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Religious freedom trumps condo rules

In a landmark decision upholding religious freedom, the Supreme Court of Canada has ruled that sincere personal religious beliefs override the terms of a condominium declaration that restrict the use of its common elements.

In a 5-4 decision at the end of last month, the Supreme Court ruled that a group of Orthodox Jews living in a luxury condominium complex have the right to construct temporary religious huts, known as sukkahs, on their balconies, despite a prohibition in the building's declaration.

The case originated at a luxury residential condominium project in Montreal known as Place Northcrest, a part of Le Sanctuaire du Mont Royal complex. Under Quebec law, a condominium is called a divided co-ownership.

In the fall of 1997, Moshe Anselem and his wife, along with three other religious neighbours, asked for permission from the co-ownership board (the Syndicat Northcrest) to construct a sukkah hut on their balconies.

A sukkah is a small, enclosed booth-like structure made of wood or canvas, and open to the heavens.

During the fall harvest festival of Sukkot, Jews are commanded to dwell temporarily in these structures, which commemorate the shelters occupied by the Israelites during their 40-years of wandering in the desert following the exodus from Egypt.

During the nine-day holiday, Jews take their meals and conduct religious ceremonies in the sukkahs.

Some also sleep in the huts, health and weather permitting.

The co-ownership declaration for Place Northcrest prohibits decorations, alterations and construction on the buildings balconies.

Restrictions of this type are common in condominiums for safety reasons and to ensure that buildings have a uniform exterior look.

In October of 1997, a group of owners at Place Northcrest constructed sukkahs on their balconies. Eight months later, the building board, Syndicat Northcrest, obtained a permanent injunction prohibiting the owners from building sukkahs on their balconies.

The trial judge heard opposing evidence from two rabbinical experts on the question of whether an observant Jew was required to have his own sukkah, or could use a communal one.

The Supreme Court of Canada ruled that this test was incorrect and expert evidence was irrelevant.

The court said freedom of religion in Canada does not require a person to prove his or her religious practices are supported by any mandatory doctrine of faith. The only role for the courts is to determine the sincerity of the claimants' belief.

The court found that the belief of the Place Northcrest owners was sincere. In prohibiting the use of the common element balconies for sukkahs, the condominium declaration was a non-trivial interference with and thus infringement of their protected rights.

What about the rights of the other owners to enjoy their units without seeing wooden huts on neighbouring balconies? The intrusion on the rights of the other owners to peaceful enjoyment of their units was at best minimal, the court ruled.

The potential annoyance caused by a few sukkahs being set up for nine days each year would undoubtedly

be quite trivial, the court wrote.

The condominium board unsuccessfully argued that the sukkah owners had waived their freedom of religion when they assumed the obligations of the buildings declaration, which prohibited construction on balconies.

According to the court, they had no choice but to sign the co-ownership declaration when they bought their units.

It would be 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, the court ruled.

The parties themselves were not the only participants in the case.

Supporting the Jewish owners in the case were the League for Human Rights of B'nai Brith Canada, the Ontario Human Rights Commission, the Evangelical Fellowship of Canada, the Seventh Day Adventist Church in Canada and the World Sikh Organization of Canada.

B'nai Brith lawyer Steven Slimovitch successfully argued that the state should not be the final arbiter of religious dogma. Rather, he said, this must be a private matter set by each individual.

Traditionally, courts have been reluctant to interfere with the reasonable rules of condominium corporations.

But Canada's highest court has now issued a warning to every condominium in the country: Where sincere religious beliefs conflict with condominium rules, the rules must give way to the religious beliefs.

Condominium declarations are no longer engraved in stone they are subject to the charter rights and freedoms enjoyed by every Canadian.

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