



HALACHA AND CIVIL SOCIETY

AN ANECDOTAL OVERVIEW

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April 30, 2019


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FREEDOM INSTITUTE



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An Anecdotal Overview

Introduction

Thank you very much to everyone who has made this interesting morning and afternoon possible. It turns out that timing, as they say, is everything. We are just a few days from Hanukkah, which celebrates a time when the Jewish community did something quite revolutionary, in so many ways.

We know from the story that it was just a few people who initiated a rebellion against the “uncivil” civil law imposed upon the Jews, of certain things they were not allowed to do, including not so trivial matters like keeping the Shabbat, studying Torah, having circumcisions: in brief, the be-all and end-all of the Jewish community. At that point, the very few who wanted to fight it, the few who did fight it, miraculously prevailed against a mighty military machine.

Who would have thought then that there would come a time, thousands of years later, when a Reverend Father-Doctor-Deacon would bring together a symposium on Halacha (Jewish law) and civil society? That, in itself, is a Hanukkah miracle we should celebrate!

Let me begin by saying that, in terms of where we are, measured by where we were, we are living in incredible times. Consider the fact that we can debate this matter in public. If we hearken back to our ancestors, our grandfathers, great-grandfathers, and so on, they would have given their eyeteeth to be in that position. They were not. They had to go by what they were told they could do, and resisting was often a life-endangering position.

We are today in a position entirely unprecedented in Jewish life outside of Israel for the last thousands of years. What I would like to do here is more anecdotal, and certainly not comprehensive. I hope to share some of the things that have happened over the course of time related to Jewish and civil law.

The plan is to cover different types of examples, ranging from no-brainers to contentious issues, to actually employing the Canadian legal system to help the Jewish reality.

I probably will miss some examples, because so many have unfolded in the Canadian context. I will interject a bit of my personal connection to some of these cases, because they did involve me, not to a large extent, but regarding which I had direct knowledge of the matters at hand.

No-Brainers

We start off with a very simple case that took place almost immediately after I came here, over fifty years ago. It seemed like a very simple case. Little did the participants know that fifty-two years later, I would be talking about it in public.

I received a call from someone who had just lost a parent, and was about to sit shiv'ah, the Jewishly mandated seven-day mourning period that follows burial. This person worked for the government. The accepted rule at that time was that you could take off five days for a loss, but that it was five days before the funeral.

In Jewish practice, we have the funeral right away, and then we have the shiv'ah afterward. This man was apparently told that he could not take the five days off, because the funeral would take place right away, and the rule was that the five days had to be before the funeral.

This did not make sense; it did not sound right. I remember writing a letter to whoever in the public service was responsible for carrying out this policy at that time. I have been trying to find the letter ever since this Decretum was decreed, and I cannot find the letter. I wrote that in Jewish practice, we have the mourning after the funeral, not beforehand. The funeral is right away after death, and is not the culmination of the mourning; it is the beginning of it. Could you allow this person to have the same amount of days off?

I did not ask for anything special, just the same amount of days off with pay. The person went to sit shiv'ah not knowing the answer. The answer came back very clearly and relatively quickly that, yes, it was eminently fair to have the same five days, but after the funeral.

This was my first experience with religious accommodation, a more particular nuance of what is referred to as reasonable accommodation. But it was an indication that we were living in a society that has some sense of, and values the importance of, religious practice.

I put this in the category of a no-brainer. That is to say, you have to be really stupid to argue against something like this, because it makes eminent sense. If, on the other hand, one were to ask for ten days off, five days before the funeral and five days after, that would be a different story.

There are others that we almost take for granted, but that happen all the time. Every rabbi in a congregation will be getting, from their congregants, requests for an accommodation. Most of the time, it happens when one is going to school and there is an exam scheduled for a Shabbat or other

Jewish holy day. The request is to have the exam deferred, since writing on Shabbat is prohibited according to Halacha.

I do not know of any case of anyone in the last little while, except for maybe some cantankerous individual who has not accommodated their students. There may be others who have had different experiences, but, generally speaking, this is, again, just about a no-brainer. We do not take it for granted, but on the other hand, it is something that has to be normative.

I remember semi-humorously that, in one instance, a professor happily agreed to defer a test from a Shabbat to what turned out to be the first day of Sukkot (Tabernacles), a Jewish holy day on which writing is also prohibited. We did not gain much in that deferral, so we had to ask for a deferral of the deferral, which was granted. So it can be complicated, but with goodwill you can achieve much. And goodwill actually does play a large part in this.

Contentious Issues

Let me get into areas wherein we did have issues, but the issues were resolved quite nicely. One actually took place in late April. It involved the intervention of the Centre for Israel and Jewish Affairs (CIJA) and B'nai Brith Canada. Someone had put up a mezuzah in his condominium. A mezuzah is a small case containing a parchment scroll with excerpts from the Torah, the Bible. According to Halacha, these are to be placed on all doorposts for entry into a house or an apartment, and also all the rooms therein.

The condominium association had rules about not defacing anything in the exclusive common area, and told the fellow that he must take down the mezuzah, or put it on the inside. He did not like that, and asked the aforementioned Jewish organizations to take up his cause. From what I understand, this case was resolved quite simply; the condominium association apologized, and the mezuzah now stands.

Additionally, a neighbour of this person who also wanted to place a mezuzah has done so. It turned out this had nothing to do with being anti-Jewish. The issue was one of not wanting the external condominium property to be defaced.

In truth, the condominium association has a full right to insist that they do not want graffiti, or anything, on their outside walls. But in this instance it clashed with the notion of religious freedom, the freedom to have a mezuzah on the outside doorpost, which is a religious obligation.

We came to an accommodation. It did not go to the courts, but it easily could have. The condominium association actually apologized, as mentioned, not knowing that this was a religious value. This was

clearly not a case of anti-Jewish bias or anything of that nature. Even in tackling issues, we need to be careful before levelling such accusations.

There was another case, less well-known, involving a condominium that had a Shabbat elevator. A Shabbat elevator is a regular elevator that is programmed to automatically stop at every floor on the Shabbat. It is immensely helpful for Shabbat observers.

Halacha prohibits the pressing of electronic controls on Shabbat. Having an elevator that stops automatically at every floor allows people who are unable to conquer the stairs to be able to leave their homes and attend synagogue on the Shabbat.

Often these matters get resolved through quiet diplomacy, which works most of the time.

After a number of years during which the said condominium had a Shabbat elevator, the condominium association revisited the situation and decided to cease its operation. There were a few people in the condominium who protested against this, because they were using it. They were using it because they needed it.

Again, accommodation was reached, and the Shabbat elevator was reinstated. This did not make that much of a splash in the news. Some of you may be surprised that something like this did happen. It corroborated what people whom I have spoken to, specially in CIJA, and previously with its predecessor, the Canadian Jewish Congress, both deeply involved in Halacha-related issues, have observed. That is, often these matters get resolved through quiet diplomacy, which works most of the time.

In the Courts

We move now to issues wherein the courts intervened to settle matters. Consider what happened in Outremont, Quebec, around twenty years ago. The Jewish community set up an Eruv, a halachic Shabbat boundary, in its neighbourhood. If you are not looking for it, you probably will not find an Eruv.

It is composed of wires, usually of the Hydro or telephone variety, that surround the community, and tangible markings on the requisite poles, allowing the people inside it to carry on the Shabbat. The mythical walls of the wires render the area inside the wires as a private rather than a public domain. Normally, carrying on Shabbat is prohibited in the public domain. The Eruv is specially useful for taking out young children in their carriages.

The Borough of Outremont took the Jewish community to court, unhappy with the intrusion of religion on the public square. The Superior Court ruled that the Eruv is not a problem. Although a subsequent community meeting seemed to reach a general consensus to appeal the ruling, for whatever reason the municipality decided not to appeal. So there is an Eruv in Outremont.

It reminds me of the experience we had, many years ago, when we set up the Eruv in Ottawa. One of the things that is needed is the permission of the city to keep it as a united city in which you have permission to walk. I remember that the person in charge argued that we must separate religion and state. I do not know where he got that from. He refused the permission of that entity, which was supposed to encompass the entire city.

We had no choice at that point in time but to go to each local municipality, rather than the big, more overarching one. We were able to secure the permission of the Ottawa and Kanata councils, and other councils, all united since then. The Ottawa Eruv goes back to the time before the city was amalgamated. Interestingly, this fellow who turned down our request has become a dear friend. Ironically, as I came back today from New York, sitting on my desk was a copy of a book that he sent me which said, “in abiding friendship”!

But at that point in time, I was pretty disappointed, because it made a very simple matter much more complicated. Again, in the end, it all worked out. We can decide whether we want to focus on why it was so difficult, or to applaud the fact that eventually all was achieved.

More scary was something that took place around fifteen years ago, dealing with ritual preparation of animals for eating. I refuse to call it ritual slaughter, because the word *slaughter* has such a violent connotation. It is ritual preparation of animals for eating, otherwise known as shehitah, and performed meticulously by rabbinic experts.

At the time this was a contentious issue in Canada, to the point that Canadian Jewish Congress was asked to intervene and make a presentation to the Senate. For reasons I do not know, I was asked to make the case, probably because the Senate is in Ottawa, and I was in Ottawa. This was before we had the proliferation of wonderful rabbis here in the city, so I could have been the only game in town.

I was scheduled to make this presentation together with an imam, a wonderful imam from Toronto. Unfortunately, he took ill at the last moment, and sent a letter, which I think the Canadian Jewish Congress must still have in its archives. In the letter he writes that, unfortunately, he cannot make it, but whatever Rabbi Bulka says goes for him too.

I argued the issue very strenuously. I pointed out the precedent of a case in Halifax in the early part of the twentieth century in which shehitah was judged to be most humane. We did not want to be given an exception, that everything has to be prepared in a humane way except for shehitah, which we will allow, even though it is inhumane.

We did not want such accommodation. We claimed that shehitah is at least as humane as any other means of preparing an animal for human consumption, and there is no reason why this matter should even be under discussion. In the end, I think the government called an election, so this issue died in committee.

We can decide whether we want to focus on why reaching a consensus was so difficult, or to applaud the fact that eventually all was achieved.

I would not offer any guarantees that this could not again resurface in the next little while, considering what has been happening in Europe. Many European countries have banned shehitah, to the terrible upset of many of the Jewish communities there.

A most interesting case was the issue of the sukkah in Northcrest, in Montreal, known as the *Amselem* case. A sukkah is a tabernacle with foliage roofing that is the place of abode during the Tabernacles Holy Days, an eight-day period usually occurring in early fall.

This is a case that went to the Supreme Court in the year 2004, involving people who wanted to put up a sukkah in their condominiums, but the condominium association refused to allow it. Through the intervention of Canadian Jewish Congress, they reached a compromise—that they would allow the owners to have the sukkah in the square of the condominium. But the people who were involved in this insisted they want to have the sukkah on their balconies, and the condominium association refused that, and actually went to court.

Here is an interesting note: in all levels of the court up to the Supreme Court, but not including the Supreme Court, the objection of the condominium association was upheld. They even asked for an injunction against putting up the sukkah on private balconies, which included permission to dismantle such sukkah if it ever was installed. All courts below the Supreme Court sided with them. When it came to the Supreme Court, in a very close vote the court sided with the people, with *Amselem*, and against the condominium association.

The issue here was how much of an inconvenience it is to have to go, for one's sukkah, to the public square, as opposed to having it on one's balcony? The court basically considered it a reasonable request, that it is not out of bounds to ask.

The court also said that they are not getting into the business of deciding whether a person's religious belief is valid. They have to stick to the fact that, if a resident or condo owner sincerely believes in what they are doing and why they are doing it, the Court will not become theologians to discuss the validity of it. This ruling, for all intents and purposes, has held to this very day.

This entire matter of what is called reasonable accommodation, and therefore entitled to special consideration, is not on terra firma.

The *Amselem* case was a major victory, but I would not be too excited about it. I am not at all confident that if a similar case came up now, the verdict would be the same. This is because the lower courts were pretty one-sided in favour of the other side, and also, the verdict of the Supreme Court was pretty close, the slimmest of margins, if I remember correctly.

This entire matter of what is called reasonable accommodation, and therefore entitled to special consideration, is not on terra firma. I am not convinced that it is solid, and is more likely a bit precarious and open to further challenge.

I do not know whether the next issue belongs in our discussion. It is the issue of tuition for Jewish schools. This is a very complicated matter. I have been involved with it peripherally over many years. Is this an issue of Halacha and civil law?

Here we are talking about something quite fascinating. Should the state support Jewish education? To put it more accurately, we have not asked the state to support Jewish education, but could the state support the secular part of the education that all Jewish institutions offer, as a way of not penalizing us?

To this point in time, there are I think seven provinces that are okay with it. They should be. Ontario is, to a certain extent, an outlier on this issue. I remember conversations we had with the premier at the time, Dalton McGuinty, and he made it very clear that there were larger considerations in this, and that it has nothing to do with any antipathy to the Jewish community. On the contrary.

Still, we have not come to the point of making inroads in Ontario. There was a time that it was close. Certainly, our obligation to teach our children is a sacred Jewish tradition, a truly Jewish obligation. The challenge is to get the government to facilitate it just by not charging, by not having us pay double tuition, in a sense, because we pay taxes on our properties that go toward this, but then

we also have to pay the tuition. This issue is not going away quickly, and hopefully will be resolved nicely down the road.

Canadian Law Helping Halacha

There is one area of Halacha and Canadian law that is quite unprecedented in Canada, wherein Canadian law is used to enforce Halacha. I am referring to the get law. A **get** is a Jewish divorce, which according to Jewish law a husband must grant to his wife if they are divorcing. Failing the delivery and receipt of the get, remarriage is forbidden.

There is a get law in Ontario, and there is a federal get law. There is the federal divorce act, and there is an Ontario family law act. Both of them say that any spouse who stands in the way of the other spouse getting married religiously, the consequence is that whatever custody and monetary arrangements have been made between the parties can be revisited. The word “get” is not mentioned in the legislation, but the intent is clear.

In other words, we have a Canadian law that makes it difficult for a husband to be recalcitrant in his behaviour toward his former wife. This is quite incredible, that we have established a Canadian law to reinforce the Halacha regarding Jewish divorce.

That we live in a society where we could engineer a federal and provincial law that would protect women against religious get abuse is actually nothing short of astounding. And to this very day, whenever a divorce situation comes up, and I get a call from the parties involved, I make sure to share with them that the first thing to do is to tell your lawyer that you are covered by Ontario law, you are covered by Canadian law, and make sure you arrange your get right away. Do not wait until after the civil settlement, because you never know what will happen. You are entitled to it, and you can use it.

This has not eliminated all the concerns with regard to the get process, but to think that we would be able to harness the Canadian legal system to help with a Jewish matter places a powerfully positive perspective on the interaction between Halacha and Canadian law.

The Armed Forces

We diverge for a moment into an area that probably is not on your radar screen, but should be, in terms of reasonable accommodation—the armed forces. A number of years ago, the armed forces

made a principle decision that it wanted to broaden its base, and actually started to seek out chaplains from all religions.

I remember a conversation I had then with the person who was in charge, and I said to him, “I do not know why you want a Jewish chaplain. You do not have that many Jews in the armed forces.” The fellow said they were actually hoping that, by having Jewish chaplains, more Jewish people would join the armed forces. Besides, the chaplains will be there to serve people of all faiths.

The Canadian Forces leadership has been nothing less than incredible. They have gone beyond anything that could be expected. They have embraced the commitment to accommodate no matter what as long as there is a basis for it.

From the very small amount of people that started applying, we have now a pretty significant number of Jewish chaplains in the armed forces. It is possible that we have a significant ratio, given the very small number of Jewish soldiers, but that will change. After all, in the Second World War, the Jewish community had the highest faith-group representation based on percentage.

As you can imagine, issues arose almost immediately, because many of the people that are applying for chaplaincy are very religious. They are rabbis. The question of simple things like kosher food came up right away. The Canadian Forces is not accustomed to supplying kosher food. What about drills on Shabbat, when one has to do some basic training? It is very difficult to stick handle around that, almost impossible. How do you do that?

I can tell you, just from firsthand experience, that the Canadian Forces leadership has been nothing less than incredible. For example, if a Jewish chaplain asked for halav Yisrael, a specialized milk that is produced under Jewish supervision, from the get-go, and is not readily available, they would actually supply it. They have gone out of their way, not just for kosher, but for super-kosher! They also have gone out of their way with regard to Shabbat observance.

Canadian Forces has gone beyond anything that could be expected, well beyond reasonable accommodation. They have embraced the commitment to accommodate no matter what, whether it is reasonable or unreasonable, as long as there is a basis for it.

Before we get to the last set of issues, I share with you a personal one. I have the great honour of delivering the final benediction at the national Remembrance Day commemoration on November 11. Unfortunately, November 11 sometimes falls on a Shabbat. A number of years ago, I spoke to the

head of the ceremony from the Royal Canadian Legion. I offered to do a pre-tape of my benediction, and they could play it as if I were there, even though I would not be there.

To their credit, they tried as much as they could to make this happen. In the end, it did not work, but it was for technical reasons. They could not get the tape to correlate the voice with the picture, and it would have looked a little bit odd. But they gave it a real college try, which was, again, extraordinary on their part. They did not have to, but they did, which leads to a very important idea for us to understand. If you ask for something nicely, as opposed to coming in with a demand, you get a lot further than if you say, “I am taking you to court.”

To give another instance, I used to have a television program in which we pre-taped all of our shows. We probably would pre-tape five shows in advance. Sometimes, the day it went to air, always a Sunday, would be a Jewish holy day, such as Passover or Sukkot. I went to them and said, “If mine ever does come out on a Jewish holy day, could you just put on, underneath, that this program was pre-taped?” They said that it is not a problem, not an issue.

Sometimes you can get into a little bit of trouble. At CFRA, where I did a Sunday-night program for about twenty-five years, I always told them in advance if Rosh HaShanah or Yom Kippur or Sukkot or Passover would be on a Sunday night, then I would not be able to do the program that week.

The first year, it came to around Hanukkah time, and they fully expected that if I could not be there on a Jewish holy day, I certainly would not be able to be there on Hanukkah. I had to give them some lesson about why, on Hanukkah, you can do radio. How do you explain this? Hanukkah you can do radio, but other holy days, you cannot. It was an interesting educational experience.

An important point to remember is that there are many people, whether they are in the legal sphere or beyond, who have tremendous respect for religious principles. We should not downplay or underestimate the importance of this.

Medical-Related Issues

An issue of recent vintage that is somewhat medical relates to the Canadian summer-job grant program. To be eligible, one has to sign that your organization is not involved in anything that would affect reproduction rights, a “nice” way of saying that you cannot be opposed to abortion. There were many who refused to sign, because they would not be true to themselves. The response by the government to the many protests of this requirement was that you may not sign it only if it impinges

on a core value. If it is not a core value, you are fine. What is and what is not a core value becomes quite problematic.

I hope I am not being paranoid, but this may be the first step toward moving away from accommodation, when it is perceived that the religious value is antithetical to a specific political or societal value. Here we are dealing with those who are against abortion, who firmly believe that via abortion we are taking away a life, and the discourse today is about the fact that this is part of reproduction rights.

I hope I am not being paranoid, but this may be the first step toward moving away from accommodation, when it is perceived that the religious value is antithetical to a specific political or societal value.

Years ago, the issue of late-term abortion was in the news. I had a radio discussion with Margaret Somerville, a major ethicist, then in Montreal. I said to her that she was arguing against berit, against circumcision, because it is painful to the baby, and yet she was in favour of late-term abortion. Have you ever seen what goes on in a late-term abortion, wherein the baby is actually

just about developed? How can you, at one and the same time, be okay with that but not okay with a small little incision? You can kill the baby, but you cannot circumcise the baby. To her credit, she agreed, and she changed her view on that.

Obviously, there are some value clashes going on, wherein we are caught in the crossfire. So far, circumcision is sacred and sacrosanct, but you never know. Down the road, we need to have stronger alliances with our other faith communities to make sure that this does not become a value for which we have to fight. I hope it does not happen, but I recall the vehemence when the issue surfaced years ago.

Another issue, arguably the defining issue related to Halacha and civil society, is the issue of medical assistance in dying. The pendulum has swung quite definitively in one direction, and it creates major problems for the Jewish religious community, as well as for many other religious communities.

We had a bit of a taste of it years ago, involving someone in Winnipeg who was in intensive care, and the family did not want him moved out of intensive care. This, even though the hospital insisted that this person was beyond recovery, and just wanted to put him in a long-term care facility. It became a cause célèbre at the time.

If we had to identify one issue on which we are in for some sort of fight, this is it. Here the fight is to protect the right of individuals to be treated, as opposed to being put into a position where they

are attacked and made uncomfortable because they want extended treatment rather than medical assistance in dying. This is an area in which many religions can coalesce. I do not downplay the fact that there are many branches within certain religions that probably are perfectly okay with this.

People of faith need to get together. If we do not do this together, all of us will lose. Together, we have a fighting chance.

Suffice it to say that we need to get together, because this is a fight on which there is very little wiggle room for many people. If we do not do this together, all of us will lose. Together, we have a fighting chance. It is similar to the Amselem case, but much more important. More people will be going through hospitals than have built a sukkah in a condominium. More important, it is an issue of life and death. It does not get more crucial than that.

Concluding Thought

I have shared with you, somewhat anecdotally, a wide range of instances wherein Halacha (Jewish law) and Canadian law have interacted. On balance, the report card is good. In some instances, it is outstanding.

But past success is no guarantee of future success. Attitudes are changing, and religion in general is not central for many Canadians, if not under assault.

Together, as a united group, the religious community can make a powerful case for the importance of sacred values for all Canadians. The sooner we come together the better, because the issues will not go away. ^



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