are justified, in conformity with art. 1056 C.C.Q., by the immovable's destination, characteristics and location. Also, preventing the obstruction of routes between balconies so that they can be used as emergency exits protects the co-owners' right to life and personal security. The argument that succahs can be erected without blocking access routes too much if certain conditions are complied with cannot be accepted at this point in the analysis, as it is based on the concept of reasonable accommodation, which is inapplicable in the context of s. 9.1.

The obligation imposed on the appellants to exercise their rights of ownership in harmony with the rights of the other co-owners is not unfair. The declaration of co-ownership was drafted in an effort to preserve the rights of all the co-owners, without distinction. It must also be borne in mind that the erection, as proposed by the respondent, of a communal succah would have had the desired result of upholding not only the parties' contractual rights, but also of the rights guaranteed by ss. 6, 1 and 3 of the Quebec *Charter*. Such a solution would be consistent with the principle that freedom of religion must be exercised within reasonable limits and with respect for the rights of others, subject to such limitations as are necessary to protect public safety, order and health and the fundamental rights and freedoms of others.

Per Binnie J. (dissenting): While freedom or religion as guaranteed by s. 3 of the Quebec *Charter* should be broadly interpreted, the Quebec *Charter* is also concerned in s. 9.1 with a citizen's responsibilities to other citizens in the exercise of their rights and freedoms. Here, the threshold test of bringing the s. 3 claim within the protected zone of religious freedom has been met but, in the circumstances of this case, the appellants cannot reasonably insist on a personal succah.

The succah ritual exists as an article of the Jewish faith and at least one of the appellants sincerely believes that dwelling in his own succah is part of his faith, subject to a measure of flexibility when a personal succah is not available. The construction of a succah on the commonly owned balconies of the building, however, is clearly prohibited by the declaration of co-ownership. Weight must fairly be given to the private contract voluntarily made among the parties to govern their mutual rights and obligations, including the contractual rules contained in the declaration of co-ownership, as well as on the co-owners' offer of accommodation. Buried at the heart of this

fact-specific case is the issue of the appellants' acceptance, embodied in the contract with their co-owners, that they would not insist on construction of a personal succah on the communally owned balconies of the building. A person's right to the peaceful enjoyment of his property is one of the rights guaranteed by s. 6 of the Quebec *Charter* and the primary right asserted by the co-owners. Although s. 9.1 does not specifically impose a duty on third parties to accommodate a claimant, as a practical matter, the reasonableness of the claimant's conduct will be measured, at least to some extent, in light of the reasonableness of the conduct of the co-owners. The text of s. 9.1 puts the focus on the claimant, who must have regard to the facts of communal living, which includes the rights of third parties. Lastly, the reasonableness of a claimant's objection must be viewed from the perspective of a reasonable person in the position of the claimant with full knowledge of the relevant facts. When all the relevant facts of this case are considered, especially the pre-existing rules of the immovable accepted by the appellants as part of the purchase of their units, the appellants have not demonstrated that their insistence on a personal succah and their rejection of the co-owner's accommodation of a group succah show proper regard for the rights of others within the protection of s. 9.1. The appellants themselves were in the best position to determine their religious requirements and must be taken to have done so when entering into the co-ownership agreement in the first place. They cannot afterwards reasonably insist on their preferred solution at the expense of the countervailing legal rights of their co-owners. As found by the trial judge, the accommodation offered by the co-owners was not inconsistent with the appellants' sense of religious obligation in circumstances where a personal succah is simply not available.

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By Iacobucci J.

Referred to: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Re Funk and Manitoba Labour Board* (1976), 66 D.L.R. (3d) 35; *R. v. Jones*, [1986] 2 S.C.R. 284; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989); *R. v. Laws* (1998), 165 D.L.R. (4th) 301; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202; *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Richard*, [1996] 3 S.C.R. 525; *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844.

By Bastarache J. (dissenting)

Québec (Procureur général) v. Lambert, [2002] R.J.Q. 599; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; *R. v. Registrar General, Ex parte Segerdal*, [1970] 2 Q.B. 697; *Barralet v. Attorney General*, [1980] 3 All E.R. 918; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *R. v. Jones*, [1986] 2 S.C.R. 284; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591; *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Desroches v. Québec (Commission des droits de la personne)*, [1997] R.J.Q. 1540.

By Binnie J. (dissenting)

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

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APPEAL from judgments of the Quebec Court of Appeal, [2002] R.J.Q. 906, [2002] Q.J. No. 705 (QL), and [2002] Q.J. No. 707 (QL), affirming a judgment of the

Superior Court, [1998] R.J.Q. 1892, [1998] Q.J. No. 1959 (QL). Appeal allowed, Bastarache, Binnie, LeBel and Deschamps JJ. dissenting.

Julius H. Grey, *Lynne-Marie Casgrain*, *Elisabeth Goodwin* and *Jean-Philippe Desmarais*, for the appellants Moïse Amselem, Gladys Bouhadana, Antal Klein and Gabriel Fonfeder.

David Matas and *Steven G. Slimovitch*, for the appellant the League for Human Rights of B'Nai Brith Canada.

Pierre-G. Champagne and *Yves Joli-Coeur*, for the respondent.

Dale Fedorchuk, *Bradley Minuk* and *Dave Ryan*, for the interveners the Evangelical Fellowship of Canada and the Seventh-day Adventist Church in Canada.

Palbinder K. Shergill, for the intervener the World Sikh Organization of Canada.

Prabhu Rajan, for the intervener the Ontario Human Rights Commission.

The judgment of McLachlin C.J. and Iacobucci, Major, Arbour and Fish JJ. was delivered by

IACOBUCCI J. —

I. Introduction

1 An important feature of our constitutional democracy is respect for minorities, which includes, of course, religious minorities: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 79-81. Indeed, respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy. But respect for religious minorities is not a stand-alone absolute right; like other rights, freedom of religion exists in a matrix of other correspondingly important rights that attach to individuals. Respect for minority rights must also coexist alongside societal values that are central to the make-up and functioning of a free and democratic society. This appeal requires the Court to deal with the interrelationship between fundamental rights both at a conceptual level and for a practical outcome.

2 More specifically, the cases which are the subject of this appeal involve a religious claim by the appellants for the setting up of a "succah" for nine days a year in the pursuit of their religious beliefs on their co-owned property under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (the "Quebec *Charter*"). The Quebec courts denied the claim. With respect, I disagree and would allow the appeal.

3 In particular, after defining the scope of freedom of religion and its infringement, I find that the appellants' religious freedom under the Quebec *Charter* has been infringed by the declaration of co-ownership. While the respondent has raised rights to enjoy property and personal security as justification for its refusal to allow a succah to be set up, I find that the impairment of the appellants' religious freedom is serious whereas I conclude that the intrusion on the respondent's rights is minimal. As such, I hold that the appellants must be permitted to set up succahs on their balconies, provided that the succahs remain only for the limited time necessary — in this case nine

days —, allow for an emergency access route, and conform, as much as possible, with the general aesthetics of the property. I also find the argument that the appellants waived their religious rights cannot be maintained under the circumstances, nor did they implicitly agree not to set up succahs on their balconies by signing the declaration of co-ownership.

II. Background

4 The appellants, all Orthodox Jews, are divided co-owners of residential units in "Place Northcrest", two luxury buildings forming part of "Le Sanctuaire du Mont-Royal" (the "Sanctuaire"), a larger complex in Montréal. Moïse Amselem has lived at the Sanctuaire, together with his wife Gladys Bouhadana, since 1996; Gabriel Fonfeder has lived at the complex since 1994; and, at the time of the proceedings below, Thomas Klein, the son of the appellant Antal Klein, had been living there since 1989. Under the terms of the Sanctuaire's by-laws in the declaration of co-ownership, the balconies of individual units, although constituting [TRANSLATION] "common portions" of the immovable, are nonetheless reserved to the [TRANSLATION] "exclusive use" of the co-owners of the units to which they are attached.

5 In late September 1996, Mr. Amselem, at the time a new resident of the Sanctuaire, set up a "succah" on his balcony for the purposes of fulfilling a biblically mandated obligation during the Jewish religious festival of Succot. 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.

6 Under the Jewish faith, in commemoration of the festival's historical connection and as a symbolic demonstration of their faith in the divine, Jews are obligated to dwell in these succahs, as their ancestors did in the desert. Orthodox Jews observe this biblically mandated commandment of "dwelling" in a succah by transforming the succah into the practitioner'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.

7 Technically, a succah must minimally consist of a three-walled, open-roofed structure which must meet certain size specifications in order to fulfill the biblical commandment of dwelling in it properly according to the requirements of the Jewish faith. While a succah is usually festively decorated interiorly, there are no aesthetic requirements as to its exterior appearance.

8 During the first two and last two days of the Succot holiday, as well as during any intermittent Saturday, Orthodox Jews are normally forbidden from *inter alia* turning electricity on or off and riding in cars or elevators. Similarly, during the Saturday(s) falling within the nine-day festival, Orthodox Jews are forbidden from carrying objects outside of their private domiciles in the absence of a symbolic enclosure, or *eruv*.

9 After Mr. Amselem put up his succah in September 1996, the syndicate of co-ownership, Syndicat Northcrest (the "respondent" or "Syndicat"), requested its removal, claiming the succah was in violation of the Sanctuaire's by-laws as stated in the declaration of co-ownership, which *inter alia* prohibited decorations, alterations and constructions on the Sanctuaire's balconies:

> [TRANSLATION]
>
> 2.6.3 Balconies, porches and patios — the owner of each exclusive portion (dwelling unit) with a door leading to a balcony, porch or patio adjoining his or her exclusive portion (dwelling unit) has the personal and exclusive use of the balcony, or of the portion of the porch adjoining his or her exclusive portion, subject to the following rules:
>
> a) On porches, an area at least as wide as is required under fire safety by-laws must be kept free of garden furniture and other accessories, as the porches serve as emergency exits.
>
> b) No owner may enclose or block off any balcony, porch or patio in any manner whatsoever or erect thereon constructions of any kind whatsoever.
>
> . . .
>
> Perpetual rights of way for emergency situations (including elevator breakdowns) are hereby created in favour of all the above-mentioned exclusive portions (dwelling units), the dominant land, on the common portions, namely every porch, balcony, terrace or patio, the servient lands.
>
> 6.5 UNIFORMITY OF DÉCOR IN THE BUILDING
>
> Entrance doors to the exclusive portions (dwelling units), windows, painted exterior surfaces and, in general, any exterior elements contributing to the overall harmony of the building's appearance may under no circumstances be altered, even if they are part of the limited common portions, without first obtaining the written permission of the Board of Directors, who themselves must first obtain the approval of the co-owners at a general meeting.
>
> 6.16 EXTERIOR DECORATIONS PROHIBITED

> Co-owners may not decorate, paint or alter the exterior of the exclusive portions in any way whatsoever without first obtaining the written consent of the Board of Directors, subject to any exceptions provided for in this declaration.

> 9.3 BALCONIES AND PORCHES

> Subject to the law and to this declaration, each co-owner having exclusive use of a balcony or a portion of a porch adjoining his or her exclusive portion (dwelling unit), as provided for in clause 2.6.3, shall keep said balcony or portion of the porch clean. The co-owner having exclusive use of said balcony or portion of the porch is solely responsible for the day-to-day maintenance thereof. However, the Board of Directors is responsible for the replacement of or repairs to said balconies and porches as a common expense, unless the balcony or porch must be repaired or replaced because of the fault or negligence of a co-owner or someone for whom that co-owner is legally responsible, in which case the costs and expenses of any repairs or replacement shall be assumed by the co-owner in question.

> Furthermore, subject to acts and regulations of general application, nothing other than usual outdoor furniture may be left or stored on a balcony or porch without first obtaining permission in writing from the Board of Directors. Under no circumstances may balconies or porches be used for drying laundry, towels, etc.

> 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.

None of the appellants had read the declaration of co-ownership prior to purchasing or occupying their individual units.

10 Mr. Fonfeder similarly placed a succah on his balcony in September 1996, but received no notice or complaint.

11 A year later, on October 6, 1997, and pursuant to the regulations in the declaration of co-ownership, Mr. Amselem requested permission from the Syndicat to set up a succah on, and thus enclose part of, his balcony to celebrate the same holiday

of Succot. The Syndicat refused, invoking the restrictions in the declaration of co-ownership.

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

13 In a letter dated October 10, 1997, the Syndicat proposed to allow Mr. Amselem, in conjunction with the other Orthodox Jewish residents of the building, including the appellants Mr. Fonfeder and Mr. Klein, to set up a communal succah in the Sanctuaire's gardens.

14 In their October 14, 1997 letter to the Syndicat, the appellants expressed their dissatisfaction with the respondent's proposed accommodation. They explained why a communal succah would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs which, they claimed, called for "their own succah, each on his own balcony".

15 In their letter, the appellants implored the Syndicat to accede to their request and permit their own individual succahs, which they undertook to set up "in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way". The Syndicat refused their request.

16 Each of the appellants nonetheless proceeded to set up a succah on his or her balcony. Apart from Mr. Amselem and Mr. Fonfeder in September 1996, the appellants in this appeal had not set up succahs on their balconies at the Sanctuaire in prior years; in those years they had celebrated the holiday as guests with family and friends, using their hosts' succahs.

17 In response, the respondent Syndicat filed an application for permanent injunction prohibiting the appellants from setting up succahs and, if necessary, permitting their demolition. The application was granted by the Superior Court on June 5, 1998.

III. Relevant Legislative Provisions

18 *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.
>
> He also possesses juridical personality.
>
> **3.** Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.
>
> **6.** Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.
>
> **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 Québec.
>
> In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

Civil Code of Québec, S.Q. 1991, c. 64 ("C.C.Q.")

> **1039.** Upon the publication of the declaration of co-ownership, the co-owners as a body constitute a legal person, the objects of which are to preserve the immovable, to maintain and manage the common portions, to protect the rights appurtenant to the immovable or the co-ownership and to take all measures of common interest.
>
> The legal person is called a syndicate.
>
> **1056.** No declaration of co-ownership may impose any restriction on the rights of the co-owners except restrictions justified by the destination, characteristics or location of the immovable.
>
> **1063.** Each co-owner has the disposal of his fraction; he has free use and enjoyment of his private portion and of the common portions, provided he observes the by-laws of the immovable and does not impair the rights of the other co-owners or the destination of the immovable.

IV. Judicial History

A. *Superior Court*, [1998] R.J.Q. 1892

19 Rochon J. found that the text of the declaration of co-ownership clearly prohibited the appellants from setting up succahs on their balconies (at p. 1899):

> [TRANSLATION] Whether or not the succah is considered a construction is of little consequence. Enclosing, blocking off or decorating a balcony or patio in any way whatsoever is prohibited. In short, apart from the usual outdoor furniture, owners may not make any alterations to the exterior. They may not place anything whatsoever outside. When considered as a whole, these restrictions demonstrate a clear intent to maintain the original condition and uniform appearance of the building's exterior.

20 He further held that the restrictions were justified by the destination of the immovable, its characteristics or its location, as required by art. 1056 C.C.Q. He was

also satisfied that, contrary to the appellants' contention, the Syndicat had applied the declaration of co-ownership in a uniform manner.

21 Rochon J. went on to consider whether the appellants' rights had been infringed by the effects of the declaration of co-ownership. He asserted that in order for a contractual clause to infringe an individual's freedom of religion, [TRANSLATION] "the impugned contractual clause must, whether directly or by adverse effect, either compel individuals to do something contrary to their religious beliefs or prohibit them from doing something regarded as mandatory by their religion" (p. 1905). According to Rochon J., a claimant must prove that a practice is required by the official teachings of his or her religion in order for it to be protected as freedom of religion under s. 3 of the Quebec *Charter*. It is not sufficient that a claimant possess a sincere belief that a particular practice is required (at p. 1907):

> [TRANSLATION] Freedom of religion can be relied on only if there is a connection between the right asserted by a person to practise his or her religion in a given way and what is considered mandatory pursuant to the religious teaching upon which the right is based. A sincere belief must be supported by the existence of a religious precept. How the teaching is observed may vary and may not necessarily correspond to how most believers perform their religious obligations. Nonetheless, the rite must have a rational, reasonable and direct connection with the teaching. How a believer performs his or her religious obligations cannot be grounded in a purely subjective personal understanding that bears no relation to the religious teaching as regards both the belief itself and how the belief is to be expressed (the rite).

22 After reviewing the evidence, Rochon J., relying primarily on the testimony of the Syndicat's witness, Rabbi Barry Levy, asserted, at p. 1909, [TRANSLATION] "that there is no religious obligation requiring practising Jews to erect their own succahs", and that [TRANSLATION] "[t]here is no commandment as to where they must be erected".

23 In reaching this conclusion, Rochon J. explicitly stated that he favoured the opinion of the Syndicat's witness, Rabbi Levy, to that of Rabbi Moïse Ohana, the witness called by the appellants, whose testimony as to the nature of the biblical commandment, he felt, resulted in a standard that was too subjective.

24 Rochon J. thus reasoned that the restrictions in the declaration of co-ownership did not prevent the appellants from fulfilling their objectively defined religious obligations and as such did not impair their freedom of religion. This he concluded, despite his findings, at p. 1909, that Mr. Amselem is [TRANSLATION] "the only one who saw the obligation to erect a succah on his own property in terms of a divine command", stemming from a sincere personal belief predicated upon Mr. Amselem's interpretation of the Bible, as per c. 8, verses 13 to 18 of the Book of Nehemiah.

25 Although Rochon J. concluded that the appellants had not established an infringement of their rights to freedom of religion, he went on to consider, for the sake of argument, whether such an interference could have been justified under s. 9.1 of the Quebec *Charter*. He concluded that any interference with the appellants' rights to freedom of religion was justified by the objectives of protecting the aesthetic value of the property and, alternatively, the security of co-owners in the event of a fire.

26 Rochon J. held that since the appellants had not established an infringement of their freedom of religion, there could be no discrimination within the meaning of s. 10 of the Quebec *Charter*. Nevertheless, he went on to consider, again for the sake of argument, whether, in the event that the appellants had established a *prima facie* case of discrimination, the respondent would have satisfied its duty to accommodate. He

concluded that the accommodation proposed by the respondent — that of a communal succah — was reasonable, whereas the appellants were not willing to compromise in order to reach an acceptable solution.

27 Having found that the impugned by-laws were not in violation of the Quebec *Charter*, Rochon J. granted the respondent's request and issued a permanent injunction prohibiting succahs on the appellants' balconies and requiring their removal, if necessary.

B. *Court of Appeal*, [2002] R.J.Q. 906

28 Dalphond J. (*ad hoc*), for the majority, agreed with the trial judge and held that, although the impugned provisions of the declaration of co-ownership restrict the appellants' rights by prohibiting succahs on their balconies, those restrictions were valid under art. 1056 C.C.Q. He believed that when the appellants signed the declaration of co-ownership they had effectively waived their rights to freedom of religion. According to Dalphond J., it was nonetheless open to the appellants to show that the Sanctuaire's by-laws were discriminatory under s. 10 and thus void under s. 13 of the Quebec *Charter*, which protects an individual from discrimination in a juridical act, such as a contract.

29 Dalphond J. reasoned that the impugned provisions were neutral in application since they affected all residents equally in prohibiting all "constructions" on balconies and as such he concluded that the restrictions in the declaration of co-ownership did not create a distinction based on religion.

30 Dalphond J. stated that even if he had found a distinction, it would not have had the effect of "nullifying or impairing" the appellants' rights to freedom of religion, and thus would not have amounted to discrimination within the meaning of s. 10, since the appellants were not religiously obligated to have succahs on their balconies. According to Dalphond J., since there was no discrimination in this case, it was not necessary to examine the duty to accommodate. Nor did he believe it necessary to apply s. 9.1 of the Quebec *Charter* since he reasoned that s. 9.1 is not applicable to an analysis under ss. 10 and 13 of the Quebec *Charter*. Dalphond J. therefore dismissed the appeal. Baudouin J.A. agreed with Dalphond J.'s reasons.

31 Morin J.A., in a concurring opinion, found that Rochon J. had adopted an interpretation of freedom of religion that was unduly restrictive. After considering the meaning of freedom of religion as articulated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, he wrote, at para. 32:

> [TRANSLATION] According to that case, it is the sincerity of the individual's beliefs as dictated by his or her own conscience that must be considered when he or she relies on freedom of religion to justify an act or a refusal to act. It matters little that those beliefs may be erroneous in relation to the official teachings of the leaders of the religious community to which the individual belongs.

32 Morin J.A. found that the appellants sincerely believed they must set up their own succah (at para. 33):

> [TRANSLATION] The evidence shows that the appellants sincerely believe, based in particular on the Bible, Book of Nehemiah, Chapter 8, verses 13 to 18, that they must erect their own succahs and dwell in them for several days during the festival of Succot. In accordance with the principle of freedom of religion, they should normally be able to do so, but the above-quoted clauses of the declaration of co-ownership, by banning the erection

> of succahs on the balconies or terraces adjoining their dwelling units, bar them, in practice, from doing what they would like to do.

He therefore found that the impugned provisions of the declaration of co-ownership infringed the appellants' rights to freedom of religion under s. 3 of the Quebec *Charter*.

33 Having found the appellants' rights to freedom of religion had been infringed, Morin J.A. concluded that the impugned provisions discriminated against the appellants. He then went on to consider the duty to accommodate, in light of this Court's decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868. Morin J.A. applied all three steps of the test set out in *Meiorin* and concluded that (1) the respondent's goal in establishing restrictions was rationally linked to the goal of administrating the building, in accordance with art. 1039 C.C.Q., and (2) the restrictions had been enacted on the basis of a *bona fide* belief that they were necessary to fulfil its mandate, in accordance with art. 1056 C.C.Q. As for undue hardship, Morin J.A. wrote, at para. 64:

> [TRANSLATION] In my view, the trial judge made no serious error that would justify the intervention of our court. On the contrary, it was the intransigent attitude adopted by the appellants that made any accommodation practically impossible, as they systematically refused every proposal that did not strictly meet their requirements.

34 Morin J.A. felt that this "intransigence" on the part of the appellants discharged the respondent from any obligation of accommodation more than the communal succah already proposed, which he felt was reasonable under the circumstances. In the end, Morin J.A. believed the respondent would suffer undue

hardship if it were forced to fully accommodate the appellants. He therefore agreed with Dalphond J. to dismiss the appeal.

V. Issues

35 In my view, the key issues before us are: (1) whether the clauses in the by-laws of the declaration of co-ownership, which contained a general prohibition against decorations or constructions on one's balcony, infringe the appellants' freedom of religion protected under the Quebec *Charter*; (2) if so, whether the refusal by the respondent to permit the setting up of a succah is justified by its reliance on the co-owners' rights to enjoy property under s. 6 of the Quebec *Charter* and their rights to personal security under s. 1 thereof; and (3) whether the appellants waived their rights to freedom of religion by signing the declaration of co-ownership.

VI. Analysis

36 In my view, apart from the content and scope of freedom of religion, the interplay of the rights in the Quebec *Charter* is governed by its unique content and structure. In the reasons that follow, I begin with an analysis of freedom of religion. I then briefly go on to discuss the respondent's justification in limiting the exercise of religious freedom in this case.

A. *Freedom of Religion*

37 The analysis that follows sets out the principles that are applicable in cases where an individual alleges that his or her freedom of religion is infringed under the

Quebec *Charter* or under the *Canadian Charter of Rights and Freedoms*. In my view, the trial judge and the majority of the Court of Appeal took, with respect, an unduly restrictive view of freedom of religion.

(1) Definition of Religious Freedom

38 Section 3 of the Quebec *Charter*, which applies in both the private and public law context, states:

> **3.** Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

39 In order to define religious freedom, we must first ask ourselves 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.

40 What then is the definition and content of an individual's protected right to religious freedom under the Quebec (or the Canadian) *Charter*? This Court has long

articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom. In *Big M*, *supra*, Dickson J. (as he then was) first defined what was meant by freedom of religion under s. 2(*a*) of the Canadian *Charter*, at pp. 336-37 and 351:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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 belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> . . . Freedom means that . . . no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> . . .
>
> . . . With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be. . . . [Emphasis added.]

41 Dickson J. articulated the purpose of freedom of religion in *Big M*, *supra*, at p. 346:

> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [Emphasis added.]

Similarly, in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, Dickson C.J. stated that the

> purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. [Emphasis added.]

42 This understanding is consistent with a personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right; see, generally, J. Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998), 43 *McGill L.J.* 325. According to Professor Woehrling, at p. 385:

> [TRANSLATION] Virtually every judicial decision based on s. 2(*a*) of the *Canadian Charter* or s. 3 of the *Quebec Charter* concerns freedom of religion. However, it would appear that these decisions stress the subjective aspect of the believer's personal sincerity rather than the objective aspect of the conformity of the beliefs in question with established doctrine. [Emphasis added.]

43 The emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make; see, e.g., *Re Funk and Manitoba Labour Board* (1976), 66 D.L.R. (3d) 35 (Man. C.A.), at pp. 37-38. In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" (*Edwards Books*, *supra*, at p. 735) and not that a particular belief is "valid".

44 For example, in *R. v. Jones*, [1986] 2 S.C.R. 284, La Forest J., writing for the minority (but not on this point), opined, at p. 295:

> Assuming the sincerity of his convictions, I would agree that the effect of the *School Act* does constitute some interference with the appellant's freedom of religion. *For a court is in no position to question the validity of a religious belief, notwithstanding that few share that belief.* [Italics added.]

Although La Forest J. did not explicitly state that all that must be shown is a sincerity of belief, it is implicit in his reasons. Indeed, this position was subsequently explicitly adopted by this Court in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 70, where La Forest J. reasoned that "it is not the role of this Court to decide what any particular religion believes".

45 In the United States, where there is a richness of jurisprudence on this matter, the United States Supreme Court has similarly adopted a subjective, personal and deferential definition of freedom of religion, centred upon sincerity of belief. For example, in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the court held that it was the plaintiff's subjective beliefs, and not the official position of the particular religion, which must be considered in evaluating the free exercise guarantees under the First Amendment of the U.S. Constitution. In delivering the opinion of the U.S. Supreme Court, Chief Justice Burger stated, at pp. 715-16:

> . . . the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the

> commands of their common faith. Courts are not arbiters of scriptural interpretation.
>
> The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion. [Emphasis added.]

This view was repeated in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), at p. 834, where White J., for a unanimous court, stated:

> Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection. [Emphasis added.]

46 To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

47 But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, "obligation", precept, "commandment", custom or ritual. Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its

observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties. Indeed, the Ontario Court of Appeal quite correctly noted this in *R. v. Laws* (1998), 165 D.L.R. (4th) 301, at p. 314:

> There was no basis on which the trial judge could distinguish between a requirement of a particular faith and a chosen religious practice. Freedom of religion under the *Charter* surely extends beyond obligatory doctrine.

48 This is central to this understanding of religious freedom that a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. Such an approach would be inconsistent with the underlying purposes and principles of the freedom emphasizing personal choice as set out by Dickson C.J. in *Big M* and *Edwards Books*.

49 To require a person to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs in a manner inconsistent with the principles set out by Dickson C.J. in *Edwards Books*, *supra*, at p. 759:

> The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. [Emphasis added.]

50 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.

51 That said, while a court is not qualified to rule on the validity or veracity of any given religious practice or belief, or to choose among various interpretations of belief, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue: see *Jones*, *supra*; *Ross*, *supra*. It is important to emphasize, however, that sincerity of belief simply implies an honesty of belief: see *Thomas v. Review Board of the Indiana Employment Security Division*, *supra*.

52 According to American constitutional law scholar Professor Laurence Tribe, the jurisprudence in this area evinces that inquiries into a claimant's sincerity must be as limited as possible. He argues that "given the widening understanding of what constitutes religion in our society, the very rights ostensibly protected by the free exercise clause might well be jeopardized by any but the most minimal inquiry into sincerity": L. H. Tribe, *American Constitutional Law* (2nd ed. 1988), at pp. 1245-46. While this was written in the context of the First Amendment to the U.S. Constitution, I believe that it is equally applicable to delimiting the court's role in interpreting religious freedom under the Quebec (or the Canadian) *Charter*. Indeed, the court's role in assessing sincerity is intended only 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.

53 Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony (see Woehrling, *supra*, at p. 394), as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. A person's connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious obligation emanating from such a relationship, may well change and evolve over time. Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, 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.

54 A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.

55 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. As articulated by Professor Tribe, *supra*, at p. 1244, "an intrusive government inquiry into the nature of a claimant's beliefs would in itself threaten the values of religious liberty".

56 Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, 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 an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

(2) Infringement of Religious Freedom

57 Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*.

58 More particularly, as Wilson J. stated in *Jones*, *supra*, writing in dissent, at pp. 313-14:

> Section 2(*a*) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion. [Emphasis added.]

Section 2(*a*) of the Canadian *Charter* prohibits only burdens or impositions on religious practice that are non-trivial. This position was confirmed and adopted by Dickson C.J. for the majority in *Edwards Books*, *supra*, at p. 759:

> All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(*a*).
>
> This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion. . . . Section 2(*a*) does not require the legislatures to eliminate every minuscule state-imposed cost associated with the practice of religion. Otherwise the *Charter* would offer protection from innocuous secular legislation such as a taxation act that imposed a modest sales tax extending to all products, including those used in the course of religious worship. In my opinion, it is unnecessary to turn to s. 1 in order to justify legislation of that sort. . . . The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(*a*) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314. [Emphasis added.]

59 It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial. The question then becomes: what does this mean?

60 At this stage, as a general matter, one can do no more than say that the context of each case must be examined to ascertain whether the interference is more than trivial or insubstantial. But it is important to observe what examining that context involves.

61 In this respect, it should be emphasized that not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute: see, e.g., *Big M*, *supra*; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29. This is so because we live in a society of individuals in which we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it": *On Liberty and Considerations on Representative Government* (1946), at p. 11. In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another.

62 Freedom of religion, as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec *Charter* and the Canadian *Charter* and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even

if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

63 Indeed, freedom of religion, like all other rights, applicable either as against the State or, under the Quebec *Charter*, in its private dimension as against another individual, may be made subject to overriding societal concerns. As with other rights, not every interference with religious freedom would be actionable, in accordance with the limitations on the exercise of fundamental rights recognized by the Quebec *Charter*.

(3) Alleged Justification for the Limit on the Exercise of Freedom of Religion

64 The respondent in the instant appeal has argued that the rights of the co-owners to peacefully enjoy property and to personal security limit the exercise of the appellants' religious freedom under the circumstances. I acknowledge that much can be said about the nature of and interrelationship among the various rights found in the Quebec *Charter* as raised in this appeal. But such an analysis is not necessary to dispose of the issues in this case. This is because at bottom, and as discussed below, whereas I find the appellants' rights to freedom of religion significantly impaired, on the facts of this case the impact on the respondent's rights at issue is, at best, minimal and thus cannot be construed as validly limiting the exercise of the appellants' religious freedom.

B. *Application to the Facts*

(1) Freedom of Religion and Infringement

(a) *As Pertaining to Setting Up One's Own Succah*

65 As outlined above, the first step in successfully advancing a claim that an individual's freedom of religion has been infringed is for a claimant to demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion. The second step is to then demonstrate that the impugned conduct of a third party interferes with the individual's ability to act in accordance with that practice or belief in a manner that is non-trivial. At trial, Rochon J., relying primarily on the testimony of Rabbi Levy, whose testimony he found more compelling than that of Rabbi Ohana, found that the impugned clauses in the declaration of co-ownership did not infringe the appellants' rights to freedom of religion since, according to him, Judaism does not require its adherents to build their own succah (at p. 1909):

> [TRANSLATION] First of all, the court notes that practising Jews are not under a religious obligation to erect their own succahs. There is no commandment as to where they must be erected.

As a result, Rochon J. believed that freedom of religion was not even triggered. Although Morin J.A., in his concurring opinion, quite properly concluded that this was not the correct approach to take to freedom of religion, the majority of the Court of Appeal seemed to endorse the trial judge's reasoning. With respect, I believe their approach was mistaken.

66 More particularly, the approach adopted by Rochon J. at trial and Dalphond J. for the majority of the Court of Appeal is inconsistent with the proper approach to freedom of religion. First, the trial judge's methodology was faulty in that he chose between two competing rabbinical authorities on a question of Jewish law. Second, he seems to have based his findings with respect to freedom of religion solely on what he perceived to be the objective obligatory requirements of Judaism. He thus failed to recognize that freedom of religion under the Quebec (and the Canadian) *Charter* does not require a person to prove that his or her religious practices are supported by any mandatory doctrine of faith.

67 Furthermore, in my opinion, any incorporation of distinctions between "obligation" and "custom" or, as made by the respondent and the courts below, between "objective obligation" and "subjective obligation or belief" within the framework of a religious freedom analysis is dubious, unwarranted and unduly restrictive. In my view, when courts undertake the task of analysing religious doctrine in order to determine the truth or falsity of a contentious matter of religious law, or when courts attempt to define the very concept of religious "obligation", as has been suggested in the courts below, they enter forbidden domain. It is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine.

68 Similarly, to frame the right either in terms of objective religious "obligation" or even as the sincere subjective belief that an obligation exists and that the practice is <u>required</u> would lead to arbitrary and hierarchical determinations of religious "obligation", would exclude religious custom from protection, and would disregard the value of non-obligatory religious experiences by excluding those experiences from protection. Jewish women, for example, strictly speaking, do not have a biblically

mandated "obligation" to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict "obligation" to do so? Is the 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.

69 Rather, as I have stated above, regardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion, it should trigger the protection of s. 3 of the Quebec *Charter* or that of s. 2(*a*) of the Canadian *Charter*, or both, depending on the context.

70 On the question of sincerity, the respondent argues that the appellants do not sincerely believe that their religion requires them to build their own individual succahs on their balconies. That said, the trial judge did find that Mr. Amselem, at least, sincerely believed that he was obliged to set up a succah on his own property, thus triggering his freedom of religion protection according to the first step in our analysis.

71 With respect to the appellants Mr. Klein and Mr. Fonfeder, Rochon J. relied primarily on their past practices to question their sincerity and concluded that they must view the setting up of their own succah as a purely optional practice, which precluded their freedom of religion from being triggered. This conclusion is troublesome for a variety of reasons. First, Rochon J. misconstrued the scope of freedom of religion. Given this mistaken approach, it is somewhat difficult to assess the sincerity of the appellants' religious beliefs regarding the setting up of succahs on their balconies. Second, I do not accept that one may conclude that a person's current religious belief is not sincere simply because he or she previously celebrated a religious holiday differently. Beliefs and observances evolve and change over time. If, as I have underscored, sincerity of belief at the relevant time is the governing standard to ensure that a claim is honest and not an artifice, then a rigorous examination of past conduct cannot be determinative of sincerity of belief.

72 Furthermore, based on the above-discussed definition of freedom of religion, it appears that the trial judge applied the wrong test to the evidence adduced by the appellants in support of their belief. For if 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, then the proper test would be whether the appellants sincerely believe that dwelling in or setting up their <u>own</u> individual succah is of religious significance to them, irrespective of whether they subjectively believe that their religion <u>requires</u> them to build their own succah. This is because it is hard to qualify the value of religious experience. Religious fulfilment is by its very nature subjective and personal. To some, the religious and spiritual significance of building and eating in one's own succah could vastly outweigh

the significance of a 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.

73 When the appellants adduced Rabbi Ohana's expert testimony, they were submitting evidence of their sincere individual belief as to the inherently personal nature of fulfilling the commandment of dwelling in a succah. As expounded upon by Rabbi Ohana, according to Jewish law the obligation of "dwelling" must be complied with festively and joyously, without causing distress to the individual. Great distress, such as that caused by inclement weather, extreme cold or, in this case, the extreme unpleasantness rendered by forced relocation to a communal succah, with all attendant ramifications, for the entire nine-day period would not only preclude the acknowledged obligation of dwelling in a succah but would also render voluntary compliance wrongful and inappropriate, thus necessitating the setting up of a private succah. In light of our test for freedom of religion, such expert testimony, although not required, would in my view certainly support a positive finding of sincerity and honesty of the appellants' belief. As a result, all of the appellants have, in my opinion, successfully implicated freedom of religion.

74 According to the governing principles, however, in order for a triggered right of religious freedom to have been infringed, the interference with the right needs to be more than trivial or insubstantial: see *Jones*, *supra*. It is evident that in respect of Mr. Amselem the impugned clauses of the declaration of co-ownership interfere with his right in a substantial way. For if, as Rochon J. himself found, Mr. Amselem sincerely believes that he is obligated by the Jewish religion to set up and dwell in his own succah, then a prohibition against setting up his own succah obliterates the substance of his right,

let alone interferes with it in a non-trivial fashion. A communal succah is simply not an option. Thus, his right is definitely infringed.

75 In respect of Mr. Klein and Mr. Fonfeder, a finding of infringement depends upon what the substance of their belief was. If they sincerely believed that they must build their own succah because doing so engenders a greater connection with the divine or with their faith, then their rights to freedom of religion will be infringed by the declaration of co-ownership to the same extent as Mr. Amselem's. For the purposes of determining if freedom of religion is triggered or whether there is a non-trivial interference therewith, there is no distinction between sincere belief that a practice is required and sincere belief that a practice, having a nexus with religion, engenders a connection with the divine or with the subject or object of a person's spiritual faith. If, however, they sincerely believed that they must build a succah of their own because the alternatives, of either imposing on friends and family or celebrating in a communal succah as proposed by the respondent, will subjectively lead to extreme distress and thus impermissibly detract from the joyous celebration of the holiday, the joy of which, as intimated by their witness Rabbi Ohana, is essential to its proper celebration, then they must prove that these alternatives would result in more than trivial or insubstantial interferences and non-trivial distress.

76 In my opinion, this has been successfully proven. At trial, the appellants testified as to the substantially distressing nature of the burden imposed upon them by the prohibition and the available alternatives. The appellants believe that they must eat every meal in the succah throughout the nine-day holiday. Imposing on others for the entire holiday amounts to a severe burden, especially when dealing with children, as testified to by Mr. Klein.

77 Similarly, a communal succah, as the respondent proposes, would force the appellants to carry food and utensils from their units on elevated floors to the succah, and traverse the expanse of the property to the Sanctuaire's gardens for every course at every meal throughout the holiday. Since Orthodox Jews are precluded from using elevators on the Sabbath and on the first two and last two days of the Succot holiday, this would amount to forcing Orthodox Jewish residents, including the elderly among them, to climb up and down numerous flights of stairs throughout each meal for much of the nine-day holiday period. Furthermore, by being forced to share all meals with the other Jewish residents of the complex, a communal succah would also preclude the intimate celebration of the holiday with immediate family. Those who choose to sleep in the succah, weather permitting, would have to do so communally and in the open, far from the proximity and safety of their individual units. Such distress is even objectively substantial and would undoubtedly, as the appellants assert, detract from the joyous celebration of the holiday and thus constitute a non-trivial interference with and an infringement of their rights to religious freedom.

(b) *As Pertaining to "Dwelling" in a Succah*

78 In the alternative, there is no doubt whatsoever from the record that all of the appellants sincerely believe that they must fulfill the biblically mandated obligation, perhaps not necessarily of having one's own succah, but of "dwelling" in a succah for the entire nine-day festival of Succot. This thus triggers freedom of religion. The question then becomes, once again, whether the appellants' rights have been infringed. Even though the Sanctuaire's by-laws do not overtly forbid them to dwell in a succah — in that the appellants are free to celebrate the holiday with relatives or in a proposed

communal succah —, the appellants' protected rights will nonetheless be infringed, according to this Court's jurisprudence, if the impugned clauses constrain their rights to dwell in a succah in a manner that is non-trivial or not insubstantial. In my view, they do.

79 The burdens placed upon the appellants as a result of the operation of the impugned clauses, either by requiring them to celebrate the holiday by imposing on others or by forcing them, as suggested by the respondent, to celebrate in a communal succah, are evidently substantial. Preventing the appellants from building their own succah therefore constitutes a non-trivial interference with their protected rights to dwell in a succah during the festival of Succot, which all acknowledge they sincerely regard as a religious requirement. The result is that the impugned stipulations in the declaration of co-ownership infringe upon the appellants' freedom of religion under s. 3 of the Quebec *Charter*.

80 Consequently, I believe that all of the appellants have successfully made out an infringement of their freedom of religion.

81 As discussed above, to my mind, the impairment of the appellants' religious freedom resulting from the refusal of the respondent to allow the setting up of succahs on balconies is serious. As a result, the enjoyment of their rights to religious freedom has been significantly impaired. The Syndicat's offer of allowing the appellants to set up a communal succah in the Sanctuaire's gardens does not remedy nor does it even address that impairment.

(2) The Alleged Justification for the Limit on the Exercise of Freedom of Religion in this Case

82 Against the appellants' rights, the respondent Syndicat claims that the potential setting up of succahs on the appellants' balconies for the nine-day holiday of Succot would interfere with the co-owners' rights to the peaceful enjoyment of their property and to personal security, protected under ss. 6 and 1 of the Quebec *Charter*, respectively, thus justifying the total blanket prohibition against setting up succahs.

83 More specifically, in this case the co-owners' rights to peaceful enjoyment of their co-owned property in general, and of the balconies as "common portions" thereof in particular, has been articulated as a function of preserving the economic and aesthetic value of their property, which, they assert, is a component of an individual's right to enjoy his or her property under the Quebec *Charter*. Similarly, the respondent claims that the co-owners' rights to personal security under the *Charter* have been implicated; because the balconies of the Sanctuaire are fire-escape routes, cordoning off of the balcony would jeopardize the co-owners' safety in an emergency situation. In essence, the Syndicat is requesting in the name of the co-ownership that the appellants cease and desist from setting up these succahs, claiming that their presence negatively affects the co-owners' aesthetic, economic, and security interests in the property.

84 In the final analysis, however, I am of the view that 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 appellants' religious freedom.

85 In practice, to what degree would the respondent be harmed were the appellants allowed to set up a succah for a period of 9 out of 365 days a year? The evidence before us does not provide a satisfactory answer. The respondent has simply

not adduced enough evidence for us to conclude that allowing the appellants to set up such temporary succahs would cause the value of the units, or of the property, to decrease. Even if I were to consider the possibility that the economic value of the property might decrease if a substantial number of co-owners were allowed to set up succahs on their balconies for a lengthy time period throughout the year, any drop in value caused by the presence of a small number of succahs for a period of nine days each year would undoubtedly be minimal. Consequently, in this case, the exercise of the appellants' freedom of religion, which I have concluded would be significantly impaired, would clearly outweigh the unsubstantiated concerns of the co-owners about the decrease in property value.

86 Similarly, protecting the co-owners' enjoyment of the property by preserving the aesthetic appearance of the balconies and thus enhancing the harmonious external appearance of the building cannot be reconciled with a total ban imposed on the appellants' exercise of their religious freedom. Although residing in a building with a year-long uniform and harmonious external appearance might be the co-owners' preference, the potential annoyance caused by a few succahs being set up for a period of nine days each year would undoubtedly be quite trivial.

87 In a multiethnic 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 — and is in many ways an example thereof for other societies —, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all democratic societies. Living in a community that attempts to

maximize human rights invariably requires openness to and recognition of the rights of others. In this regard, I must point out, with respect, that labelling an individual's steadfast adherence to his or her religious beliefs "intransigence", as Morin J.A. asserted at para. 64, does not further an enlightened resolution of the dispute before us.

88 Finally, the respondent alleges that banning succahs on the appellants' balconies, portions of which are subject under the by-laws to a right of servitude in cases of emergency, ensures that the balconies, as fire escape routes, would remain unobstructed in the case of emergency and, as such, the ban seeks to protect the co-owners' rights to personal security under s. 1 of the Quebec *Charter*. I agree that security concerns, if soundly established, would require appropriate recognition in ascertaining any limit on the exercise of the appellants' religious freedom.

89 However, in their October 14, 1997 letter to the respondent, the appellants obviated any such concerns by all offering to set up their succahs "in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way".

90 Since the appellants have never claimed that the succah need have any exterior aesthetic religious component, the appellants should set up their succahs in a manner that conforms, as much as possible, with the general aesthetics of the property in order to respect the co-owners' property interests. Counsel for the appellants acknowledged this undertaking in oral argument.

C. *Waiver*

91 Dalphond J. held, and the respondent contends, that the appellants had waived their rights to freedom of religion — or had implicitly agreed with the terms of the by-laws — when they signed the declaration of co-ownership, and that the appellants must comply with the impugned provisions of the Sanctuaire's by-laws, including the general prohibition against decorations or constructions on balconies. I confess to some difficulty in understanding the legal basis for this proposition. Whether it amounts to "waiver" — or to waiver by another name —, the argument does not withstand scrutiny.

92 Whether one can waive a constitutional right like freedom of religion is a question that is not free from doubt: see, e.g., for cases where waiver was disapproved of: *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158; *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202; *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, at para. 21; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 28. But see where cases recognized waiver: *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Richard*, [1996] 3 S.C.R. 525; *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647.

93 But I need not explore that question in this case. I say that because, even assuming that an individual can theoretically waive his or her right to freedom of religion, I believe that a waiver argument, or an argument analogous to waiver, cannot be maintained on the facts of this case for the following reasons.

94 First, while the respondent claims that succahs are "plainly" and unconditionally prohibited under s. 2.6.3b) of the declaration of co-ownership, I am not

persuaded that the purported prohibition comes more squarely under s. 2.6.3b) than under s. 9.3. On the contrary, both deal with the enclosure of balconies. However, unlike s. 2.6.3b), s. 9.3 does not create an absolute prohibition; rather, it permits the covering and enclosure of balconies, but only with the consent of the co-owners or the directors.

95 This inherent ambiguity obviates any question of waiver or implicit agreement on the part of the appellants. For if the prohibition can properly be construed as falling under s. 9.3, and if that clause does not contain an absolute prohibition but simply requires soliciting the consent of the co-owners to enclose one's balcony, then the appellants' signing of the declaration of co-ownership cannot possibly be construed as a waiver or as an implicit agreement not to build succahs; it simply recognizes the need to obtain consent from the co-owners before setting up a succah.

96 Second, by its very nature, waiver of any right must be voluntary, freely expressed and with a clear understanding of the true consequences and effects of so doing if it is to be effective: see *Richard*, *supra*, at para. 22.

97 Looking at our jurisprudence, in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, for example, La Forest J. stated that a right holder who has no other choice but to renounce a right cannot be said to have truly waived his or her right. In that case, an employee of the City of Longueuil was faced with the following choice: undertake to maintain her permanent residence in Longueuil for the duration of her employment or quit and seek employment elsewhere. In the words of La Forest J., at para. 72:

> Stated simply, the respondent in this case had no opportunity to negotiate the mandatory residence stipulation and, consequently, she cannot in any

> meaningful sense be taken to have freely given up her right to choose where to live. In civilian parlance, her acquiescence in signing the residence declaration was (as Baudouin J.A. found in the course of his public order analysis) tantamount to accepting a contract of adhesion and, as such, it cannot properly be understood to constitute waiver.

Because Ms. Godbout had no opportunity to negotiate the mandatory residence stipulation, the Court held that she could not be taken to have freely given up her right to choose where to live.

98 Under the circumstances of the instant case, the appellants had no choice but to sign the declaration of co-ownership in order to live at the Sanctuaire. They had no more choice than Ms. Godbout did. It would be both insensitive and morally repugnant to intimate that the appellants simply move elsewhere if they took issue with a clause restricting their rights to freedom of religion. However, this attitude is explicitly reflected in what Morin J.A. proposed the appellants do at paras. 69-70:

> [TRANSLATION] I believe the appellants will have to sacrifice their right to live in Place Northcrest if they cannot comply with the restrictions set out in the co-ownership agreement they freely signed.
>
> . . . However, in the case at bar, the appellants could easily choose to live someplace other than Place Northcrest if they refuse to make any concessions whatsoever in terms of how they practise their religious beliefs.

In my view, since the appellants did not have a real choice, it would be incorrect to conclude that they voluntarily and validly waived their rights to religious freedom.

99 Further, in this case, there is no evidence whatsoever that the appellants were aware that signing the declaration of co-ownership amounted to a waiver of their rights to freedom of religion. In fact, the respondent admits that the appellants [TRANSLATION]

"did not read these provisions on purchasing their co-owned property, although they were duly given a copy of the declaration of co-ownership". If, as the respondent itself alleges, the appellants did not take note of these restrictions upon purchasing their units, despite the fact that a copy of the declaration of co-ownership was given to them, and were thus not aware of the general clauses therein prohibiting the setting up of such structures as succahs on their balconies, I believe it is safe to conclude that there was no clear understanding of the consequences of the alleged waiver.

100 Third, at a minimum, waiver of a fundamental right such as freedom of religion, if possible at all, presumably need not only be voluntary; it must also be explicit, stated in express, specific and clear terms. Not only would a general prohibition on constructions, such as the one in the declaration of co-ownership, be insufficient to ground a finding of waiver, but arguably so would any document lacking an explicit reference to the affected *Charter* right.

101 In the end, it is my view that the appellants did not voluntarily, clearly and expressly waive their rights to freedom of religion. Further, it cannot be said that the claimants had full knowledge that signing the co-ownership agreement would result in the waiver of their rights. I have no doubt that in signing the declaration, the furthest thing from the claimants' minds was that by doing so they were waiving their rights to freedom of religion, especially since s. 9.3 of the by-laws specifically allowed for enclosing portions of balconies with consent of the co-owners, which the appellants could have assumed would not be unreasonably withheld for the setting up of temporary succahs to celebrate the annual festival of Succot. In fact, the record shows that the intention of at least some of the appellants when purchasing their units was to acquire

units specifically with unobstructed balconies, open to the heavens, so that they could technically put up a proper succah in accordance with the specifications of Jewish law.

102 In light of the above, I do not believe the appellants in this case can be said to have waived their rights to freedom of religion in signing the declaration of co-ownership.

VII. Conclusions and Disposition

103 Based on the foregoing analysis, I find that the impugned provisions in the declaration of co-ownership prohibiting constructions on the appellants' balconies infringe the appellants' freedom of religion under the Quebec *Charter*. I also do not believe it can be maintained that the appellants waived their rights to freedom of religion or implicitly agreed not to set up succahs on their balconies for the religiously mandated period by signing the declaration of co-ownership. Under the circumstances, I find that the respondent's justificatory claims for this infringement are unfounded; the co-owners' personal security concerns are largely obviated and their property interests are, at most, minimally intruded upon. The appellants are thus legally entitled to set up succahs on their balconies for a period lasting no longer than the holiday of Succot, so long as the succahs allow room for a passageway in case of emergency as well as conform, as much as possible, with the general aesthetics of the property.

104 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the decision of the Court of Appeal, and, in lieu thereof, declare that the appellants have a right to set up succahs on their balconies for the annual festival of

Succot, subject to the undertakings they have given with regard to the size, placement, and general aesthetics of said succahs.

English version of the reasons of Bastarache, LeBel and Deschamps JJ. delivered by

105 BASTARACHE J. (dissenting) — This appeal concerns two cases involving private parties and raises the difficult problem of reconciling the freedom of religion of certain individuals with the rights of others to private property, to security and to having their contracts respected. More specifically, it must be decided whether the appellants have the right to erect private succahs on their balconies during the nine-day Jewish holiday of Succot, in violation of the declaration of co-ownership for Phases VI and VII of the Sanctuaire du Mont-Royal. To decide these cases, we must establish what method should be used to determine which aspects of religious practice are protected by the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, and the *Canadian Charter of Rights and Freedoms*, how the sincerity of religious belief should be assessed, and how all the rights in question are to be balanced under s. 9.1 of the Quebec *Charter*.

I. Facts

106 The appellants, who are practising Orthodox Jews, live in two buildings that are part of a residential development in Montréal called "Le Sanctuaire du Mont-Royal". The two buildings, built in Phases VI and VII of the development project, are known more specifically as "Place Northcrest". The co-owners of the two buildings are the members of a body known as "Syndicat Northcrest" ("Syndicat"), which is the

respondent in the case at bar. The Syndicat is governed by a declaration of co-ownership, certain provisions of which are contested in the instant case.

A. *The Declaration of Co-Ownership*

107 The declaration of co-ownership imposes certain restrictions on the rights of the co-owners. The restrictions are found primarily in ss. 2.6.3, 6.5, 6.16 and 9.3 of the declaration, which read as follows:

> [TRANSLATION]
>
> 2.6.3 Balconies, porches and patios — the owner of each exclusive portion (dwelling unit) with a door leading to a balcony, porch or patio adjoining his or her exclusive portion (dwelling unit) has the personal and exclusive use of the balcony, or of the portion of the porch adjoining his or her exclusive portion, subject to the following rules:
>
> a) On porches, an area at least as wide as is required under fire safety by-laws must be kept free of garden furniture and other accessories, as the porches serve as emergency exits.
>
> b) No owner may enclose or block off any balcony, porch or patio in any manner whatsoever or erect thereon constructions of any kind whatsoever.
>
> . . .
>
> Perpetual rights of way for emergency situations (including elevator breakdowns) are hereby created in favour of all the above-mentioned exclusive portions (dwelling units), the dominant land, on the common portions, namely every porch, balcony, terrace or patio, the servient lands.
>
> 6.5 UNIFORMITY OF DÉCOR IN THE BUILDING
>
> Entrance doors to the exclusive portions (dwelling units), windows, painted exterior surfaces and, in general, any exterior elements contributing to the overall harmony of the building's appearance may under no circumstances be altered, even if they are part of the limited common portions, without first obtaining the written permission of the Board of Directors, who themselves must first obtain the approval of the co-owners at a general meeting.

6.16 EXTERIOR DECORATIONS PROHIBITED

Co-owners may not decorate, paint or alter the exterior of the exclusive portions in any way whatsoever without first obtaining the written consent of the Board of Directors, subject to any exceptions provided for in this declaration.

9.3 BALCONIES AND PORCHES

Subject to the law and to this declaration, each co-owner having exclusive use of a balcony or a portion of a porch adjoining his or her exclusive portion (dwelling unit), as provided for in clause 2.6.3, shall keep said balcony or portion of the porch clean. The co-owner having exclusive use of said balcony or portion of the porch is solely responsible for the day-to-day maintenance thereof. . . .

Furthermore, subject to acts and regulations of general application, nothing other than usual outdoor furniture may be left or stored on a balcony or porch without first obtaining permission in writing from the Board of Directors. Under no circumstances may balconies or porches be used for drying laundry, towels, etc.

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.

108 The declaration of co-ownership provides that patios, porches and balconies, including those set up as terraces, are considered to be common portions. However, these common portions are reserved for the exclusive use of the co-owners of the exclusive portions (s. 2.6). The declaration also requires that all co-owners comply with the law, with the declaration itself and with all by-laws passed by the co-owners and directors (ss. 6.13 and 20.2), and it further provides that [TRANSLATION] "[t]he purchase, lease or occupation of an exclusive portion constitutes ipso facto an express acceptance of the applicable provisions of the law, of this declaration and of said by-laws" (s. 20.2). Although it is clear from the evidence that the appellants did not read the declaration of co-ownership before purchasing or occupying their dwelling units, they are deemed, pursuant to s. 20.2, to have accepted the terms and conditions of the declaration.

109 The declaration of co-ownership also charges the members of the Syndicat's board of directors with preserving the immovable, maintaining and managing the common portions and ensuring that the co-owners of the private portions comply with the declaration of co-ownership (ss. 12.2 and 12.2.8).

110 The immovables making up Place Northcrest, which the respondent described as [TRANSLATION] "very luxurious", are upscale buildings whose co-owners have a marked interest in maintaining their harmony and aesthetic value. The declaration of co-ownership in fact provides that no co-owner may, directly or indirectly, change the destination of the immovable or alienate common portions the retention of which is necessary to the destination of the immovable without obtaining the unanimous consent of the other co-owners (s. 13.5.4).

111 Despite the appellants' allegations that the Syndicat had applied the declaration of co-ownership inconsistently, the trial judge found that, on a preponderance of evidence, it had [TRANSLATION] "applied the restrictions in the declaration of co-ownership in a consistent manner" ([1998] R.J.Q. 1892, at p. 1901). Thus, since 1993, the Syndicat had asked co-owners to remove, in particular, fencing (wooden trellises) that had been installed on balconies and, in 1997, a satellite dish.

B. *Events Leading to the Legal Proceedings*

112 The appellants, as practising Orthodox Jews, celebrate Succot, a holiday that begins four days after "Yom Kippur", that is, on the 15th day of the month of "Tishrei" in the Jewish calendar. The trial judge gave the following description of the holiday (at p. 1897):

> [TRANSLATION] . . . practising Jews must, for a period of eight days beginning at sunset on the first day, dwell in a succah, that is, a rough structure made of wood or canvas with an open roof covered with only fir branches or bamboo, as the roof must for the most part remain open to the sky.

113 Although the biblical commandment is to "dwell" in succahs, the climate in the Montréal area is such that practising Jews, including the appellants, do not in fact dwell in them. Instead, the mandatory religious practice is apparently to eat supper on the first day and all meals on the second day in a succah. The obligation is less strict for the days that follow.

114 On October 10, 1997, Mr. Amselem asked the Syndicat for permission to erect a succah for a period of 11 days, that is, from October 14 to 25, 1997. The respondent refused, maintaining that this was prohibited under the declaration of co-ownership. However, the Syndicat offered to set up a large tent near one of the towers, which would serve as a communal succah for all Jewish co-owners wishing to celebrate Succot. This offer, to which the appellant Amselem agreed, was also approved by the Canadian Jewish Congress, which acknowledged [TRANSLATION] "the efforts made by Syndicat Northcrest and the members of its board of directors to accommodate Jewish co-owners wishing to comply with religious obligations relating to the festival of Succot".

115 Notwithstanding Mr. Amselem's earlier acceptance, the appellants decided this offer was unacceptable and proceeded to erect succahs on the balconies, porches or patios adjoining their respective dwelling units. In response, the Syndicat took legal action, filing a motion to institute proceedings and an application for an injunction to bar

the appellants, immediately and in the future, from erecting succahs on the common portions of the co-owned property that are reserved for exclusive use and, if need be, to have any such structures demolished or dismantled.

II. Judicial History

A. *Superior Court*, [1998] R.J.Q. 1892

116 Rochon J. considered that the declaration of co-ownership clearly prohibited the erection of succahs on balconies, porches or patios. After reviewing the declaration of co-ownership, he reached the following conclusion (at p. 1899):

> [TRANSLATION] On reading together all the clauses containing restrictions, the Court quickly concluded that the erection of succahs is prohibited. Whether or not the succah is considered a construction is of little consequence. Enclosing, blocking off or decorating a balcony or patio in any way whatsoever is prohibited. In short, apart from the usual outdoor furniture, owners may not make any alterations to the exterior. They may not place anything whatsoever outside. When considered as a whole, these restrictions demonstrate a clear intent to maintain the original condition and uniform appearance of the building's exterior.

117 Rochon J. then examined art. 1056 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), which provides for restrictions on the rights of co-owners insofar as they are justified (1) by the destination of the immovable, (2) by its characteristics, or (3) by its location. Next, he noted that the constituting act of co-ownership (1) provided that the destination of the immovable is strictly residential, (2) described the immovable as a luxurious, upscale development and (3) placed special importance in the building's aesthetic value and exterior harmony. Rochon J. found the restrictions imposed on the co-owners by the declaration of co-ownership as regards the use of the common portions

reserved for exclusive use to be consistent with art. 1056 C.C.Q. In his view, the evidence showed that, since taking control of the immovable in 1991, the respondent had applied the restrictions provided for in the declaration of co-ownership in a consistent and uniform manner.

118 Rochon J. went on to review the effect of the restrictions on the appellants. After reviewing the case law, he noted that freedom of religion can be relied on only if there is a connection or nexus between the asserted right and what is considered mandatory pursuant to the religious teachings upon which the right is based. In his view, the evidence showed that Judaism does not require practising Jews to have their own succahs and that there is no commandment as to where they must be erected. He concluded that the restrictions did not prevent the appellants from fulfilling their religious obligations and consequently did not infringe their freedom of religion.

119 In case this conclusion was overturned, Rochon J. then considered the question of whether the accommodation proposed by the respondent was reasonable in the circumstances. He pointed out that the Syndicat had adopted a respectful and deferential attitude with respect to the appellants' rights, had given the appellants an opportunity to express their point of view and had proposed a reasonable solution accommodating their needs by offering to erect a communal succah on land close to one of the buildings, at the expense of all the co-owners, in a place that would have allowed the appellants to comply with the precepts of their religion. Rochon J. criticized the appellants for their failure to show flexibility or a spirit of compromise in categorically refusing this compromise. In his view, the appellants' inflexibility showed that they were not interested in reaching a solution that would be acceptable to all concerned.

120 Continuing with the assumption that the appellants' freedom of religion had been infringed, Rochon J. found that the infringement could be justified under s. 9.1 of the Quebec *Charter*. He noted that the declaration of co-ownership created a right of way on balconies for emergency situations and determined that the erection of succahs on balconies and terraces posed a risk to the residents' safety. He also felt that the erection of succahs affected the co-owners' right to free enjoyment of their property — a *Charter* right that in his opinion is on an equal footing with any fundamental freedom guaranteed by the *Charter* — under the agreement they had signed. He therefore concluded that the objectives of the declaration were legitimate and that the measures were implemented in a reasonable and rational manner with respect to those objectives.

121 Rochon J. accordingly issued a permanent injunction ordering the appellants to refrain from setting up any shelter, structure, construction or succah on the common portions reserved for the exclusive use of the co-owners.

B. *Court of Appeal*, [2002] R.J.Q. 906

1. Dalphond J. (*ad hoc*)

122 Dalphond J. began by confirming that the impugned provisions of the declaration of co-ownership prohibited the erection of succahs on balconies, porches, and patios. Since these provisions limited the residents' enjoyment of their balconies, porches or patios, they restricted the co-owners' rights. Dalphond J. also agreed with the trial judge's conclusion that the impugned provisions imposed restrictions that were valid under art. 1056 C.C.Q. He found that the provisions were adopted first to preserve

the building's style and its aesthetic appearance of a luxury building, and also to ensure the residents' safety.

123 With regard to the applicability of the Quebec *Charter*, Dalphond J. pointed out that the impugned provisions were found not in a statute, but in a contract that the appellants had freely signed when they purchased a co-owned property in Place Northcrest. For this reason, he considered that only s. 13 of the Quebec *Charter* was applicable. Since the constituting act of co-ownership was a "juridical act" within the meaning of s. 13, Dalphond J. stated that the issue was whether its provisions concerning the use of balconies, patios and terraces were discriminatory within the meaning of s. 10 of the Quebec *Charter*.

124 Applying the three-step test from *Québec (Procureur général) v. Lambert*, [2002] R.J.Q. 599 (C.A.), he noted that, at first glance, the impugned provisions were neutral in application, as they prohibited all residents from placing anything other than ordinary furniture on their balconies, porches or patios. In his view, the restrictions did not affect the appellants any differently from other co-owners with religious beliefs, nor were they any more prejudicial to co-owners with religious beliefs than to those who did not hold such beliefs. In short, Dalphond J. found that the impugned provisions were not discriminatory within the meaning of s. 10 of the Quebec *Charter*.

125 Dalphond J. concluded that the trial judge had correctly stated the law in finding that the appellants were not under a religious obligation to set up succahs on their balconies, terraces or patios during Succot and that what was in issue was [TRANSLATION] "an act that they wished to carry out in 1996 and 1997 to discharge a moral obligation to celebrate Succot. This is a finding of fact made by the trial judge

that is supported by the evidence independently of the debate between the two rabbis" (para. 153). He concluded that the appellants' right to freedom of religion had not been infringed. In his view, s. 9.1 of the Quebec *Charter* is not relevant to the case, as it does not apply to violations of s. 10 or s. 13. He also considered it unnecessary to rule on the issue of the duty to accommodate, given that the appellants had failed to prove discrimination within the meaning of s. 10 of the Quebec *Charter*.

126 Dalphond J. was of the view that the appeal should be dismissed, and Baudouin J.A. concurred with his reasons.

2. Morin J.A.

127 Morin J.A. felt that the trial judge had adopted an unduly restrictive interpretation of the very concept of freedom of religion. In his view, the provisions of the act of co-ownership infringed the freedom of religion expressly recognized in s. 3 of the Quebec *Charter*.

128 Morin J.A. then proceeded to apply the three-step "unified approach" to analysing claims of discrimination that this Court advocated in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, adapting the test to the context of private relations between a syndicate of co-owners and certain of the co-owners. He relied on art. 1039 C.C.Q. to conclude that the restrictions had been adopted for a purpose rationally connected to the management of the immovable. He then relied on art. 1056 C.C.Q. to conclude that the restrictions had been adopted in an honest and good faith belief that they were necessary to the fulfilment of that legitimate purpose.

129 Regarding the third step of the test, that is, the analysis of undue hardship, Morin J.A. stated that the appellants' inflexible and intransigent attitude had made any accommodation virtually impossible. He therefore concluded that the Syndicat had discharged its duty to accommodate by making reasonable offers to the appellants, and that it would have suffered undue hardship had it been forced to accede to their demands. Thus, he adopted the trial judge's findings on this point.

130 With respect to s. 9.1 of the Quebec *Charter*, Morin J.A. was of the opinion that the trial judge had stated the law correctly when he concluded that the restrictions imposed on the co-owners constituted reasonable limits that were justified under s. 9.1, especially since the restrictions applied to portions of the property where the right of ownership was held in common. Like Dalphond J., Morin J.A. was of the view that the appeal should be dismissed.

III. Relevant Statutory Provisions

131 *Civil Code of Québec*, S.Q. 1991, c. 64

PRELIMINARY PROVISION

> The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.
>
> **1056.** No declaration of co-ownership may impose any restriction on the rights of the co-owners except restrictions justified by the destination, characteristics or location of the immovable.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.
>
> He also possesses juridical personality.
>
> **3.** Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.
>
> **6.** Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.
>
> **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 Québec.
>
> In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

IV. Analysis

A. *The Scope of Freedom of Conscience and Religion*

132 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.

133 In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, this Court had occasion to interpret s. 2(*a*) of the Canadian *Charter* for the first time. Dickson J. (as he then was) made a number of comments that now form the basis of our interpretation of freedom of religion (at pp. 336-37):

> 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 belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> . . . Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs of his conscience.

134 A year later, in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, Dickson C.J. wrote the following:

> The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices.

135 These passages seem to show that this Court has interpreted freedom of religion as protecting both religious beliefs, which are considered to be highly personal and private in nature, and consequent religious practices. However, a religion is a system of beliefs and practices based on certain religious precepts. A nexus between personal beliefs and the religion's precepts must therefore be established. This point of view is consistent with those encountered in other common law jurisdictions: *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406 (H.L.); *R. v. Registrar General, Ex parte Segerdal*, [1970] 2 Q.B. 697 (C.A.); *Barralet v. Attorney General*, [1980] 3 All E.R. 918 (Ch. D.); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Religious precepts constitute a body of objectively identifiable data that permit a distinction to be made between genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience. 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 or the adoption of a religious practice that is supported by a personal belief, but also a genuine connection between the belief and the person's religion. In my view, the only way the trial judge can establish that a person has a sincere belief, or has sincerely adopted a religious practice that is genuinely connected with the religion he or she claims to follow, is by applying an objective test. It is one thing to assert that a practice is protected even though certain followers of the religion do not think that the practice is included among the religion's precepts and quite another to assert that a practice must be protected when none of the followers think it is included among those precepts. If, pursuant to s. 3, a practice must be connected with the religion, the connection must be objectively identifiable.

136 This Court has also noted on a number of occasions that freedom of religion, like any other freedom, is not absolute: *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182. It is inherently limited by the rights and freedoms of others. La Forest J. explained this as follows in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 72:

> Indeed, this Court has affirmed that freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience. This freedom is not unlimited, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.

137 In light of the foregoing, a method must be established for determining the scope of the protection that freedom of religion affords a claimant. If the authorities refer here to [TRANSLATION] "conscientious objection" or "the possibility of exempting oneself from the application of a law or a rule of internal management on religious grounds" (see H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at p. 1033), it is because there are in fact two elements to consider in analysing freedom of religion. First, there is the freedom to believe and to profess one's beliefs; second, there is the right to manifest one's beliefs, primarily by observing rites, and by sharing one's faith by establishing places of worship and frequenting them. Thus, although private beliefs have a purely personal aspect, the other dimension of the right has genuine social significance and involves a relationship with others. It would be an error to reduce freedom of religion to a single dimension, especially in conducting a contextual analysis like the one that must be conducted under s. 9.1 of the Quebec *Charter*. Even an author who says he is favourable to a secular justification for freedom of religion, i.e., a justification free of moral considerations, has said:

> Notwithstanding the wide variety of religious experience, no religion is or can be purely individual in its outlook, as ultimate concern is said to be. On the contrary, religions are necessarily collective endeavours. By the same token, no religion is or can be defined purely by an act of personal commitment, as the ultimate concerns of an individual are said to be. Instead, all religions demand a personal act of faith in relation to a set of beliefs that is historically derived and shared by the religious community. It follows that any genuine freedom of religion must protect, not only individual belief, but the institutions and practices that permit the collective development and expression of that belief.
>
> More fundamentally, while it is possible to understand religion in such a way as to include practices that would conventionally be regarded as secular, it is simply not possible to understand religion in such a way that the distinction between the religious and the secular collapses, for the religious and the secular exist in contradistinction to one another. Yet such a collapse is implicit in the view that the secular becomes religious as and when it becomes a matter of ultimate concern to any individual, for whether a practice is secular or religious would then be a purely subjective question. Any objective distinction between the two would disappear.

(T. Macklem, "Faith as a Secular Value" (2000), 45 *McGill L.J.* 1, at p. 25)

138 However, it should be noted that to analyse a religious practice in the context of conscientious objection, it is necessary to examine the believer's perception. It is important that a believer's religious practices not be limited to those of the majority or of an entire community, or to those that are considered to be generally accepted. Still, it is the person relying on a religious precept to establish the mandatory nature of his or her religious practice who must prove that the precept exists; see J. Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998), 43 *McGill L.J.* 325, at p. 388, and H. Brun, "Un aspect crucial mais délicat des libertés de conscience et de religion des articles 2 et 3 des Chartes canadienne et québécoise: l'objection de conscience" (1987), 28 *C. de D.* 185, at p. 195. In addition to this initial examination, there is also the question of the sincerity of the person claiming the right. Once again, though, the two dimensions of the right to freedom of religion must not be forgotten. The sincerity of beliefs does not bar a court from examining the observance of rites, which have social significance, in light of s. 9.1 of the Quebec *Charter*. In fact, this is essential, since the *Charter*, like the *Civil Code of Québec*, constitutes a coherent legislative whole. I believe that the following comment about the *Civil Code* by Professor M. Tancelin can be transposed to this situation:

> [TRANSLATION] A serious, and fairly common, error is made about the Civil Code, namely a belief that it is a consolidation of laws, which it may be in form, whereas it is a document that, once voted on one or more times, forms a whole. In reality, it is *one* law, a self-contained law that forms a whole despite the wide variety of subjects with which it deals. Thus, the rule of interpretation that every legal provision be read in light of those surrounding it also applies to the articles of each of the subsets that make up the divisions of the Code. In concrete terms, this means that each portion of the Code has been drafted in a manner consistent with the others. [Emphasis in original.]

> (M. Tancelin, "L'acte unilatéral en droit des obligations ou l'unilatéralisation du contrat", in N. Kasirer, ed., *La solitude en droit privé* (2002), 214, at pp. 216-17)

139 The first step of the analysis therefore consists in examining the belief of a claimant who adopts a particular religious practice in accordance with the rites prescribed by his or her religion. To this end, evidence must be introduced to establish the nature of the belief or conviction, that is, to determine upon what religious precept the belief or conviction is based: *Edwards Books*, *supra*, at p. 763. The onus is on the person seeking to be excused from obeying a law, a rule of internal management or another legal obligation to show that the precept in question is genuinely religious and not secular: Brun and Tremblay, *supra*, at p. 1033. The court's inquiry into the religious obligation does not imply that it is substituting its own conscience for that of the parties. This inquiry is only needed to identify the religious precept that is the basis for the claimant's practice. As constitutional law experts Brun and Tremblay state, a religious precept is [TRANSLATION] "obviously easier to demonstrate in cases involving a well-known and established collective religion than in those concerning a new or individual one": Brun and Tremblay, *supra*, at p. 1033.

140 In other words, to meet the requirements of this first step, a claimant must prove that the conduct or practice to which he or she seeks to have freedom of religion apply is in fact based on a precept of his or her religion. The test is reasonable belief in the existence of a religious precept. In the absence of such proof, the court cannot assess the effects of the provisions or standards that, according to the claimant, infringe the rights of one or more members of a religious group: *Edwards Books*, *supra*, at p. 767. Even though religion is, first and foremost, a question of conscience, when an individual feels that a right as fundamental as the right to practise his or her religion has been

infringed, a connection must be established between the religious precept and the individual asserting the right. To this end, expert testimony will be useful, as it can serve to establish the fundamental practices and precepts of a religion the individual claims to practise.

141 In the second step, the judge considers the sincerity of the claimant's religious beliefs. Before finding that there has been interference with the purpose of freedom of religion, a judge must determine that the claimant believes in a given religious precept and sincerely adheres to it. In short, the claimant must establish that he or she has a sincere belief and that this belief is objectively connected to a religious precept that follows from a text or another article of faith. It is not necessary to prove that the precept objectively creates an obligation, but it must be established that the claimant sincerely believes he or she is under an obligation that follows from the precept. In *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 295, La Forest J. described the role of the courts as follows:

> Assuming the sincerity of his convictions, I would agree that the effect of the *School Act* does constitute some interference with the appellant's freedom of religion. For a court is in no position to question the validity of a religious belief, notwithstanding that few share that belief. But a court is not precluded from examining into the sincerity of a religious belief when a person claims exemption from the operation of a valid law on that basis. Indeed it has a duty to do so. [Emphasis in original.]

As explained by Dickson C.J. in *Edwards Books*, *supra*, at p. 780, a court has no choice but to make such an inquiry:

> Judicial inquiries into religious beliefs are largely unavoidable if the constitutional freedoms guaranteed by s. 2(*a*) are to be asserted before the courts. We must live with the reality that such an inquiry is necessary in order for the same values to be given effect by the judicial system.

142 Although any analysis of freedom of religion must include an inquiry into the sincerity of the beliefs of those who assert it, such an inquiry must be as limited as possible, since it will "expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting": *Edwards Books*, *supra*, at p. 779.

143 The sincerity of a belief is examined on a case-by-case basis and must be supported by sufficient evidence, which comes mainly from the claimant. A method like this was proposed by Professor Woehrling, *supra*, at p. 394:

> [TRANSLATION] . . . the sincerity of religious beliefs is a question of fact that must be assessed in accordance with the particular circumstances of each case, and the claimant's personal credibility is of decisive importance, as his or her testimony will always be the principal source of evidence.

Although consistency in religious practice may be indicative of the sincerity of a claimant's beliefs, it is the claimant's overall personal credibility and evidence of his or her current religious practices that matter. The essential test must be the claimant's intention and serious desire to obey the fundamental precepts of his or her religion. Previous practice is but one among a number of means of demonstrating this intention.

144 The approach I suggest gives a broad scope to the purpose of freedom of religion as guaranteed by s. 3 of the Quebec *Charter*. However, this is not to say that all conduct or practices will be protected so long as they are carried out in the name of freedom of religion. As I stated above, a claimant relying on conscientious objection must demonstrate (1) the existence of a religious precept, (2) a sincere belief that the practice dependent on the precept is mandatory, and (3) the existence of a conflict between the practice and the rule.

145 It should also be borne in mind that not all restrictions on freedom of religion entail an infringement of the right protected by the Canadian *Charter*. In *Jones*, *supra*, Wilson J., dissenting, wrote the following (at pp. 313-14):

> Section 2(*a*) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion. I believe that this conclusion necessarily follows from the adoption of an effects-based approach to the *Charter*.

Thus, unless the impugned provisions or standards infringe the claimant's rights in a manner that is more than trivial or insubstantial, the freedom of religion guaranteed by the two *Charters* is not applicable.

146 Finally, it should be noted that even if religious conduct, practices or expression that could infringe or affect the rights of others in a private law context are protected *a priori* by the purpose of freedom of religion, they are not necessarily protected under the right to freedom of religion. While the purpose of freedom of religion is defined broadly, the right to freedom of religion is restricted, as mentioned above, by the provisions of the Quebec *Charter* that place limits on the right. In the case at bar, the appellants' right to freedom of religion must be interpreted in light of s. 9.1 of the Quebec *Charter*, which requires that the rights and freedoms provided for in ss. 1 to 9 of the Quebec *Charter* be exercised in respect of each other with "a proper regard for democratic values, public order and the general well-being of the citizens of Québec". It should also be mentioned that the Quebec *Charter* must be interpreted in harmony with the *Civil Code of Québec*, which is the most important instrument for defining the principles governing public order and the general well-being of the citizens

of Quebec (C.C.Q., preliminary provision). In a private law context, the observance of religious rites often affects a number of aspects of social existence; it is accordingly imperative to consider the importance of the rites and of the requirements of security, public order and the general well-being of citizens as they relate to them.

B. *The Applicable Test Under Section 9.1 of the Quebec Charter in the Context of Private Legal Relationships*

147 Section 9.1 of the Quebec *Charter* reads as follows:

> **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 Québec.
>
> In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

148 In *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, this Court had occasion to rule on the meaning of s. 9.1 of the Quebec *Charter* in a public law context. At p. 770 of that unanimous decision, the Court wrote the following:

> The first paragraph of s. 9.1 speaks of the manner in which a person must exercise his fundamental freedoms and rights. That is not a limit on the authority of government but rather does suggest the manner in which the scope of the fundamental freedoms and rights is to be interpreted. The second paragraph of s. 9.1, however — "In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law" — does refer to legislative authority to impose limits on the fundamental freedoms and rights. [Emphasis added.]

149 It would appear from this passage that the second paragraph of s. 9.1 applies to legislative action, while the first serves rather as an interpretive tool for private law relationships. Since *Ford*, *supra*, dealt with public law issues, this Court did not have

an opportunity to examine the way in which s. 9.1 can be applied as a limiting provision in a private law context. However, it can be seen that the important distinction drawn by the Court between the first paragraph of s. 9.1, which applies to persons, and the second, which, like the limiting provision under s. 1 of the Canadian *Charter*, applies to legislative action, means that the outcome of the application of s. 9.1 will vary depending on the context.

150 As Professor F. Chevrette points out in "La disposition limitative de la Charte des droits et libertés de la personne: le dit et le non-dit" (1987), 21 *R.J.T.* 461, at p. 465, applying s. 9.1 to private relationships leads to [TRANSLATION] "flexibility in the practical exercise of rights and freedoms". An analysis of the manifestations of this flexibility will take into account the facts and circumstances surrounding the exercise of the right or freedom in question. He suggests the following interpretation of s. 9.1, at p. 465:

> [TRANSLATION] Either the first [paragraph] has an independent scope, in which case implicit limits, possibly lacking a basis in law, may be imposed on the exercise of rights and freedoms, or this paragraph merely states an objective or purpose that can be attained from a legal perspective only by the means provided for in the second [paragraph].
>
> In support of the first interpretation, it could be argued that, as the courts and the man in the street have long suggested, fundamental freedoms are not absolute and are inherently limited by both the realities of social existence and the rights of others. This interpretation is supported by the fourth paragraph of the Charter's preamble, which states that "the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being". In short, the first paragraph [of s. 9.1] would proscribe a form of abuse of rights.

151 In my view, this interpretation, according to which the scope of the rights and freedoms set out in ss. 1 to 9 of the Quebec *Charter* is defined in light of the rights of others and the demands of social existence, is consistent with the legislature's intent

in enacting s. 9.1, as evidenced by the following comment made by the Minister of Justice at the time the *Charter* was passed:

> [TRANSLATION] The purpose of s. 9.1 is to temper the absoluteness of the freedoms and rights set out in ss. 1 through 9 both by imposing limits, which are set out in the first paragraph, on the holders of those rights and freedoms in relation to other citizens, and by establishing, in the second paragraph, the principle that the legislature may impose limits in relation to the community at large.
>
> (*Journal des débats: Commissions parlementaires*, 3rd Sess., 32nd Leg., December 16, 1982, at p. B-11609)

152 In light of this comment and the reasons given by this Court for its decision in *Ford*, *supra*, it can be seen that s. 9.1 of the Quebec *Charter* is a tool for interpreting rights and freedoms that is similar to, but different in a number of ways from, s. 1 of the Canadian *Charter*. Their similarity becomes apparent in a public law context, in which state actions that infringe upon rights may be justified under either s. 1 of the Canadian *Charter* or the second paragraph of s. 9.1 of the Quebec *Charter*, two provisions which are subject to a similar test: *Ford*, *supra*, at p. 770. The important difference, however, is that the first paragraph of s. 9.1, insofar as it does not require that the infringement of a right or freedom result from the application of the law, applies only to private law relationships, that is, to infringements of the rights and freedoms of private individuals by other private individuals: see Chevrette, *supra*, at p. 466.

153 This Court had occasion to apply s. 9.1 of the Quebec *Charter* in a private law context in *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591. In that case, the claimant had brought an action in civil liability against the appellants, a photographer and a publisher, for taking a photograph of her sitting on a step in front of a building and publishing it in a magazine without her consent. She alleged that the appellants' conduct

constituted a violation of her right to privacy under s. 5 of the Quebec *Charter*. In their defence, the appellants argued that even if there had been an infringement of the claimant's right to privacy, it was justified under s. 9.1 of the *Charter* because of the public's predominant interest in obtaining the information, supported by the guarantee of freedom of expression set out in s. 3 of the *Charter*.

154 L'Heureux-Dubé J. and I, writing for the majority, stated the following, at para. 56:

> The right to respect for one's private life, like freedom of expression, must be interpreted in accordance with the provisions of s. 9.1 of the Quebec *Charter*. For this purpose, it is necessary to balance these two rights.

Later, at para. 61, we observed that it had to "be decided whether the public's right to information can justify dissemination of a photograph taken without authorization". Thus, in *Aubry*, the conflict between two fundamental rights, that is, the right to privacy (s. 5) and the right to freedom of expression (s. 3) was resolved by reconciling the two rights under s. 9.1. There are many situations in which one or even a number of rights guaranteed under the Quebec *Charter* impose limits that have the effect of narrowing the scope of another right or freedom also protected by the Quebec *Charter*. The same approach was favoured, to give one example, in *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85, in which the issue was the scope of freedom of expression in the specific context of discharge of the duties of an elective office. The reconciliation of rights requires more than a simple review of the alleged infringement of any one of the rights in question; it is clearly different from the duty to accommodate in the context of an infringement of the right to equality. To reconcile all the rights and values at issue in light of the wording of the first paragraph of s. 9.1 of the Quebec

Charter involves finding a balance and a compromise consistent with the public interest in the specific context of the case. To attain this balance and compromise would be impossible if the right in issue and the exercise thereof were subject only to the subjective assessment of the person wishing to exercise it. Nor would a simple inquiry into the relative importance of the infringement of the co-owners' rights be appropriate in the case at bar; that would be equivalent to requiring a reasonable accommodation on the respondents' part, whereas accommodation is irrelevant to a s. 9.1 analysis. That is why this Court stressed in *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 818, that s. 10 of the Quebec *Charter*, which brings the duty to accommodate into play, cannot be used to circumvent the operation of s. 9.1 and thereby to avoid specifying the scope of the fundamental right in issue in accordance with the limits established by s. 9.1. Nor is it a question of simply comparing the inconvenience for one party with the inconvenience for the other; that would distort s. 9.1, which refers specifically to the common interest of all citizens of Quebec.

155 A court engaged in a reconciliation exercise must ask itself two questions: (1) Has the purpose of the fundamental right been infringed? (2) If so, is this infringement legitimate, taking into account democratic values, public order, and the general well-being? A negative answer to the second question would indicate that a fundamental right has been violated.

156 In the first step of the analysis, the person alleging the infringement of a right bears the burden of proving that it has occurred. To do this, as I explained above, the claimant must demonstrate the existence of a religious precept, a sincere belief that the practice dependent on the precept is mandatory, and the existence of a conflict between the practice and the rule. At this stage, the issue is an infringement of the

purpose of the right, not a violation of the right itself. Consequently, even if a claimant shows in the first step that the purpose of the protected right has been infringed, this amounts to a violation of the right itself only if the infringement is inconsistent with the principles underlying s. 9.1. In the second step, in my view, the onus is on the defendant to show that the infringement is consistent with s. 9.1. It is logical to place the burden of proving an infringement on the claimant and that of proving consistency with s. 9.1 on his or her adversary, since these parties are in the best position to give the required proof.

157 In short, the rights and freedoms subject to s. 9.1 must be exercised in relation to one another while maintaining proper regard for democratic values, public order and the general well-being of citizens. Their scope is therefore defined in accordance with how each of them is exercised in the particular circumstances of each case, taking into account the reconciliation of the rights in issue.

C. *Application to the Facts*

1. Freedom of Religion and Sincerity of Belief

158 Like the trial judge and Dalphond J. of the Court of Appeal, I am of the view that the declaration of co-ownership prohibits, *inter alia*, the erection of succahs on the balconies, porches and patios constituting the common spaces of Place Northcrest reserved for exclusive use. There is no ambiguity on this point, as s. 2.6.3b) of the declaration of co-ownership is clear. The appellants, who are all practising Orthodox Jews, allege that this prohibition infringes their right to freedom of religion by preventing them from erecting succahs on balconies, porches or patios.

159 The appellants submit that they sincerely believe that their religion requires them to construct succahs on their own balconies. The respondent contests the existence of a sincere belief on their part. To resolve this debate, it is necessary to determine whether the appellants' belief is sincere and, lastly, whether it is grounded in the precepts of their religion. As mentioned above, expert evidence will be useful in this regard, as it can serve to establish the fundamental precepts and practices of a religion upon which a claimant's desired action is based.

160 In the case at bar, after reviewing the evidence presented to him, including the testimony of two expert witnesses, Rabbi Barry Levy and Rabbi Moïse Ohana, the trial judge came to the following conclusion (at p. 1909):

> [TRANSLATION] First of all, the court notes that practising Jews are not under a religious obligation to erect their own succahs. There is no commandment as to where they must be erected.

Rochon J. also considered the appellants' testimony about their own practices and concluded that all of them, with the exception of Mr. Amselem, believed that their fundamental obligation was to eat meals in a succah, as opposed to a succah on their own property, during Succot (at pp. 1908-9):

> [TRANSLATION] The respondents' past conduct attests to the optional nature of the succah's ownership and the location where it is erected.
>
> For many years, Fonfeder went to the home of his sister, who lived not far from his apartment on Hutchison Street, to celebrate Succot. In 1994, when he moved into the Sanctuaire, he did not erect a succah. Instead, he went to New York state and stayed with a grandson who had his own succah.

> As for Thomas Klein, he has lived in the Sanctuaire since 1989 and had never erected a succah before 1996. During that period, even though he practised his religion, he usually went to New York state to celebrate Succot with his family. For several years, he remained in Montréal for the first important days of the holiday but did not erect a succah, as he thought it would be too difficult to do so for just a few days.
>
> . . . We heard no evidence from the other respondents on this point.

161 After reviewing the testimony of each of the appellants and the nature of the religious teachings as explained by Rabbi Levy and Rabbi Ohana, the trial judge did not dismiss the appellants' belief or reject their argument based on freedom of conscience. Rather, he weighed and examined the evidence before him to verify the existence of a religious precept supporting the appellants' belief, as this examination of religious teachings is an integral part of the required analysis.

162 The evidence shows that the appellants sincerely believed they were under an obligation to eat their meals and celebrate Succot in a succah. Although it would be preferable to do so in their own succahs whenever possible, there are numerous circumstances, such as the ones noted by the trial judge, in which using another person's succah would appear to be justified. Based on the evidence that was adduced and accepted by the trial judge, I accept that the appellants sincerely believe that, whenever possible, it would be preferable for them to erect their own succahs; however, it would not be a divergence from their religious precept to accept another solution, so long as the fundamental obligation of eating their meals in a succah was discharged. I therefore cannot accept that the appellants sincerely believe, based on the precepts of their religion that they are relying on, that they are under an obligation to erect their own succahs on their balconies, patios or porches. Rather, it is their practice of eating or celebrating Succot in a succah that is protected by the guarantee of freedom of religion set out in s. 3 of the Quebec *Charter*. The declaration of co-ownership does not hinder this practice,

as it does not bar the appellants from celebrating Succot in a succah, whether at the homes of friends or family or even in a communal succah, as proposed by the respondent. Consequently, the prohibition against erecting their own succahs does not infringe the purpose of the appellants' right to freedom of religion. Any inconvenience resulting from the prohibition against erecting individual succahs is not sufficient to elevate the preference to the status of a mandatory religious practice.

163 In the case of the appellant Amselem, however, the trial judge concluded that he was [TRANSLATION] "the only one who saw the obligation to erect a succah on his own property in terms of a divine command" (p. 1909). Assuming that his belief is sincere, which the trial judge accepted, and that it is based on a precept of his religion, in accordance with the interpretation of the Book of Nechemiah, Chapter 8, verses 13 to 18, accepted by Morin J.A. on appeal, it is necessary to turn to the second step and to interpret the prohibitions imposed by the declaration of co-ownership in light of s. 9.1 of the Quebec *Charter* to determine whether they violate Mr. Amselem's right to freedom of religion.

2. Reconciling Rights Under Section 9.1 of the Quebec *Charter*

164 Mr. Amselem contends that the restrictions contained in the declaration of co-ownership infringe his right to freedom of religion under s. 3 of the Quebec *Charter*. According to s. 9.1 of that *Charter*, the right asserted by Mr. Amselem must be exercised with "proper regard for democratic values, public order and the general well-being of the citizens of Québec". If this right cannot be exercised in harmony with the rights and freedoms of others and the general well-being of citizens, the infringement thereof may be considered legitimate, and no violation of the right to freedom of religion provided

for in the Quebec *Charter* will have been established. As I mentioned above, s. 9.1 requires not merely a balancing of the respective rights of the parties, but a reconciliation of the rights that takes the general interest of the citizens of Quebec into account.

165 The rights and freedoms in issue must first be identified. At this point, I would once again stress that the Quebec *Charter* must be interpreted in harmony with the *Civil Code of Québec*. In the case at bar, Mr. Amselem's freedom of religion is in conflict with the right of each of the other co-owners to the peaceful enjoyment and free disposition of their property under s. 6 of the Quebec *Charter* and their right to life and to personal security under s. 1 thereof. These rights must be reconciled. The reconciliation must also take into account the other circumstances of this case, such as the contractual rights arising out of the declaration of co-ownership which is binding on the parties, the application of the *Civil Code of Québec*, the negotiations that took place and the offers made by the parties in an attempt to find an acceptable solution. The exercise of rights with a regard for public order and the general well-being of citizens makes this necessary.

166 In the case at bar, the right to the peaceful enjoyment and free disposition of one's property is included in the purpose of the restrictions provided for in the declaration of co-ownership. The restrictions are aimed first and foremost at preserving the market value of the dwelling units held in co-ownership. They also protect the co-owners' right to enjoy the common portions reserved for exclusive use while preserving the building's style and its aesthetic appearance of a luxury building, not to mention the use of the balconies to evacuate the building in a dangerous situation. The total ban on erecting anything whatsoever, including succahs, on the balconies is necessary to attain this goal, since without it, harmony cannot be maintained and

emergency routes will be compromised. In this situation, freedom of religion imposes limits on the exercise of the rights of all the co-owners.

167 The restrictions preserve not only the co-owners' rights under s. 6 of the Quebec *Charter*, but also their rights under the *Civil Code of Québec*, which, together with the *Charter*, provides the framework for the right of ownership in Quebec. The trial judge reviewed the relevant articles of the Code and concluded that the restrictions in the declaration of co-ownership were valid under art. 1056 C.C.Q., which provides that "[n]o declaration of co-ownership may impose any restriction on the rights of the co-owners except restrictions justified by the destination, characteristics or location of the immovable." He wrote the following (at p. 1899):

> [TRANSLATION] The legislature has restated the classic triptych of the right of ownership: the right to use, enjoy and dispose of property freely (art. 947 C.C.Q.). It has also stated that ownership may be in various modes. Co-ownership of an immovable is one of the "special modes of ownership" (art. 1009 C.C.Q.). Co-ownership is itself defined as "ownership of the same property, jointly and at the same time, by several persons" (art. 1010 C.C.Q.). Co-owners may dispose of their fractions, but their use and enjoyment of both the private and common portions thereof must be consistent with the by-laws of the immovable and must not "impair the rights of the other co-owners or the destination of the immovable" (art. 1063 C.C.Q.).

168 Regarding the destination of the immovable, the trial judge reviewed the declaration of co-ownership and made the following observation (at p. 1901):

> [TRANSLATION] The quality of the materials used, the layout of the dwelling units, the detailed architecture and the harmony of the exterior are the elements that give this property its appearance of luxury and comfort. . . .
>
> What potential buyers are presented with is not just a luxurious and prestigious property, but a "lifestyle" . . . .

. . .

> The preservation of these overall qualities within an upscale residential concept is a collective element that the co-owners will want to preserve.

This led the trial judge to conclude that the restrictions imposed on the use of patios, balconies and terraces were justified, in conformity with art. 1056 C.C.Q., by the immovable's destination, characteristics and location.

169 As for the co-owners' right to life and personal security under s. 1 of the Quebec *Charter*, it was protected by another purpose of the declaration of co-ownership, that is, to prevent the obstruction of routes between balconies so that they could be used as emergency exits. To attain this objective, balconies and patios, which were common portions reserved for exclusive use, were subject to a right of way in favour of the co-owners. The trial judge discussed the need to keep these areas free of obstructions (at p. 1914):

> [TRANSLATION] It is easy to see from the testimony and from a review of the plans and photographs of the premises that there are a number of places where it is possible to move, either horizontally or vertically, from one balcony to another. For example, people trapped on their balcony by a fire raging inside their apartment could cross over to a neighbour's balcony. It can be seen from photographs of the succahs that they hinder this type of movement and, depending on the materials used in their construction, could even block an escape route entirely.

170 It is easy to see the required connection between the prohibition against building on balconies and the desire to keep emergency routes open. The purpose of the prohibition is to protect the fundamental right of all co-owners to life and personal security, and this right must be taken into account when reconciling the various rights and freedoms in issue. The argument that succahs can be erected without blocking

access routes too much if certain conditions are complied with cannot be accepted at this point in the analysis, as it is based on the concept of reasonable accommodation, which is inapplicable in the context of s. 9.1.

171 The respondent also submits that allowing succahs on balconies, patios or porches would compromise safety and, according to its insurer, would be considered an increased risk that could cause its insurance to be suspended. In a letter dated October 15, 1997, the senior underwriter for business insurance at the Canadian General Insurance Company wrote the following:

> [TRANSLATION] This is to confirm that we cannot agree to cover any liability resulting from the construction of a shelter or small structure on the premises belonging to the insured, be they on the adjacent land or on balconies. This would be an increase of risk in terms of coverage for third-party liability and fires.

In reconciling the rights at issue here, the Syndicat's interest in maintaining its insurance coverage and avoiding an increase of risk with respect to both the common and private portions of Place Northcrest must be taken into account.

172 Finally, it should be noted that all the co-owners have an interest in maintaining harmony in the co-owned property and an undivided right therein, especially with respect to a common portion reserved for restricted use in which, by contract, they have a collective right of ownership. Reconciliation cannot amount to a simple request made to the co-owners to renounce their rights in the common portion consisting of the balconies. Co-owners have the right to expect contracts to be respected; this expectation is also consistent with the general interest of the citizens of Quebec.

173 Therefore, it must be decided if it is possible to reconcile the provisions of the declaration of co-ownership, which is binding on the parties and which preserves the co-owners' right to the peaceful enjoyment and free disposition of their property and their right to personal security, with Mr. Amselem's freedom of religion. This Court's comment in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877, is relevant in this regard:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, . . . *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

174 Furthermore, any reconciliation of rights must take into account the fact that certain rights and freedoms in the Quebec *Charter*, including s. 6, which is at issue here, are self-limiting. Professor Chevrette, *supra*, at pp. 468-69, presented two ways to look at this situation in light of s. 9.1:

> [TRANSLATION] What is the effect of s. 9.1 on ss. 6 (enjoyment and free disposition of property) and 9 (professional secrecy), given that s. 6 already provided that the guarantee existed "except to the extent provided by law" and s. 9 provided that it could be overridden by "an express provision of law"? Can it be argued that s. 9.1, which was enacted after these provisions, supersedes them and replaces the legislature's discretion with the tests established by s. 9.1?
>
> It seems obvious that this is not the case. The clarity and the exceptional nature of these provisions make them special standards that prevail over the subsequent general standard of s. 9.1. Since "the principle granting priority to special legislation, or to the more recent enactment, is at best a guide or presumption of legislative intent", the second principle must apply, as the legislature intended that s. 9.1 should reduce rather than increase the precedence of the sections subject to s. 9.1 over any other law.
>
> This is, however, far from the end of the matter. Within the first chapter of the Charter, there is a superimposition of certain guarantees. Some sections are not self-limiting, although they are still subject to s. 9.1; others are. Thus, an expropriation could be justified under s. 6 itself, in that it

> would amount to an impairment of the enjoyment of property "provided by law", whereas it could not be justified under s. 8 (respect for private property), which is not self-limiting, without the operation of s. 9.1.

175 In *Desroches v. Québec (Commission des droits de la personne)*, [1997] R.J.Q. 1540, at pp. 1552 and 1555, the Quebec Court of Appeal saw the limitation in s. 6 of the Quebec *Charter* as giving precedence to another right referred to in the *Charter* that was subject to no such limitation:

> Although section 6 acknowledges the recognition our society accords to property rights, these rights are subject to an inherent limitation, expressly stated in section 6 itself: property rights are limited by the restrictions provided for by law, including above all those limits which stem from the respect of other charter rights.
>
> . . .
>
> . . . Property rights cannot trump equality guarantees. Where a seemingly neutral policy rationally related to the running of a business (for instance) has the adverse effect of discrimination, however, the courts may allow the policy to stand so long as the duty to accommodate is fulfilled.

176 In the case at bar, not only is there a conflict between the right to freedom of religion and property rights, but the right to freedom of religion is also in conflict with the right to life and personal security, and with contractual rights. It should also be borne in mind that the Syndicat, in an attempt to reconcile the co-owners' competing interests, proposed the construction of a communal succah near one of the towers. This offer, which, it should be noted, Mr. Amselem had accepted, was the result of a negotiation process involving a number of parties. What is more, the Canadian Jewish Congress considered the proposed compromise to be reasonable and, in a letter dated October 10, 1997, thanked the Syndicat for its efforts to accommodate its Jewish residents. All this is important to the assessment of what is consistent with the general well-being of citizens.

177 In the end, the appellants rejected the Syndicat's offer, citing a multitude of problems and details, but they never proposed anything other than the erection of succahs on their balconies. It is clear that the communal succah would be a source of inconvenience for Mr. Amselem, but the individual succah, too, was a source of genuine inconvenience for the other co-owners: in particular, it obstructed an emergency route, and the elevators were blocked during the construction while being used to transport the materials. On this issue, the trial judge criticized the appellants for being inflexible in rejecting the compromise. In his view, their attitude showed that they were not willing to contribute to a solution that would be acceptable to all. It is especially important to note in this respect that such a contribution is required of all rights holders by s. 9.1 of the Quebec *Charter*, by the *Charter*'s preamble, which recognizes that "the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being", and by the preliminary provision of the *Civil Code of Québec*, which states that the Code, "in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property". As I noted above, 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. It is not irrelevant that the trial judge, following a thorough analysis, concluded that there was a reasonable accommodation in the case at bar and that in the Court of Appeal, Morin J.A. relied on this Court's decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, *supra*, to hold that there was no reason to interfere with this assessment of the evidence. In other words, the trier of fact was satisfied that even the most demanding test did not support the appellants' case.

178 The appellants contend that the obligation imposed on them to exercise their rights of co-ownership in harmony with the rights of the other co-owners is unfair. However, it must not be forgotten that the declaration of co-ownership was drafted in an effort to preserve the rights of all the co-owners, without distinction. It must also be borne in mind that the compromise proposed by the respondent, namely the erection, at the expense of all the co-owners, of a communal succah on land belonging to all the co-owners located next to the building, would have had the desired result of upholding the parties' rights under ss. 6, 1 and 3 of the Quebec *Charter*. Such a solution would also be consistent with the three conditions adopted by this Court in *Big M Drug Mart*, *supra*, and approved in *Ross*, *supra*, that is, that freedom of religion must be exercised (1) within reasonable limits, (2) with respect for the rights of others and (3) bearing in mind such limitations as are necessary to protect public safety, order and health and the fundamental rights and freedoms of others. The right of co-ownership, in its essence, is exercised in harmony with the rights of all the co-owners. This does not amount to repudiating freedom of religion, but rather to facilitating the exercise thereof in a way that takes the rights of others and the general well-being into account.

179 With respect to s. 1 of the Quebec *Charter*, it is difficult to imagine how granting a right of way in emergency situations, which is essential to the safety of all the occupants of the co-owned property, could fail to justify the prohibition against setting up succahs, especially in light of the compromise proposed by the respondent. I see no need to revisit the trial judge's findings of fact on this subject.

180 This leads me to conclude that, since Mr. Amselem's right to freedom of religion cannot be exercised in harmony with the rights and freedoms of others or with the general well-being, the infringement of Mr. Amselem's right is legitimate. Even

though the declaration of co-ownership's prohibition against building prevents the appellants from erecting succahs on their balconies, porches or patios, it does not violate their freedom of religion.

D. *Waiver of Freedom of Religion*

181 Given that there was no violation of the appellant's right to freedom of religion, there is no need to consider the argument that the appellants implicitly waived their right by signing the declaration of co-ownership, although it goes without saying that the submissions made in respect of this question apply to the s. 9.1 analysis.

V. Conclusion

182 For the foregoing reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

BINNIE J. (dissenting) —

I. Introduction

183 The unusual aspect of the claim to freedom of religion in this case is that the claim is asserted by the appellants, not against the State but against fellow co-owners of a Montréal luxury building (or "immovable"), all of whom (including the appellants) entered into contractual rules governing the use of commonly owned facilities. The agreed rules, as found by all of the judges in the courts below, plainly prohibit the

erection on the communally owned balconies of a succah, which is a makeshift temporary dwelling, open to the sky, that is used in connection with the appellants' religious observance in the Jewish tradition for nine days in each year. The appellants rely on a right to freedom of religion under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, to insist on building a succah on each of their balconies despite the contract they made with their co-owners and despite their co-owners' offer of a communal succah in the garden of the building. There is much to be said on both sides of this issue but in the end I agree with the Quebec Court of Appeal that in all the circumstances the appellants cannot reasonably insist on a personal succah. I would therefore dismiss the appeal.

184 My reasons differ from those of my colleague Bastarache J. because of the weight I place on the private contract voluntarily made among the parties to govern their mutual rights and obligations, including the contractual rules contained in the declaration of co-ownership, as well as on the co-owners' offer of accommodation. Buried at the heart of this fact-specific case is the issue of the appellants' acceptance, embodied in the contract with their co-owners, that they would not insist on construction of a personal succah on the communally owned balconies of the building.

185 There is a vast difference, it seems to me, between 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. It was for the appellants, not the other co-owners, to determine in advance of their unit purchase what the appellants' particular religious beliefs required. They had a choice of buildings in which to invest. They undertook by contract to the owners of *this* building to abide by the rules of *this* building even if (as is apparently the case) they accepted the rules without reading them. They

thereafter rejected the accommodation offered by their co-owners of a communal succah in the garden because it did not fully satisfy their religious views although the accommodation was not, as will be seen, inconsistent even with Mr. Moïse Amselem's sense of religious obligation in circumstances where a personal succah is simply not available.

A. *Freedom of Religion*

186 I agree that freedom of religion as guaranteed by s. 3 of the Quebec *Charter* should be broadly interpreted. Judges have no manageable criteria by which to evaluate the merits or "validity" of an individual's own faith-based belief in what imperils his or her immortal soul (in the Judeo-Christian tradition), or to appraise the conduct on this earth that conformity to that belief demands. However, care must be taken when it comes to religious practices or conduct that impinge not on private worship but on the rights of others. Due regard must be had to obligations freely undertaken by the claimant toward other individuals, and to broader relationships with people living in a community, as reflected in the opening paragraph of s. 9.1 of the Quebec *Charter*, which provides:

> 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 Québec.

Thus the Quebec *Charter* is concerned not only with rights and freedoms but with a citizen's *responsibilities* to other citizens in the *exercise* of those rights and freedoms.

187 The law does not provide a general definition of freedom of religion for all purposes. Much depends on the context. The context and structure of the *Canadian*

Charter of Rights and Freedoms, which applies only to constrain State action and does not regulate private relationships, is different. Even in the case of the Canadian *Charter*, however, the Court has observed that "although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower": *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226. See also *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 72; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 30.

188 It is helpful to approach s. 3 of the Quebec *Charter* using the framework proposed by the authors H. Brun and G. Tremblay, in their text *Droit constitutionnel* (4th ed. 2002), at p. 1033, which poses four requirements: [TRANSLATION] "(1) existence of a religious precept; (2) sincere belief in that precept; (3) existence of a conflict between the precept and the rule; and (4) reasonableness of the objection".

189 I accept that Mr. Amselem has met the threshold test of bringing his claim within the protected zone of religious freedom. (For present purposes, as I conclude the appeal should be dismissed, it is unnecessary to dwell on the alleged insufficiencies of the evidence of the other appellants.) Mr. Amselem clearly respects the succah ritual as a religious precept, by which I understand him to mean a divine command (*Shorter Oxford English Dictionary* (5th ed. 2002), vol. 2, at p. 2316). There is no doubt expressed by any of the parties that in general terms the precept exists as an article of the Jewish faith. We are not dealing here with a religion of one phenomenon, or a non-traditional claim such as the smoking of peyote as part of a claimed religious experience (*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)). Those types of issues will have to be addressed when they arise.

190 I do not think it is the function of the courts to choose between the competing views of Rabbi Levy and Rabbi Ohana, each of great respectability, as to the precise content of the divine command. Mr. Amselem believes what he believes, and he sincerely believes that dwelling in his own succah, rather than just in a succah, is part of his faith, subject to a measure of flexibility when a personal succah is not available, as hereinafter described.

191 The rigour of the analysis should, in my view, not occur at the front end of the s. 3 analysis, when the existence of a religious precept (or divine command) and the sincerity in the belief of that religious precept is being considered, where the freedom should be generously accorded, but at the subsequent limitation stage under s. 9.1 where, in the private context, the reasonableness of the exercise of a religious practice at the expense of others is being assessed. Religion is by nature an intensely personal and subjective matter. It is therefore, as Iacobucci J. demonstrates, a right of immense potential scope. The appellants urge both a broad front end acceptance of religious belief and a restricted view of acceptable accommodation. Such an approach would create an imbalance between the rights of the individual and the countervailing rights and interests of other members of Quebec society, whose "general well-being" is also protected by s. 9.1 of the Quebec *Charter*. As stated by the Quebec Minister of Justice when s. 9.1 was adopted in 1982:

> [TRANSLATION] The purpose of s. 9.1 is to temper the absoluteness of the freedoms and rights set out in ss. 1 through 9 both by imposing limits, which are set out in the first paragraph, on the holders of those rights and freedoms in relation to other citizens, and by establishing, in the second paragraph, the principle that the legislature may impose limits in relation to the community at large. [Emphasis added.]

> (*Journal des débats: Commissions parlementaires*, 3rd sess., 32nd Leg., December 16, 1982, at p. B-11609)

See also *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591, at para. 18.

B. *Rights and Freedoms of the Other Co-Owners*

192 The primary right asserted by the respondent is under s. 6 of the Quebec *Charter*, which states in part as follows:

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

Article 1063 of the *Civil Code of Québec*, S.Q. 1991, c. 64, provides in the case of co-ownership that "[e]ach co-owner has the disposal of his fraction" and "has free use and enjoyment of his private portion and of the common portions, provided he observes the by-laws of the immovable and does not impair the rights of the other co-owners or the destination of the immovable" (emphasis added). The rules of a building/immovable under divided co-ownership, contained in the declaration of co-ownership, promote peaceful enjoyment of the units (one of the s. 6 rights) by all co-owners. The regulation of common areas enhance the appearance and value of the building as a whole, and the appellants accept that this is so.

193 Section 3 of the Quebec *Charter* groups freedom of religion compendiously with freedom of conscience, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association. While there are security and insurance concerns about succahs on balconies, the co-owners' primary concern is the appearance

of their home as an expression of how they wish to be seen by the world. This is related to maintaining the value of their investment.

194 The strictness of the rules agreed to by the co-owners, including the appellants, would have been evident had the appellants made even the most casual examination. Section 2.6, titled [TRANSLATION] "Limited Common Portions", includes s. 2.6.3b) dealing with [TRANSLATION] "Balconies, porches and patios" which provides in part:

> [TRANSLATION]
>
> b) No owner may enclose or block off any balcony, porch or patio in any manner whatsoever or erect thereon constructions of any kind whatsoever. [Emphasis added.]

The prohibition in s. 2.6.3b) does not include a consent provision but seems absolute, as compared with (for example) s. 9.3 dealing with decoration:

> [TRANSLATION] 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.

Irrespective of whether a structure which is "open to the skies" can be said to be "covered" or "enclosed" under s. 9.3, I agree with the trial judge and the judges of the Court of Appeal that the construction of a succah was prohibited under a combination of the other rules. Indeed counsel for the appellants frames one of the issues in dispute as follows:

> Can one waive his or her right to freedom of religion in advance by signing a contract of adhesion containing a general prohibition against decorations or constructions on one's balcony?

The appellants undertook to respect not only s. 9.3 but also s. 2.6.3b) of the declaration of co-ownership, and even if (as Iacobucci J. suggests) the appellants might have been encouraged by the possibility of consent from their co-owners under s. 9.3 (had they read it), they would still have appreciated that a succah is a "construction of any kind" under s. 2.6.3b), and that construction of such structures on the outside balconies of this particular building was prohibited. Thus, while the offer of a communal succah in the garden of the building was less than the appellants desired, it was more than they had contracted for.

195 None of these restrictions in the rules of the immovable had a religious purpose. The rules were certainly not aimed at persons of the Jewish faith. The rules simply express a certain style of architectural austerity or collective anonymity which the co-owners wanted to present to the world in a building shorn of any external display of individual personality. The owners have gone so far in recent rulings as to prohibit the display of garden trellises and television reception dishes. They told the Ambassador of the Netherlands to remove his national flag. Such micro-control of the exterior appearance of the building may not be to everyone's taste, but it was the collective will of the co-owners of the building in which the appellants had decided to invest.

C. *Existence of a Conflict*

196 There is clearly a conflict between the austere external appearance envisaged by the rules of the immovable and the appellants' desire to construct individual succahs on their balconies, even if only for a brief period of nine days a year.

D. *Reasonableness of the Appellants' Objection*

197 Although s. 9.1 of the Quebec *Charter* does not specifically impose a duty on third parties to accommodate a claimant, no doubt as a practical matter, the reasonableness of the claimants' conduct will be measured, at least to some extent, in light of the reasonableness of the conduct of the co-owners. The text of s. 9.1, however, puts the focus on the claimant who, in the exercise of his or her rights, must have regard to the facts of communal living which, of course, includes the rights of third parties. For convenience, I repeat the relevant part of s. 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 Québec. [Emphasis added.]

As this Court said in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, a case dealing with State interference in freedom of expression, s. 9.1 imposes interpretative limits on the scope of the protected freedom (at p. 770):

> The first paragraph of s. 9.1 speaks of the manner in which a person must exercise his fundamental freedoms and rights. That is not a limit on the authority of government but rather does suggest the manner in which the scope of the fundamental freedoms and rights is to be interpreted. [Emphasis added; emphasis in original deleted.]

198 In my view, the "reasonableness" of the objection test, proposed by Brun and Tremblay, *supra*, viewed from the perspective of a reasonable person in the position of the appellants with full knowledge of the relevant facts, accords well with s. 9.1 of the Quebec *Charter*.

199 The trial judge made a finding of fact that use of the communal succah would not compromise the appellants' observance of the festival of Succot, and the evidence of Mr. Amselem, the most exigent of the appellants in this respect, supports that conclusion. Mr. Amselem testified that it would not be contrary to his faith to go to the communal succah in the garden:

> [TRANSLATION]
>
> Q. . . . So you do not transgress the law by walking from your unit to the proposed communal succah or in the communal garden?
>
> A. No.
>
> Q. Is that right: you do not transgress Jewish law?
>
> A. No.

Mr. Amselem immediately notes a prohibition against "transporting" food to the succah but he then explains that (in the case of the communal succah at the synagogue) the food must be put on location prior to the holy day(s):

> [TRANSLATION]
>
> Q. Is that not what is done at the synagogue, Mr. Amselem?
>
> A. No, you don't cook at the synagogue. As I told you earlier, what people do at the synagogue is they bring their food the day before, at the Sabbath, during Succot . . . .

200 Mr. Amselem then outlines the possibility of celebrating Succot in a communal succah at the synagogue:

> [TRANSLATION] The meals given at the synagogue are for people for whom it is physically impossible to make a *succah* at home, because they have no room, they live in an apartment where there is no balcony. If a person is religious and has a balcony open to the sky and enough room, he makes a *succah*. [Underlining added.]

201 He then states that his religion permits him to find alternatives:

> [TRANSLATION]
>
> A. If it's impossible for me to do it where I live, if I don't have the physical space to do it where I live?
>
> Q. Yes.
>
> A. Well, in that case, I find alternatives. I go to the synagogue. [Emphasis added.]

202 Apart from the synagogue, going to see family and sharing their succah is also permitted, according to Mr. Amselem:

> [TRANSLATION]
>
> Q. . . . When you went to your son's home, did that comply with the precepts of Jewish law, the commandments?
>
> A. Yes.
>
> Q. Yes?
>
> A. Absolutely.

203 Friends are yet another possibility:

[TRANSLATION]

Q. You said earlier — if I remember correctly — that you've already spent Succot with friends at their homes?

A. Yes.

. . .

A. But if you're travelling or visiting someone, or a cousin or son invites you to spend the holiday in his home, well, if he has a succah, that's great. But it isn't an obligation. You make accommodations to be together. It's the *mitzvah*, the commandment is fulfilled, but it's by chance. Normally, you want to spend Succot at your own home. [Underlining added.]

This language (you want) shows the "precept" is permissive not mandatory, a fact which he subsequently confirms:

[TRANSLATION]

A. No, I'll go to my children's home, to the synagogue, or I have friends, or I'll go to Miami, to the home of my brother, who's a rabbi.

Q. You could go to the homes of friends or family?

A. My family, my children.

Q. Or to the synagogue?

A. Or to the synagogue. . . .

204 The appellants called as their expert Rabbi Moïse Ohana, who testified on their behalf that the faithful are exempted from celebrating Succot if such celebration causes [TRANSLATION] "serious discomfort":

> [TRANSLATION] In practice, though, if eating meals in a *succah* leads to genuine drudgery, day after day after day, we then start to come under a provision of the law according to which if the *succah* is a source of serious discomfort, you are *ipso facto* released from the obligation to stay there.

205 There was thus ample evidence before the trial judge that Mr. Amselem and the other appellants could have had recourse to a communal succah, whether at the synagogue, in the communal garden with friends, or elsewhere. If a succah is unavailable, or if use of it involves "serious discomfort" ("*inconfort sérieux*"), the faithful are to that extent "released" of their religious obligation ("*libéré de l'obligation*"). These conclusions are not the subject of controversy but flow directly from the evidence of Mr. Amselem and his own expert and they are borne out by the historical practice of the other appellants.

206 With all due respect for the contrary view, I do not believe it is necessary for the respondent to show that the appellants "waived" their freedom of religion by accepting the rules of the immovable. The issue is much narrower. There is no "general" waiver involved. The dispute is limited to the erection of a personal succah, a practice accepted as obligatory by some but not all members of the Jewish faith, and even in the case of Mr. Amselem is not obligatory where a personal succah is not available. The co-owners were entitled to conclude that when the appellants accepted the declaration of co-ownership they were indicating that the practice of their religion permitted them to live within the existing rules. Accordingly, rather than elevate the issue to one of waiver of "freedom of religion", which would overdramatize the situation, it seems to me the issue is more modestly and accurately framed as whether the appellants in *this* case can reasonably insist on a *personal* succah in all the circumstances, including their contract not to construct a personal dwelling, even a temporary dwelling, on the commonly owned balconies of the immovable.

207 The issue here is not a simple balance of advantages and disadvantages, i.e., whether in the Court's view the appellants would be more disadvantaged by the

denial of construction of their personal succah than would be the co-owners by having a number of succahs constructed on the exterior of their building. Thus I cannot accept as dispositive the test offered by my colleague, Iacobucci J. (at para. 84), namely that in his view

> 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 appellants' religious freedom.

With respect, such an approach goes too far in relieving private citizens of the responsibility for ordering their own affairs under contracts which they choose to enter into and upon which other people rely. Section 9.1 of the Quebec *Charter* imposes a more nuanced approach. Each side to this appeal insists on a legal entitlement, and the onus was on the appellants to make their case. I believe s. 9.1 required reasonable persons in the situation of the appellants to have regard to the facts that:

1. There is no state action involved here.

2. There is a set of rules governing the immovable voluntarily agreed to by the parties, including the appellants. The prohibition in s. 2.6.3 is plain and obvious.

3. The vendors did what they could to ensure that these rules were read by the appellants in advance of their purchase.

4. Reasonable people, when making a major purchase such as a residential unit, are expected to read the terms of the agreement before they sign,

including the declaration of co-ownership that will govern their communal life.

5. Given the importance the appellants attached to constructing a dwelling on a communally owned balcony, the respondent co-owners could reasonably have expected the appellants to have satisfied this concern before they purchased.

6. Purchasers who do not take the trouble to read the rules should not enjoy greater rights under the contract than the diligent and conscientious purchasers who do.

7. This particular immovable was only one of several potential immovables in which the appellants could have chosen to invest.

8. The balconies were designated as commonly owned property, although set aside for the use of the co-owner.

9. The rules prohibited construction of a dwelling on the balconies of the building at the time the appellants made their investment (although the duration of the succah was only nine days a year).

10. The co-owners had offered the alternative of a communal succah in the garden.

11. A succah in the garden had some disadvantages compared with a succah on the balcony for some of the appellants, but the disadvantages seemed to be physical (e.g., Mr. Amselem objected to going up and down several flights of stairs), rather than spiritual.

12. Mr. Amselem's religious beliefs did not, according to his own testimony, preclude recourse to a communal succah where a personal succah was not available.

208 I conclude that in all the circumstances, and especially having regard to the pre-existing rules of the immovable accepted by the appellants as part of the purchase of their units, and their own evidence of use of a communal succah when a personal succah is not available, the appellants have not demonstrated that their insistence on a personal succah and their rejection of the accommodation of a group succah show proper regard for the legal rights of others within the protection of s. 9.1.

209 I note again the fact-specific nature of this case. If the rules of the immovable had permitted the construction of a succah at the time the appellants purchased, and a majority of the co-owners had afterwards sought to impose a ban on their construction at a later date, a different issue would arise. The point in this case is that the appellants themselves were in the best position to determine their religious requirements and must be taken to have done so when entering into the co-ownership agreement in the first place. They cannot afterwards *reasonably* insist on their preferred solution at the expense of the countervailing rights of their co-owners.

II. Disposition

210 I would dismiss the appeal with costs.

Appeal allowed with costs, BASTARACHE, BINNIE, LEBEL *and* DESCHAMPS JJ. *dissenting.*

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