

**Should Religious Rights Trump Real Property Restrictions? - - A Comment on the  
Supreme Court of Canada Decision in *Syndicat Northcrest v. Amselem***

by

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1.     **INTRODUCTION**

Rarely does the Supreme Court of Canada hear a case centered upon real property issues, let alone a condominium dispute involving the enforceability of provisions in a condominium declaration or by-law. Recently however, the highest court in our land has handed down an extremely thought-provoking and controversial decision in the case of *Syndicat Northcrest v. Amselem* 2004 S.C.C. 47 (hereinafter referred to as the “**Syndicat Case**”), which will undoubtedly be lauded by libertarians and religious zealots, and equally scorned by condominium corporations and contract lawyers (especially condominium development lawyers) who have the unenviable task of drafting clauses in condominium documents that are clear, unambiguous and most of all, enforceable.

The main issue raised in the Syndicat Case was whether the exercise of one’s religious rights [as inscribed in the *Quebec Charter of Human Rights And Freedoms* R.S.Q., c. C-12, and enshrined in section 2(a) of the *Canadian Charter of Rights And Freedoms*] should override what would otherwise be construed as valid and binding restrictions on the use of common property, as stipulated in the condominium’s declaration and by-laws governing the co-ownership of same. The decision of the Court in this case, written by Mr. Justice Iacobucci on behalf of a 5 : 4 majority, has far-reaching implications, and raises a panoply of potential problems that condominium declarants, condominium corporations and condominium unit owners will have to wrestle with in the months and years to come.

## 2. THE FACTS OF THE CASE

The appellants were co-owners of dwelling units in a luxury condominium project in Montreal. In accordance with the provisions of the condominium's declaration of co-ownership, the balconies of individual dwelling units, although constituting common property (akin to common elements in an Ontario condominium), were expressly reserved for the exclusive use of the co-owners of the units to which they were attached (similar to exclusive use common elements appurtenant to the respective dwelling units in an Ontario condominium). The appellants, being Orthodox Jews, proceeded to erect "succahs" on their balconies, for the purposes of fulfilling a biblically-mandated obligation during the Jewish religious festival known as "Succot", beginning in late September to early or mid-October. A succah is an enclosed temporary hut or booth, traditionally made of wood or other materials (such as fastened canvas), and opened to the sky. In the Jewish faith, Jews are commanded to temporarily dwell in their succahs during the nine-day festival of Succot, which includes taking all meals and conducting certain religious ceremonies within the confines of the succah, and making the succah their primary abode for the entirety of the festival period, health and weather conditions permitting.

The respondent condominium corporation requested the removal of the succahs, claiming that these structures violated the condominium's declaration and by-laws, which expressly prohibited any decorations, alterations or constructions upon the condominium's balconies. Whether or not a succah should be considered a "construction" was of little consequence, because the relevant condominium documents essentially confirmed that unit owners were not allowed to make any alterations to the exterior of the condominium, and were correspondingly prohibited from placing anything whatsoever outside of their respective dwelling units, or upon their balconies, apart from

customary seasonal outdoor furniture. When considered as a whole, the restrictions in the condominium's declaration and by-laws demonstrated a clear intention to maintain the original luxury state and condition of the condominium, and a uniform appearance of the building's exterior. Regrettably, none of the appellants had bothered to read the condominium's declaration of co-ownership, or relevant by-laws, prior to purchasing or occupying their respective units. As a compromise solution, the condominium corporation proposed to allow the appellants to set up a communal succah in the non-exclusive use garden area of the condominium. However, the appellants argued 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 called for the setting up of their own individual succahs, on their respective balconies. The condominium filed an application for a permanent injunction, prohibiting the appellants from erecting these succahs, and if necessary, permitting their demolition. The application was granted by the Quebec Superior Court, and affirmed by the Quebec Court of Appeal, and leave to appeal to the Supreme Court of Canada was granted.

### 3. **ISSUES TO BE DECIDED**

The key issues to be decided by the Court in this case were whether the restrictive provisions in the condominium's by-laws and declaration of co-ownership infringed the appellants' freedom of religion protected under the Quebec (and Canadian) Charter, and if so, whether the refusal by the condominium corporation to permit the erection of succahs was reasonably justified, and alternatively, whether the appellants had waived their rights to freedom of religion, by acquiring their dwelling units subject to the provisions of the registered declaration and by-laws, and by actually signing the declaration of co-ownership as a pre-requisite to closing.

#### 4. THE COURT'S RULING

In order to resolve the first issue, the Court embarked upon a detailed analysis of religious freedom. Mr. Justice Iacobucci confirmed that 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. More than that, religious freedom is underscored by the principle that one is not to be forced to act in a way that is contrary to one's personal beliefs or conscience, provided that the manifestation of one's religious beliefs do not harm or injure one's neighbours, or their parallel rights to hold and manifest beliefs and opinions of their own. The Court concluded that freedom of religion, under both the Quebec (and the Canadian) Charter, consists of the freedom to undertake practices and maintain beliefs which have a nexus with religion, in order to connect with the divine (or some other superhuman or controlling power) or to otherwise fulfill a function of one's spiritual faith, and in which an individual demonstrates that he or she sincerely believes, irrespective of whether a particular practice or belief is required by official religious dogma, or is in conformity with any established religious precepts or commandments, or accords with the position of religious officials. Essentially, this approach reflects and upholds a personal or subjective understanding of religious freedom. As such, the Court ruled that a claimant need not show some sort of objective religious obligation or requirement in order to invoke freedom of religion. Rather, it is the religious or spiritual essence of an action, not any mandatory practice to be observed or carried out, that will attract protection under the Quebec (and Canadian) Charter.

Mr. Justice Iacobucci made it clear in his ruling that the government is in no position to be the arbiter of religious dogma, and that the courts should avoid judicially interpreting the content

of a claimant's subjective understanding of a religious requirement. Therefore, arguments that underscore the distinction between "obligation" versus "custom", or between "objective obligation" versus "subjective belief", have no merit in determining whether one's freedom of religion has been infringed. While the Court is not qualified or competent to rule on the validity or veracity of any given religious practice or belief, it is nevertheless qualified to inquire into the sincerity of a claimant's belief, where sincerity is, in fact, at issue. In turn, the sincerity of one's belief implies an honesty of belief, and Mr. Justice Iacobucci concluded that it is the court's role to ensure that a presently asserted belief is being maintained in good faith, and is neither fictitious nor capricious. The assessment of sincerity is simply a question of fact, that can be based on criteria such as the credibility of a claimant's testimony, as well as an analysis of whether the alleged belief is consistent with the claimant's current religious practices. Since the focus of the inquiry is not on what others may view the claimant's religious obligations to be, but rather what the claimant personally believes his or her religious obligations are, it is therefore unnecessary and inappropriate for the Court to require expert opinions on the claimant's religious practices in question. Moreover, in recognition of the vacillating nature of religious beliefs, the Mr. Justice Iacobucci reasoned that a judicial inquiry into the sincerity of the claimant's religious beliefs should focus not on past practices or past beliefs, but only on the claimant's belief at the time of the alleged interference with his or her religious freedom.

Once religious freedom is triggered, the Court must then ascertain whether there has been some material or non-trivial interference with the exercise of the claimant's religious belief or practice, so as to constitute an infringement of the freedom of religion under the Quebec (or Canadian) Charter. However, no right, including the freedom of religion, is absolute, and not every

interference with religious freedom will be actionable. Mr. Justice Iacobucci confirmed that any religious conduct or action which would potentially cause harm to others, or interfere in a non-trivial way with the rights of others, may not be protected.

In the end, the Court concluded that the appellants sincerely believed that they were obliged to establish individual succahs on their respective balconies, and that the interference with their right to freedom of religion was more than trivial, inasmuch as the restrictions in the declaration effectively obliterated the substance of their religious rights (namely the right to erect and dwell within one's own succah during the festival of Succot). The Court was also convinced that the alternative of celebrating in a communal succah, as proposed by the condominium, would cause significant inconvenience to the appellants (by having to transport food and utensils to and from the communal succah, not to mention the difficulty of access thereto, up and down numerous flights of stairs, by elderly observants), and would preclude the intimate celebration of the holiday with immediate family members, thus detracting from the joyous celebration of the holiday and thereby leading to extreme distress endured by the appellants.

The condominium corporation argued that the establishment of succahs on the appellants' balconies for the nine day holiday of Succot, would interfere with the co-owners' rights to peaceful enjoyment of their respective properties, and potentially jeopardize their right to personal security, as protected under section 6 and section 1 of the Quebec Charter respectively, and therefore justified the blanket prohibition against decorations, alterations or constructions on balconies that would preclude the erection of succahs. It was argued that the restrictive provisions in the condominium documents had the legitimate aim of preserving the economic and aesthetic value of their

condominium property, which was asserted as a component of an individual's inalienable right to enjoy one's property under the Quebec Charter. Moreover, since the balconies of the condominium also served a dual purpose or function as fire escape routes, it was argued that the erection of succahs (which would effectively cordon off the balcony areas) would threaten the safety of the condominium's residents in an emergency situation.

However, the Court held that the alleged intrusions on the other owners' rights to peaceful enjoyment of their properties, and to personal security, were minimal at best, and therefore could not be reasonably considered as imposing valid limits or restrictions on the exercise of the appellants' religious freedom. Insufficient evidence was adduced to substantiate the conclusion that the erection of temporary succahs would cause the value of the dwelling units, or of the condominium property, to decrease. Moreover, the appellants offered to reconstruct their succahs in a manner which would not block any doors, nor obstruct any fire routes or emergency egress, so as to pose no threat to the safety or security of the residents of the condominium, and Mr. Justice Iacobucci was convinced that the security concerns raised by the condominium were thereby obviated. The Court also determined that protecting the co-owners' enjoyment of the condominium property, by preserving the aesthetic appearance of the balconies, and maintaining or enhancing the harmonious external appearance of the building, could not be reconciled with a total ban imposed on the appellants' exercise of their religious freedom, inasmuch as the potential annoyance caused by a few succahs, erected for a period of nine days each year, would be trivial. Mr. Justice Iacobucci ultimately ruled that in a diverse multi-cultural society such as ours, where the promotion of religious tolerance is extolled, the condominium's position that a nominal intrusion upon the aesthetic

interests of a majority of unit owners should outweigh the exercise of one's religious freedom, is simply unacceptable.

The final issue to be decided by the Court was whether the appellants had waived their constitutional right to freedom of religion, or had implicitly agreed with the terms of the condominium's declaration and by-laws (including the general prohibition against decorations or constructions on balconies), when they formally signed the declaration of co-ownership. It was concluded that a waiver argument, or an argument analogous to waiver, could not be maintained on the facts of this case. Mr. Justice Iacobucci asserted that the waiver of any right must be voluntary, and freely expressed, with a clear understanding of the true consequences and effects of doing so, in order for same to be effective. The Court noted that the appellants in this case had no opportunity to negotiate the mandatory provisions governing everyone's residence in the condominium, and accordingly had no choice but to sign the declaration of co-ownership, if they wanted to reside in this complex. Furthermore, there was no evidence that the appellants were aware that signing the declaration amounted to a waiver of their rights to freedom of religion. In fact, the evidence confirmed that the appellants failed to read the condominium documents, even though they were duly given a copy of the declaration of co-ownership prior to their respective closings. In Mr. Justice Iacobucci's opinion, the execution of the declaration of co-ownership was tantamount to accepting a contract of adhesion, and could not be properly construed to constitute a waiver. Moreover, one of the provisions in the condominium's by-laws specifically allowed for enclosing portions of balconies with the consent of the co-owners, and Mr. Justice Iacobucci believed that the appellants could have reasonably assumed that such consent would not be unreasonably withheld. Mr. Justice

Iacobucci went so far as to state that it would be morally repugnant to intimate that the appellants simply move elsewhere, if they took issue with a clause restricting their rights to exercise their religious beliefs.

In the end, the Court concluded that a general prohibition regarding constructions on balconies, such as the one in the declaration of co-ownership under review, would be insufficient to support a finding of waiver, and arguably so would any document lacking an explicit reference to the affected rights granted by the Quebec (and Canadian) Charter. If nothing else, the Syndicat Case stands for the proposition that with respect to the waiver of a fundamental right, particularly a right espoused in the Canadian Charter or in the Human Rights Code (such as freedom of religion), only a clear and express waiver of one's enshrined rights will be countenanced and accepted by the courts. Thus, the appellants' erection of succahs on their balconies, as an exercise or manifestation of their right to religious freedom, was held to override the impugned provisions in the condominium's declaration of co-ownership which clearly prohibited same.

## 5. CRITIQUE OF THE COURT'S DECISION

While the writer sincerely appreciates the fundamental importance of religious freedom and tolerance in this country, the writer does not believe that religious rights should inherently or automatically attain paramountcy over other legitimate rights that ordinary citizens value, such as the right to enjoy one's property, including common property like the common elements of a condominium governed by registered restrictions designed to maintain or enhance the communal environment being shared. The writer fervently believes that the Court's ruling in the Syndicat Case has opened a virtual Pandora's box of potential conflicts in the condominium context, between

condominium corporations and their respective boards of directors on the one hand, and an infinite succession of condominium unit owners on the other hand, who may hold diverse religious beliefs and may wish to practice a myriad of religious customs and ceremonies that might impact on the common elements, and correspondingly contravene some provision or restriction in the relevant declaration, by-laws and rules. The writer's consternation with the Syndicat Case is predicated on five major concerns regarding the reasoning and conclusions of the Court, each of which are briefly described as follows:

Firstly, the writer takes great issue with the Court's adoption and support of a personal or purely subjective understanding of religious freedom. Without the obligation imposed upon a claimant whose religious practice violates a clear and unambiguous restriction in the condominium documents, to prove his or her compliance with some sort of objective religious obligation or mandate that justifies the claimant's invocation of freedom of religion, it will be possible for anyone, in the aftermath of the Syndicat Case, to openly contravene provisions in the condominium's declaration, by-laws or rules, and simply seek sanctuary and exoneration by resorting to the claim of sincere personal religious belief, and correspondingly connecting such non-compliant behavior to some espoused personal religious precept. The mere claim of a religious belief or practice, no matter how weird or bizarre [such as the hanging of stuffed carcasses on a condominium balcony, patio or terrace, to ward off evil spirits, or the storing of containers filled with urine (or worse) to represent the purification of one's soul], will inexorably embroil the condominium corporation in protracted litigation. In the writer's respectful opinion, it was naive at best and sophistry at worst, for the Court to think that condominium residents who wish to flout some restriction or provision in the condominium documents, for whatever reason, will not hereafter, in a moment of desperation,

suddenly cling to a religious life jacket, and claim to receive an epiphany (or divine inspiration) that purports to validate their contravention of the impugned provision on religious grounds. If the personal subjective beliefs of the claimant are all that is relevant to the Court, without reference or regard to any objective religious standards or dogma, then it will be exceedingly difficult for a condominium corporation (which has no ability or resources to investigate the day-to-day personal activities of the defaulting unit owner) to successfully attack the credibility of the claimant's testimony, particularly if the latter is a liar whose demeanor is convincing and whose testimony is compelling.

Secondly, even though the contravening unit owner or condominium resident will have the burden of proving the sincerity of his or her religious beliefs, in the dispute with the condominium corporation, the latter will be unable to marshal and present evidence of the claimant's past conduct or practices that are inconsistent with the presently-held religious beliefs being articulated, and which might arguably assist in convincing the trial judge that the claimant's beliefs are not genuine, but rather contrived solely to maintain impunity. Simply put, the condominium's inability to raise evidence of past inconsistent conduct, is effectively akin to placing the condominium in a fight with its arms tied behind its back.

Thirdly, in light of the fact that the focus of the judicial inquiry will be on what the claimant views his or her personal religious obligations to be (rather than what others view his or her obligations as being), and since the Court will also be obliged to determine whether the infringement of religious freedom by the impugned condominium provision is more than trivial in the particular circumstances under review, and whether the claimant's particular religious practice has the potential

for harming or interfering with the protected rights of others, it becomes obvious that the ultimate resolution of these types of disputes will inevitably require a case-by-case factual analysis, thereby potentially causing the condominium corporation to be entangled in litigation with each and every delinquent unit owner who claims a religious justification for his or her breach, without the precedent-setting benefits of prior cases litigated by the condominium. No one, least of all condominiums with insufficient reserve funds, has the financial resources to engage in a litigious challenge of one's religious beliefs on a personal case-by-case basis, with the result that a compliance order under section 134(1) of The Condominium Act 1998 (the "Act") will only be pursued by condominium boards for the most egregious violations of the condominium's governing documents, in those situations where a religious defence has been raised, despite the fact that section 17(3) of the Act imposes a mandatory duty on the condominium corporation to take all reasonable steps to ensure compliance with the declaration, by-laws and rules. In other words, the Syndicat Case puts condominium corporations in a financial straightjacket, when it comes to defending impugned condominium provisions or restrictions that are being openly breached for purported religious grounds.

Fourthly, the writer takes issue with the somewhat dismissive nature by which Mr. Justice Iacobucci minimized the importance of the condominium's efforts to maintain a uniform aesthetic appearance throughout the exterior of the project, not only for the ethereal benefit of maintaining the mental well-being of the condominium's residents and invitees, but for the tangible benefit of preserving the economic re-sale and/or mortgage values of the condominium property. Condominium developers and their respective architects and lawyers, not to mention municipal planning staff, often go to great lengths to ensure that the condominium is designed, constructed and

maintained in a manner which will protect, preserve and perpetuate a specific and consistent aesthetic look and feel to the project . . . one that is intended to endure well beyond registration. Most declarations invariably impose restrictions on the ability of unit owners to unilaterally make installations or alterations to the common elements or the exterior facade of the condominium, which might detract from the condominium's overall appeal, and deleteriously affect the market value of all the dwelling units in the project. Condominium documents are generally drafted in a manner intended to balance, to the extent reasonably possible, the rights of all units owners, without distinction. In the writer's respectful opinion, the other unit owners or co-owners in the Syndicat Case were equally entitled to the right of peaceful enjoyment of their respective condominium properties, and to have the building's luxury style, design and aesthetic appearance duly maintained at all times. The restrictions in the condominium's declaration prohibiting unilateral alterations, decorations or constructions on balconies were reasonable and justified, and crafted so as to protect a legitimate interest. In the writer's view, the obligation imposed on the appellants to exercise their rights of ownership (including their religious rights) in harmony with the rights of the other owners and residents in the condominium is not unfair. The problem with Mr. Justice Iacobucci's reasoning is that it fails to properly understand or appreciate the true nature of condominium or communal living, where all unit owners in a complex are equally entitled to (and equally reliant upon) the protection of their contractual and property rights, as circumscribed by the condominium's declaration, by-laws and rules. If and when those rights are not protected or enforced, particularly in the face of clear and unambiguous language in the condominium's governing documents, then the enjoyment of their property, and thus their quality of life, will be adversely affected. It follows that declarations of condominiums ought to be construed and enforced quite strictly, in order to ensure that what each unit purchaser sees, is what each unit owner will ultimately obtain, and can rely upon.

Correspondingly, any restrictions in the condominium's documents which prevent unilateral action or behavior which might impact upon the common elements, or prejudice other unit owners, should be clothed with a very strong presumption of validity, arising from the fact that at the time each unit owner acquired his or her dwelling unit, he or she knew (or ought to have known) of the provisions in the registered condominium documents, and should therefore be deemed to have accepted any restrictions imposed, similar to restrictive covenants that run with the title to land. Absent evidence that any such restrictions in the condominium documents are wholly arbitrary in nature, or capricious in their application, or blatantly abrogate some fundamental human right, or clearly violate public policy, it is the writer's respectful position that such restrictions should not be invalidated or suspended merely because one or more individual unit owners find compliance or adherence inconvenient or uncomfortable. Frankly, it's the very essence of condominium living that all unit owners must be able to rely on the enforceability of the provisions of the registered declaration, save in the most limited instances as previously noted, inasmuch as the failure of such provisions to withstand attack from defiant or recalcitrant unit owners, and to correspondingly survive judicial scrutiny, would inexorably lead to a state of confusion and uncertainty, and effectively paralyze the board of directors charged with the responsibility of governing the affairs of the condominium.

Finally, the writer vehemently disagrees with Mr. Justice Iacobucci's position on the argument of waiver. In the writer's view, when an individual freely chooses to reside in a condominium where activities upon the common elements are strictly regulated, by provisions that are registered on title for all to see, and intended to be enforceable against (and to be concomitantly relied upon by) all condominium owners and residents alike, it is implicit in the act of having completed his or her purchase transaction that such individual has thereby evinced a clear intention

to be bound by (and comply with) such registered provisions. All the more so in the circumstances of the Syndicat Case, where the declaration of co-ownership was physically signed by the appellants prior to closing. The fact that the appellants in the Syndicat Case were either too lazy or too pre-occupied to be bothered to read the pertinent provisions of their condominium documents should be no excuse. The language of the restrictions in the condominium documentation was clear and unambiguous, and presumably there was no need to resort to a magnifying glass or a dictionary for such provisions to be easily read and understood. Nothing was done by the condominium corporation to mislead the appellants regarding the impugned restrictions, and the fact that the appellants chose not to read these provisions should be irrelevant to the question of fairness or conscionability. Parenthetically, there was also no duty or obligation, either at law or in equity, imposed upon the condominium corporation to physically bring the impugned balcony restrictions to the specific attention of the appellants, other than the presumed requirement to have them execute the declaration of co-ownership as a pre-requisite to closing.

With the greatest of respect and deference to Mr. Justice Iacobucci, the learned justice was wrong to construe and compare the declaration to a contract of adhesion, where there is generally an inequality of bargaining power between two sides adverse in interest. Rather, the declaration is akin to a charter of a company, clearly setting out the rights and corresponding obligations of each of the shareholders, or unit owners who will be sharing a communal living environment, and which declaration must, of necessity, impose certain restrictions on the use of the common property that are designed to promote and maintain a safe, harmonious and homogeneous community. Accordingly, the fact that the appellants chose, of their own volition, not to read the condominium documents prior to moving into the complex cannot, and should not, place them in any better or

higher position than those who did take the time to read same. Moreover, the Court's requirement that the impugned provisions must expressly refer to the waiver of one's right to religious freedom, totally fails to recognize the commercial realities of the condominium marketplace. Certainly no one developing and marketing condominiums for sale, who ensures that restrictions on unilateral alterations to the common elements are incorporated in the declaration, would also, in an effort to avoid non-compliance with such provisions, include an express waiver of the exercise of one's right to freedom of religion. Clearly, any express waiver of such rights would be viewed by the marketplace as far too broad and encompassing, and would correspondingly have the chilling effect of scaring off all potential buyers. Moreover, because of the subjective nature of the test for determining religious freedom that has been adopted by the majority of the Court, the condominium declarant would have no alternative but to incorporate directly within the condominium documents an express broadly-drafted waiver of one's religious rights, because there would be no way to predict what type of activities or machinations might be undertaken in the future regarding the common elements, in the pursuit of religious adherence, and correspondingly no way to limit or circumscribe the precise nature or scope of the religious rights being waived. It is simply disingenuous for Mr. Justice Iacobucci to propose that condominium corporations can only enforce such restrictions uniformly, and without having to make exceptions or accommodations for religious reasons, if and only when there is an explicit waiver, stated in express, specific and clear terms. The writer simply fails to see why a clear prohibition on alterations, decorations or constructions upon the balconies, such as the one in the declaration of co-ownership in the Syndicat Case, is insufficient to support a finding of waiver.

6. CONCLUSION

It is the writer's personal view that where the manifestation or exercise of one's religious freedom clearly conflicts, in a material or non-trivial way, with the registered restrictions of a condominium in which such individual has freely chosen to reside, and provided such individual had actual notice (or is deemed to have had actual notice) of such restrictions prior to closing, then the interests of the collective unit owners to enforce and preserve the integrity of those restrictions should prevail, absent cogent evidence that such restrictions inherently or blatantly abrogate some fundamental human right or directly offend public policy. Anything less makes non-compliance with the condominium's governing documents more likely to occur in the future, and makes the task of drafting enforceable provisions that can be relied upon by all condominium residents far more difficult, if not impossible.

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