

# Inter-Cultural Litigation of *Eruv* Disputes In Quebec, New York and New Jersey

*A Post-Mortem Examination of Lost Opportunities*



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by Frank Gomberg



*...The next day, the Sunday Times carried another review of the show, a lengthy and serious attack against my entire painting style, against the essential integrity of my efforts, and especially against the crucifixions...Once again, there were photographs of the two crucifixions....*

*My mother came into my room that afternoon and stood near the doorway. I was at the window, looking out at the dirty snow in the yard below.*

*Had I seen the review in the Times? she asked softly.*

*"Yes..."*

*I tried to explain it to her. Somewhere in the middle of it all, it became clear that I was not succeeding. She would accept what I had to say. But she would never understand it. To do what I had done was beyond comprehension. She would not even dare try to explain it to my father. What could she explain? The crucifixion had been in a way responsible for his own father's murder on a night before Easter decades ago. What could she possibly say to my father?*

*She went out of the room. A few minutes later, I was called to the telephone. The Rebbe wanted to see me.*

*I remember the Rebbe's long burning gaze and the silence that filled the space between us. He had read everything. He had followed the papers and the magazines. He understood everything. He sat behind his desk, gazing at me out of dark sad eyes. The brim of his ordinary hat threw a shadow across his forehead...*

*"I understand," he kept saying. "I understand." Then he said "I do not hold with those who believe that all painting and*

*sculpture is from the sitra achra. I believe such gifts are from the Master of the Universe. But they have to be used wisely, Asher. What you have done has caused harm. People are angry. They ask questions, and I have no answer to give them that they will understand. Your naked women were a great difficulty for me, Asher. But this is an impossibility." He was silent for a long moment. I could see his dark eyes in the shadow cast by the brim of his hat. Then he said "I will ask you not to continue living here, Asher Lev. I will ask you to go away."*

*"You are too close here to people you love. You are hurting them and making them angry. They are good people. They do not understand you. It is not good for you to remain here."*

*I said nothing.*

*"Asher."*

*I looked at him.*

*"Go to the yeshiva in Paris. You did not grow up there. People will not be so angry in Paris. There are no memories in Paris of Asher Lev."*

*I was quiet.*

*"Asher Lev," the Rebbe said softly. "You have crossed a boundary. I cannot help you. You are alone now. I give you my blessings."*




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<sup>1</sup> Chaim Potok. *My Name Is Asher Lev*, (New York: Anchor Books, 2003) pp 365-367. This novel explores the inner world of the Hasidim and how insular that world is. It beautifully and gently examines what happens when an insider, in this case a talented artist, mixes with the outside world. The price of doing this is banishment or expulsion. The insider is thrust out and becomes an outsider.

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## Preface

In 1960, I was 7 years old. My mother took me to the dentist. On the way out of the building when we got on the elevator, there was a black man in the elevator. There were just the three of us in the elevator. I stared and stared. My mother was very uncomfortable. Even as a 7 year old, I could sense my mother's discomfort. My mother thought I was going to blurt something out—something embarrassing or worse; for she thought I'd never seen a black man.

When we got off the elevator and went our separate ways, my mother asked me why I had been staring. She expected the obvious answer "Because he's black". My answer was, "Ma—he's George Dixon, the star halfback with the Montreal Alouettes". My mother said that if I was so sure, I should run after him and ask him. I did. He was. Dixon, an elegant and friendly man, walked us to our car, signed an autograph—and I never saw him again.

The story is deeply telling—as not only does it speak about "the other", but it also speaks about my mother's incorrect interpretation of my thinking. How layered is culture and difference between us: how much like the Russian babushka dolls, each nested inside another.

I dedicate this paper and the work that went into it to my beloved late mother Barbara Rosen Gomberg, B.A., B.S.W., M.S.W. (June 11, 1929 - September 2, 2004). My mother was a sensitive, caring, insightful, compassionate human being. I owe her much and miss her every day.

## 1. INTRODUCTION

The definition of “culture” is elusive, amorphous and impossible to articulate. The members of our LL.M. class on Diversity and Culture variously described culture as “a kaleidoscope”, an “Irish wake”, a “Hora at a Jewish wedding”, a “woman in a sari eating kasaba”, a “tapestry”, a “weaving of threads” and the “confluence of peoples of different ethnic origins in Istanbul”.<sup>2</sup>

These diverse descriptions of what constitutes “culture” barely scratch the surface of a rich and fascinating area of study; and for conflict resolution practitioners working with inter-cultural disputants, this is only half the paradigm. The other half relates to the definition of “conflict”. Again, the members of our class offered varied and idiosyncratic definitions of conflict: “positional standoff”, a “fist fight”, the “September 11, 2001 tragedy”, “two people on either side of a line”, a “fight with one’s parents” and “brinksmanship”.<sup>3</sup>

It is readily apparent that the permutations and combinations of “culture” and “conflict” are as numerous as snowflakes—and of course, no two snowflakes are identical.

I submit that just as it is a truism that no two people are identical, it is axiomatic that no two conflicts are identical. That doesn’t mean that an examination of conflictual patterns of behaviour is unhelpful to understanding the sources of conflict and the potential solutions to same. However, it is absolutely essential to the conflict resolution professional to keep in mind that one person’s vision may be markedly different from another’s and that there are numerous ways of looking at the world.

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<sup>2</sup> Notes taken by Frank Gomberg in Professor LeBaron’s LL.M. class, Toronto, Ontario, March 9, 2010.

<sup>3</sup> *Ibid.*

It is trite to observe that the introvert and extrovert approach conflict and its resolution very differently. So, too do the communitarianist and the individualist. Japanese society is high context. American society is low context. Is it surprising that the Toyota apology over the “sticky gas pedal” fiasco failed to address the many concerns of the American government and consumer advocates? That apology might very well have been appropriate in Japan, but it fell far short of North American expectations. Similarly, a high context Japanese businessman and a low context American businessman may have difficulty achieving understanding, let alone agreement, at a commercial mediation.

The high context/low context example is archetypal in that it places dramatically different cultures in conflict. Sensitivity and fluency are clearly required to effectively address the significant discord and dislocation which inevitably results.

In preparing to write this paper it struck me that almost all conflict is inter-cultural in the sense that no matter how homogeneous a society is, disputants view things through different lenses leading to vastly divergent interpretations. These lenses are themselves a culture or a subculture. Thus, there are cultural elements at play in a dispute between two Roman Catholics, just as there are cultural elements at issue in a dispute between two religious Jews. In March 1982, there was gunfire at Osgoode Hall during a motion in the Supreme Court of Ontario before Mr. Justice Osler. The legal dispute was over control of a Sikh Temple. To the outside world this looked like a fight amongst Sikhs—an homogeneous group to the outsiders. To the three victims’ families, they had little in common with Kuldip Singh Samra, the shooter.<sup>4</sup>

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<sup>4</sup> For those who naively question whether history repeats itself see Denise Balkissoon, “Sikh temple votes out 10 directors”, *Toronto Star*, Thursday, April 22, 2010 at page G3. It is clear that a dispute resolution process would be helpful to moderate tension and attempt to resolve what is a recurring problem. Balkissoon’s article concludes with the ousted members’ lawyer advising that the matter would be going to Court but wouldn’t be resolved for 6 to 8 months. The whole process is eerily familiar.

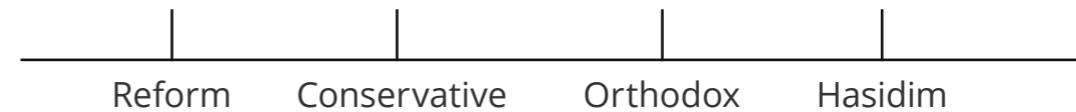
In this paper, I will look at the fractious relationships between Hasidic Jews and the non-Jewish communities in Outremont, Quebec; the City of New York; and in Long Branch and Tenafly, New Jersey which ultimately served as the genesis for lawsuits in each of these jurisdictions. I propose to undertake a post-mortem examination of these litigated claims in order to extract some lessons which can be learned from these failed relationships. My thesis is that we can learn much from lost opportunities and as in a medical post mortem examination, we can seek to avoid or obviate similar problems in the future by learning from past mistakes.

I believe that not only can we improve the prognoses for resolution of inter-cultural disputes by analyzing the Hasidic-Gentile conflicts, but the lessons we learn from these analyses are equally apposite to intra-cultural disputes. Hopefully the motivations, aspirations, worldviews and metaphors of the Hasidim and the Gentiles as have emerged from their many clashes will be instructive to those of us who devote our professional lives to resolving disputes—in order to render this world more functional and peaceful.

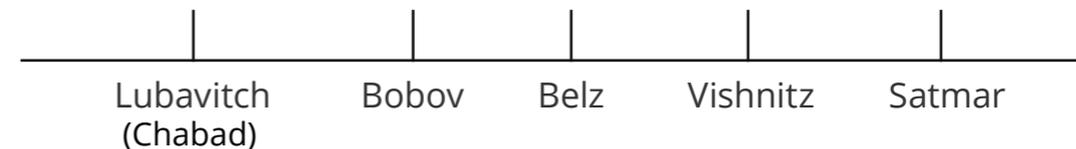
## 2. JUDAISM AND HASIDISM

The Jewish religion, unlike the Roman Catholic and Anglican religions, is not centralized. There is no “Pope”, there are no Cardinals and there are no Bishops. Judaism is practiced in congregations which are categorized as orthodox, conservative and reform. The Orthodox are the most observant or religious. They adhere to the Torah’s 613 rules of ethical, personal and moral behaviour, don’t drive cars on the Sabbath and eat only

kosher food. Conservative Jews are less observant and Reform Jews even less so. A subset of Orthodox Judaism or perhaps in a category of its own—to the right of Orthodox Judaism—is the Hasidic movement, whose members are called Hasidim.



What is rarely understood by Jews (and never understood by Gentiles unless they have exceptional knowledge obtained by studying the subject) is that even the Hasidim are not homogeneous. In a recent discussion with Chabad Lubavitch Rabbi Zalman Grossbaum,<sup>5</sup> I was told that amongst the Hasidim there are many different denominations. The Lubavitch (synonymous with Chabad) are the most left-leaning and the Satmar group is the most conservative. Keeping in mind that we are speaking here of different groupings of ultra-orthodox Jews (who as a group are all highly religious), a depiction of where some of these groups fall on the spectrum of “orthodoxy” is as follows:



Each of these groups has its origin in a small village of Eastern Europe. The Rabbi who began the Hasidic movement was Israel Baal Shem Tov. He was born in 1698 and died in 1760 in what is now the Ukraine. Many of Baal Shem Tov’s followers moved away to

<sup>5</sup> I met with Rabbi Zalman Grossbaum for about 90 minutes on April 19, 2010, at the Chabad headquarters in Thornhill, Ontario.

other towns and villages and themselves became heads of different Hasidic groups. The Lubavitch Hasidim, Bobov Hasidim, Belz Hasidim, Vishnitz Hasidim and Satmar Hasidim are all offshoots of the movement begun by Baal Shem Tov in the mid 1700's.<sup>6</sup>

What is instructive about this is that these divisions, which as stated are unknown to most, have implications for the dispute resolution practitioner working with Hasidim and trying to resolve Hasidic-Gentile disputes in Quebec and elsewhere. Why is this? The answer is that it may be useful for the mediator to know that the Lubavitch Hasidim are relatively liberal and may constitute part of a potential solution as opposed to being part of the problem. There are many differences amongst the various Hasidic groups. For example, the Lubavitch Hasidim believe in the legitimacy of the State of Israel. The Belz, Bobov, Vishnitz and Satmar groups view Israel to be an illegitimate state because they believe that the State of Israel can only be established when the Messiah arrives. Since they believe that the Messiah has not yet arrived, the State of Israel—to them—is illegitimate in a religious sense. Without some knowledge of the differing worldviews embraced by the various Hasidic groups, it is impossible to even know that you should be trying to enlist the assistance of a Lubavitch Hasid in the possible resolution of a Hasidic-Gentile conflict. Without knowing the various worldviews held by disputants involved in any given conflict, a person attempting to resolve the conflict is missing the foundational understanding necessary to know where to turn for help.

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<sup>6</sup> Hasidic Judaism. Wikipedia. The Free Encyclopedia. [www.wikipedia.com](http://www.wikipedia.com).

### 3. OUTREMONT, QUEBEC

#### 1) THE ORIGIN OF THE CONFLICTS

Outremont is an affluent suburb of Montreal with a population of just under 100,000. It was historically populated by the elite of French Canadian society: doctors, lawyers, university professors, politicians, writers, newspaper editors and other professionals. At the conclusion of World War II, there were residents of many different ethnic origins and religions in Outremont, including a Hasidic community comprising approximately 30 families. By virtue of their numbers, the Hasidim posed no threat to the French Canadians and the tolerance shown to them by the French Canadians and by other established Gentile communities ironically spawned an explosion of further Hasidic settlement in Outremont. The Hasidim now comprise 20 to 25 per cent of Outremont's population of 97,000, an increase from 13 per cent in 1990.<sup>7</sup> The Hasidim are no longer an enclave. They enthusiastically embrace the Biblical command "be fruitful and multiply". It is typical for a Hasidic family to have 6, 7 or even more children. This has caused a dramatic shift in Outremont's demographics. It is apparent that at their disproportionate rate of reproduction, the Hasidic population will soon form a much larger minority and perhaps eventually a majority of Outremont's population.

In its April 19, 2010 edition, Maclean's called the brewing Hasidic-French Canadian conflict an "unholy mess".<sup>8</sup> This "unholy mess" has been growing to its present malignant state for at least

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<sup>7</sup> Martin Patriquin. Outremont's Unholy Mess: Maclean's, April 19, 2010 at page 22.

<sup>8</sup> Ibid.

30 years. Garry Beitel in his film *Bonjour! Shalom!*<sup>9</sup> described significant tensions between the Hasidim and the French Canadians in Outremont as they played out in about 1990. He interviewed Hasidim and French Canadians and obtained comments like this one from one francophone woman:

It feels like I'm living in a neighbourhood in mourning....this constant black and white. Their religion is supposed to express joy but from the outside, it's so absolutely sad. Their complexion is sickly white, it's all like death. It's a mask...a death mask.<sup>10</sup>

This type of comment reflected a common, if not prevalent view in the Outremont francophone community in 1990, some 20 years ago. Gerard Leblanc, a journalist at La Presse expressed a similar view:

They don't talk to me when I say hello—they'd stop to talk to each other in these huge cars which they drive like cowboys. I'd be stuck and that made me angry. Then when they'd have to talk to me, they'd speak English. And that made me even angrier. Then there's our background as fragile Quebecois—we know we don't integrate immigrants well. We know we feel threatened. We're just a little drop in the North American ocean. When we see people who are so different, who don't talk French, we say, these are others who will never be on our side.<sup>11</sup>

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9 Garry Beitel. *Bonjour! Shalom!* (Imageries P.B. Ltee. 1992) [Beitel].

10 *Ibid.* Francois Hebrard, interview.

11 *Ibid.* Gerard Leblanc, interview.

It is interesting to ponder whether Leblanc's comments are xenophobic or racist. The difference is of course one of degree; however, it may be possible to educate xenophobes. The prognosis for racists is much less optimistic. Leblanc goes on to say:

But the problem is that they live next door to me. If they lived in monasteries, I'd really like to visit them.

Basically, they reject our values. They say they're no good. They're like sects who retreat from the world but stay in it.

You go out, walk three minutes, you're in the heart of the City. At the same time, we're in our own little garden paradise...protected, full of parks, no problems, no violence. So, the presence of the Hasidic Jews is more striking in this little paradise amongst ourselves, our own kind. Outremont was always a preserve of the French Canadian Bourgeoisie. People who are well off.<sup>12</sup>

The xenophobic fear of the other is equally well captured in Beitel's discussions with Hasidic Jews. It should be apparent from his talks with Ernest Kisner, a Belz Hasid and Alex Werzberger, a Satmar Hasid, that neither of them had much use for, nor much desire to interact with their French Canadian neighbours:

It's a so-called wall. It's a religious kind of a wall that we want to protect our heritage of religion. Because we want to protect our children for the future to be the same way we have been.<sup>13</sup>

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12 *Ibid.*

13 *Ibid.* Ernest Kisner, interview.

Werzberger with obvious understatement told Beitel the following:

We are **a little bit a** closed society. We do not mingle with our neighbours as much as other people would for the simple reason that we don't want our kids to walk into a non-Jewish house, possibly eat something unkosher, watch T.V.—which we don't and so on. Therefore it's not a sign of unfriendliness. It's a sign that we want to be isolated from the so-called 20<sup>th</sup> century evils.  
<sup>14</sup> [emphasis added]

These quotations demonstrate the similarity of views held by Belz and Satmar Hasidim towards “the other,” at least in Outremont in the late 1980's and early 1990's. The metaphor of the wall is used by both Hasidim and French Canadians. This should not be lost as a potential bridge to generate some interchange between them. I will discuss this further below.

Beitel also interviewed Claudine Schirardin, President of the Mile End Residents Association<sup>15</sup> and Maurice da Silva, President of the Inter-ethnic committee of Outremont. Both spoke in similar terms about the isolation of the Hasidim and of the fear of “the other” being felt by French Canadians. From Schirardin's perspective:

The Hasidim seem to live completely outside our customs...outside of our hours even. At 6:00 a.m.—the men and boys are at the synagogue across the street. They're back between 7:00 and 9:00 p.m. On a Saturday, when we go shopping,

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<sup>14</sup> *Ibid.* Alex Werzberger, interview.

<sup>15</sup> Mile End is a geographical area contiguous to and immediately east of Outremont. It too has a large Hasidic population.

they're back at the synagogue. They live at different hours.

...

This wall that exists between us and the Hasidic community—it's not a hostile wall. It's sort of invisible. We know it exists. They know they've put it there. They want to protect themselves and stay as they are.<sup>16</sup>

Da Silva initially spoke about the fear of outsiders as observed through the French Canadian lens:

We're starting to see it, in the streets of Outremont. Increasing numbers of young Jews are making their presence felt. And you have to notice it. It's quite striking. So it seems clear that some Francophone Quebecois are on their guard or you could say, a little worried.<sup>17</sup>

Da Silva's commentary was initially somewhat benign. However, as he spoke more openly and became more comfortable with the interviewer, his comments became sharper and more troubling:

It's a symbol of the taking of possession of territory. When you build a synagogue, we're afraid it will attract people. The more you multiply these houses of prayer, the more they stick around them. The synagogue is the most visual symbol of the apprehension that a number of Francophone Quebecois feel in

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<sup>16</sup> See footnote 9. Claudine Schirardin, interview.

<sup>17</sup> *Ibid.* Maurice da Silva, interview.

the face of the changing character of their neighbourhood.<sup>18</sup>

With these types of comments, observations and xenophobic, if not racist barbs, it ought to have been apparent to community leaders on both sides that some method of defusing tensions or a system of conflict management or dispute resolution was essential to permit the communities to live in some harmony. Instead, little was done and it is no exaggeration for Maclean's to describe the situation in 2010 as a crisis. This is the proverbial snowball rolling downhill. Had the snowball been stopped, or redirected, it would not have started an avalanche.

## 2) THE VISHNITZ SYNAGOGUE

The first of the incidents that led to community unrest occurred when the Vishnitz Hasidim purchased an empty building lot (in 1988) to erect a synagogue. When they applied for a zoning permit, it was denied. They then exacerbated an already bad situation by buying another property that was already zoned commercial. With the help of Jerome Choquette, the Outremont mayor,<sup>19</sup> the Vishnitz congregation disingenuously obtained a permit to open a restaurant. They then opened a synagogue in what should have been the restaurant. The phantom restaurant was on the ground floor of a residential fiveplex. When a French Canadian woman, Celine Forget, moved into one of the units (the others were occupied by Hasidim), she was appalled by the unchallenged presence of the illegal synagogue. She was also offended by the heavy foot and vehicular traffic in the area, giving

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<sup>18</sup> *Ibid.*

<sup>19</sup> Choquette was previously the Quebec Minister of Justice in Premier Robert Bourassa's Liberal Government and very friendly to the Jews in general and to the Hasidim in Outremont in particular.

rise to air and noise pollution and much illegal parking. Forget went to court in 1997 and obtained an injunction. The synagogue was closed, the battle was on and the court process was engaged to resolve French Canadian-Hasidic disputes.

## 3) THE ERUV<sup>20</sup>

### *Rosenberg v City of Outremont*<sup>21</sup>

The next skirmish of note between the Outremont Hasidim and the French Canadians was over the eruv in Outremont. The Hasidim sought a declaratory order permitting them to erect an eruv. The City of Outremont included in its court filing an Affidavit from the same Celine Forget who had obtained the court injunction against the illegal Vishnitz synagogue in 1997. In 1999, Forget was elected to Outremont City Council and she was strongly against special treatment for any Outremont residents including the Hasidim. Fresh from her court victory against the Vishnitz synagogue, she challenged the Hasidim's right to maintain the eruv. When the case went to court, Forget and her supporters could point to no inconvenience caused to Outremonters by the presence of the eruv, other than an interference with the flying of kites. It is submitted that this "kite argument" was specious and the court had no difficulty concluding that there was no undue hardship in accommodating the Hasidim by permitting the eruv. As Mr. Justice Hilton (who clearly found the "flying the kite" argument disingenuous) put it:

...the accommodation the Petitioners seek does not purport to require the City of Outremont to endorse or in any way to be associated

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<sup>20</sup> See Appendix for definition.

<sup>21</sup> [2001] Q.J. No. 2858; [2001] R.J.Q. 1556 (Quebec Sup. Ct.).

with Orthodox Judaism, but only to tolerate a religious practice that has not been shown to cause any inconvenience or undue hardship to Outremont residents. To the extent that some residents in the affected area contend that the granting of the Petitioners' claim will involuntarily place them in some kind of religious zone from which they cannot escape as long as they live there, counsel for the Petitioners is right to point out that the area within an eruv is only a religious zone for those who believe it to be one. That belief is limited to the practitioners of Orthodox Judaism, and not to residents who do not belong to that faith.

...the City has a constitutional duty to provide accommodation for religious practices that do not impose undue hardship on its residents.<sup>22</sup>

This litigation concluded in favour of the proponents of the eruv.<sup>23</sup>

After winning the Vishnitz synagogue case in 1997, being elected to Outremont City Council in 1999 and participating in the loss of the Rosenberg eruv case in 2001, Forget again sued the Vishnitzers in 2001, this time alleging that their spanking new and otherwise legal synagogue encroached 6 feet onto an adjoining lot. Once again Forget was on the losing side.

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<sup>22</sup> *Ibid.*

<sup>23</sup> In an April 27, 2010 telephone discussion with Julius Grey, counsel for the Hasidim in *Rosenberg*, Mr. Grey advised me that the *Rosenberg* case was not mediated, nor was mediation even considered. Mr. Grey further advised me that the City of Montreal would have mediated as would the Hasidim. He told me that the French Canadians would not have agreed to mediate—as they were “hardliners”. How ironic that the francophones—who at least were living in the twentieth century would have rejected mediation—a modern approach to dispute resolution, whereas the Hasidim, who in many respects live in the eighteenth century would have embraced it.

#### 4) THE SATMAR SYNAGOGUE AND THE YWCA

The next contest between the Hasidim and the French Canadians would be comical but for the inter-cultural seriousness of their clashing worldviews. The Parc Avenue YWCA was adjacent to a Hasidic synagogue. The Hasidim in the neighbourhood and in particular those leaving the synagogue to talk and smoke on breaks from their Torah studies complained that they were unwittingly viewing women in the YWCA exercising in provocative spandex and similar outfits. A solution was reached whereby the Hasidim paid for the installation of tinted windows in the YWCA. After this was accomplished, 100 members of the gym complained, saying that the tinted windows affected the interior lighting and this diminished their enjoyment of gymnastics, tai chi and other exercises. Rabbi Wieder of the next door Yetev Lev Synagogue felt that this accommodation was reasonable—because there was a poor view from the YWCA's window anyway. The window looked out over an alley. Members of the YWCA petitioned the gym to reverse its stand and to re-install the original windows. These members argued that the Yetev Lev congregation should accommodate the YWCA and not vice versa.

They argued that since the windows of the YWCA and the windows of the synagogue did not provide a direct view into either building from the other, the synagogue should have tinted its own windows if the Hasidim wanted to shield those in the synagogue from viewing the exercising women. The YWCA members also argued that if the synagogue members took smoking breaks in front of the synagogue and not in the back alley, the Hasidim would not be in the vicinity of the gym windows and wouldn't be forced to look at the horrible image of women working out.

The controversy over who should accommodate whom is a thorny one. As an outsider looking in, I submit that the women's activities in their gym were perfectly proper. If the Hasidim didn't like what was transpiring, they obviously had a number of options: tint the synagogue's windows; smoke and congregate in front of the synagogue and not in the alley; or most obviously, not succumb to the temptation of looking at women exercising in their gym outfits.

I found the question of why these facts engendered a clash fascinating. When I spoke with Rabbi Grossbaum about this, he told me that the Yetev Lev synagogue is a Satmar synagogue. I submit that once one knows this (and I didn't until I spoke with Rabbi Grossbaum) and given the uncompromising nature of the Satmars, it is not surprising that they couldn't tolerate the presence of women exercising at a window near to the synagogue. I asked Rabbi Grossbaum whether the Lubavitch would have had the same objection to the exercising women. His response was "it depends". When I asked him what it depends on, he responded that "it depends on the nature of what they're wearing and what they're doing".<sup>24</sup>

This response by Rabbi Grossbaum holds some promise for a mediated settlement to some of these internecine battles. It may be possible to enlist the assistance of the more moderate elements of the Hasidic and French Canadian communities to assist in devising conflict resolution approaches, systems, structures and modalities, which then become an integral component of a solution to these inter-cultural dust-ups.

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<sup>24</sup> See footnote 5.

#### 4. STATE OF NEW YORK AND THE ERUV <sup>25</sup>

*Smith v Community Board No. 14, et al* <sup>26</sup>

In 1985 Joseph Smith, a resident of the City of New York, brought an application in State Supreme Court to enjoin a Jewish organization from constructing or maintaining an eruv on public property. Smith sought the injunction because he believed that:

...the enclosing of the aforescribed area by this religious device will create a religious aura in and have a metaphysical impact on the area which will force myself and other residents to assume special burdens to avoid. The only way to avoid this unwelcomed and unwanted religious device and the resultant religious aura and metaphysical impact in the area would be to move away from the area and find residence elsewhere, in a neighbourhood free from religious aura and/or designation.<sup>27</sup>

The defendants argued the following:

...that the eruv is not a religious symbol or device but a legal fiction created by Jewish law, that even if the eruv is such a symbol or device it does not violate the Establishment Clause and that the Free Exercise Clause requires that City agencies accommodate the religious customs

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<sup>25</sup> I have quoted extensively from the American decisions. The quotations lend a flavour to the tone of the disputes and reflect the factual underpinnings of the cases and the legal arguments that were made. This is critical to an intimate understanding of the Hasidic-Gentile conflicts in all jurisdictions. I have slightly edited the quotations (and omitted internal citations and many case references in the quotations) in order to make the paper more readable. I have not in any way changed the purport of the quotations.

<sup>26</sup> 491 N.Y.S. 2d 584 (Supreme Court, New York).

<sup>27</sup> *Ibid.*

of the Orthodox Jewish Community. It is further alleged that all actions taken by agencies of New York City were within their normal policies, rules and regulations.<sup>28</sup>

Justice Goldstein concluded that there were three guiding principles to determine whether the government's conduct violated principles of U.S. Constitutional Law:

...whether the conduct has a secular purpose even if that secular purpose is not primary, whether its principal effect either advances or inhibits religion, and whether there is excessive government entanglement with religion. The requirement of a secular purpose has been satisfied inasmuch as the eruv committee raised sea fences which had fallen into disrepair over the years. These sea fences had originally been built to prevent flooding, erosion and windblown sand from going onto the streets and neighboring property. The Department of Parks routinely allows for the improvement of public land by community or other philanthropic groups at their own expense and, in fact, many other of the sea fences along the beach had previously been repaired by residents of the area. Furthermore, the policy of New York City to allow equal access to public lands for religious or nonreligious purposes is an acceptable secular purpose. The second prong of the *Lemon* test demands that religion neither be advanced or inhibited by the conduct complained of. Here,

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<sup>28</sup> *Ibid.*

the City accommodated a religious custom of Orthodox Jews by granting permission to use public land and poles in substantially the same manner as it has accommodated the religious beliefs of other New Yorkers. These permits were granted pursuant to accepted and standard rules and regulations of New York City. No public moneys were expended on the eruv and there was no intent to advance religion in general or the Orthodox Jewish faith in particular, nor was that the result. Plaintiffs' argument that the eruv "enclosed" and "separated" the area and that the eruv is a "wall" is simply not true. The eruv is a virtually invisible boundary line indistinguishable from the utility poles and telephone wires in the area.

The third criterion is that the conduct should not create excessive government entanglement with religion. Here, the role of the City was to permit cord or wire to be strung from lamp poles and to permit certain sea fences to be raised. The Department of General Services routinely allows commercial signs and banners to be hung from New York City lamp poles. The Department of Parks routinely allows public lands to be used for various assemblies, meetings and exhibits, temporarily or permanently, for secular or religious purposes. There is no indication that the eruv committee was treated any differently than any other group desirous of using public facilities for other forms of expression. The construction of the eruv was financed totally by private funds with no financial assistance by the

City and the eruv will be maintained in the future totally by private funds.<sup>29</sup>

Justice Goldstein concluded that:

New York courts have repeatedly held that by their very nature religious institutions are beneficial to the public welfare and consequently proposed religious uses should be accommodated.<sup>30</sup>

As such, the eruv was permitted to stand and Joseph Smith's challenge, like that of the City of Outremont's in Quebec Superior Court was rejected.

On appeal, the New York Supreme Court, Appellate Division affirmed the trial judgment and adopted the reasons of Justice Goldstein.<sup>31</sup>

## 5. STATE OF NEW JERSEY AND THE ERUV

### 1) AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND JACOBY V CITY OF LONG BRANCH<sup>32</sup>

The plaintiffs sought an injunction in Federal Court to restrain the defendants from erecting and maintaining an eruv within the City of Long Branch. They argued that:

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> 518 N.Y.S. 2d 356.

<sup>32</sup> 670 F. Supp. 1293.

...demarcation of the eruv using poles and fences erected on public property violates the "constitutional proscription against governmental action respecting an establishment of religion." Plaintiffs maintain that the creation of the eruv constitutes the placement of "permanent symbols" of the Jewish religion on public property.<sup>33</sup>

As Judge Thompson stated it:

In order to determine whether there is a secular purpose for actions taken by the City of Long Branch we must examine what the city did and what the effect of the actions has been. The city's actions appear to be limited to granting the Congregation the right to erect two additional utility poles, extend a fence and lengthen a fence pole in order to create an eruv in which observant Jews may engage in secular activities on the Sabbath, such as carrying a book or pushing a baby carriage to the park. As the City of Long Branch notes in its brief, the secular purpose of this resolution is that it allows a large group of citizens access to public properties. Within the eruv district they may go to the park, push a baby carriage on public streets, and visit friends. The eruv which the city has allowed the Congregation to create is not a religious symbol. Neither the boundary markers of the eruv nor the eruv itself have any religious significance. They are not objects of worship nor do they play

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<sup>33</sup> *Ibid.*

any theological role in the observance of the Sabbath. Under Jewish law the eruv does not alter the religious observance of the Sabbath, it merely allows observant Jews to engage in secular activities on the Sabbath. The court finds that the City of Long Branch has established a secular purpose for its authorization permitting the delineation of an eruv in Long Branch.

By permitting the synagogue to use its own funds to create an almost invisible boundary in which its members may engage in secular activities on the Sabbath, the City of Long Branch is not putting its imprimatur on any public manifestation of religion, such as moments of prayers in public schools or the posting of the ten commandments on classroom walls. Providing equal access to public facilities to people of all religions and enabling individuals to get to and from their chosen places of worship safely are permissible accommodations by the government. The government is permitted to fix sidewalks outside churches, provide police protection and basic utilities for mass outdoor religious gatherings, provide police to direct traffic into synagogue parking lots and authorize a house of worship to install additional street lights on public property to facilitate access to evening services. The city allowed the eruv to be created to enable observant Jews to engage in secular activities on the Sabbath. This action does not impose any religion on the other residents of Long Branch. Residents are not confronted with any visible religious symbolism

in their community, in fact the only visible alterations are two additional utility poles, an additional piece of fence, and some half-rounds on the sides of the existing poles. None of these objects have any religious significance. Residents are not subjected to religious words coming from those employed by the government, such as teachers in public schools, nor has any religious group been given any authority to mandate behavior in the community. The eruv does not alter the observance of the Sabbath by observant Jews, these congregants will continue to observe the Sabbath as they have all their lives and as they would without an eruv. The eruv merely permits them to participate in such secular activities as pushing a stroller or carrying a book while observing the Sabbath.

Under the *Lemon* test the defendants must also show that the city's resolution does not advance any particular religion. As noted above the existence of the eruv does not impose the Jewish religion on other residents of Long Branch, it merely accommodates the religious practices of those residents who are observant Jews. Since it is permissible to construct houses of worship on public land at an airport to enable travelers and airport employees to practice their religions, it is certainly permissible to unobtrusively demarcate an area as an eruv to permit observant Jews to engage in secular activities while they practice their religion. In the case now before this court no religious symbol has been erected. As Rabbi Roth, of the Congregation of the Brothers of

Israel, testified before this court the eruv itself has no religious significance or symbolism and is not part of any religious ritual. The eruv is basically invisible to Long Branch residents as it utilizes existing poles and wires with the addition of wooden half-rounds attached to the sides of the poles. The two additional poles and the fence extension will not significantly alter the existing environment. Having examined pictures of the eruv boundaries, the court finds that the boundaries are invisible in that they look just as they looked prior to being designated as the eruv's boundaries. The eruv sends no religious message to the rest of the community. Its existence could not be discerned by anyone who has not been shown the boundaries. An eruv does not in any way force other residents to confront daily images and symbols of another religion. As the court noted in *Smith v Community Board*, accommodating the religious customs of one group by permitting the creation of an eruv does not necessarily advance any one religion as proscribed by the *Lemon* test. As long as there is no evidence that Long Branch has refused to accommodate other religious groups and since the city will spend no money on the eruv, permitting the eruv is an acceptable accommodation and does not improperly advance religion. In all probability residents other than those who actively participated in the initial debate and those observant Jews who are provided with a map of the eruv's boundaries will never see

the eruv nor will they be able to discern its boundaries. Their own freedom to practice their religion or not to practice any religion will not be interfered with at all. The court finds that no violation of the First Amendment to the Constitution has been stated.<sup>34</sup>

It is apparent that the same analytical approach undertaken by Mr. Justice Hilton in the Outremont case and by Justice Goldstein in the New York case was embraced by Judge Thompson of the United States District Court for the District of New Jersey. The common element which emerges from all of the cases is the duty to accommodate.

## II) TENAFLY ERUV ASSOCIATION V THE BOROUGH OF TENAFLY<sup>35</sup>

The United States District Court for the District of New Jersey again had to deal with the eruv issue, approximately three years after its October 1987 decision in Long Branch. In December 2000, the proponents of an eruv in Tenafly, New Jersey went to Federal Court, alleging violations of their constitutional right to freedom of religion. Judge Bassler heard evidence about what public speakers had said about the proposed eruv at a series of Borough Hearings. A sample of these comments is set out below as the comments were surprisingly similar to those voiced by the francophones interviewed by Garry Beitel in *Bonjour! Shalom!* One of the opponents to the Tenafly eruv stated:

Well, they start to insist that shops close on Saturday. If they start to try to think of the

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<sup>34</sup> *Ibid.*

<sup>35</sup> 155 F. Supp. 2d 142 (United States District Court, District of New Jersey).

neighborhood as their sole possession (sic). The attitudes of the community change. So, I would say this is not a simple issue about cables on poles. This is much more an issue the character of a community being committed to diversify rather than beginning to be separate sectors supporters of a town (sic). And therefore I very strongly oppose this as a person who absolutely would be there at the drop of a hat to protect their free exercise of religion. This is not about that.<sup>36</sup>

Another opponent articulated his concerns as follows:

Just take a look at what happened in Teaneck. Teaneck was beautiful. I love this area. I've lived here for 65 years. I used to shop in Teaneck when I lived in Englewood. Teaneck had beautiful stores. Almost every store in Teaneck today is geared towards the Orthodox. There is a racial imbalance in the school system in Teaneck because most of the Orthodox children go to Yeshivas and they go to religious (sic). Who's left in the Teaneck school system but those children [who] cannot afford to go to a private school. There is a serious imbalance there and I have concern that this could possibly happen to Tenafly because the....If this is granted, let's all be honest, more and more Orthodox are going to move here. The more people that move here, they're not going to buy their meat in the Grand Union, they're going to want to go to Glat Kasher Orthodox store. They're going to be looking to open up businesses in Tenafly. They're going to

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<sup>36</sup> *Ibid.*

have the same thing that happened in Teaneck. This is my concern. I have no children in school anymore, but I am concerned about the school system, and I am concerned about what will come in to our local shopping areas. And I think that we should seriously consider this.<sup>37</sup>

Yet another resident, this one a member of City Council stated:

We find...in modern times that when you create a neighborhood through the use of this religious symbol, however its physical characteristics may be, there is a tendency over the years to then have only people of that particular Orthodox Jewish faith to live in that neighborhood.<sup>38</sup>

Another resident offered the following. Note the reference to "them" and "they".

I think that Tenafly, that most of us would agree that the community is very diverse, and the people of all nationalities and all religions, I mean, there's no block in town that's like Korean or a Chinese quarter. It's a small town and the beauty of it is the diversity and the richness and that's what I think we're all about. I would worry that by our giving this, we're saying that they have a right to have a community in our community, and our community is so small, it's not like we're so big that they need to congregate in one area....I just don't see a need to give this

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

to them because we're all about diversity and they're free to wherever want (sic).<sup>39</sup>

Mayor Moscovitz who is Jewish stated:

It's something that could never [be] seen by anybody[;] [there] is nothing significant about this. Anybody looking for it would [never] know it was even there. It's not an obvious thing but allows these people to bring their children to temple. That's all. You know, whether it makes sense to you or not is not really important...I mean we don't have to agree with everyone's religion...It's such an innocuous thing. It's something that nobody can see or know that's there. It's a religious thing, and we have a reputation in this town of permitting people to go to whatever church they wish to go to or temple they wish to go to and bring their children.<sup>40</sup>

The "taking over the community" argument is a particularly pernicious one. It is another example of xenophobia, if not racism.

It is not simply a matter of being able to carry your child to the synagogue, they have been able to go to synagogue for five years with nobody interfering. This is something that has considerable implications in terms of changing the social community. It makes it a part of

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

their private domain. I personally object to the use of our public property to converting it to anyone's private domain.<sup>41</sup>

Judge Bassler summarized what some of the eruv opponents said as follows:

There was also the oft repeated concerns that just because Long Branch permitted a town to have an *eruv*, the decision did not require a town to do so, and that in a small, diverse town such as Tenafly an *eruv's* "artificial contrivance to get around Orthodox Judaic religious laws" would set a terrible precedent for future actions by the town. It was opined that letting any one group have such religious access to the right-of-way would make it impossible to differentiate between requests in the future, or establish a precedent that could not later be undone. Others took issue with the erection of a permanent structure on public property to aid a religious group in calling the Borough their private domain. Residents commented that they were opposed to the creation of a "community within a community," because of the perceived attendant social evils that would result. As one resident said, "I do not want to live in someone else's domain, also known as a ghetto."

Some residents felt that the *eruv* was "like a hostile take-over" of the community, in which the Borough should not assist. Others thought it would lead to a demise of the public schools...<sup>42</sup>

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

After considering the complete panoply of arguments, Judge Bassler found the establishment of the eruv to be constitutionally impermissible. His reasons differing from Judge Thompson's conclusion were as follows:

First, after an examination of all the evidence, the Court must conclude that the utility poles and the right-of-way are not public forums, or even limited public forums for speech. Since they were never used for public discourse, and were never committed to that purpose, the utility poles and the right-of-way are undoubtedly a nonpublic forum. Given such a nonpublic forum, absent any evidence that others were granted comparable access while Plaintiffs were denied it, or that Plaintiffs were denied access they otherwise would have received based solely on their viewpoint, regardless of the Council's motive the Court holds that a decision to enforce a reasonable, neutral access restriction of general applicability can not have amounted to viewpoint discrimination.

Second, the Court is convinced that the fundamental reason animating the Borough Council's decision was its concern that public property should not be permanently allocated to a religious purpose. In making this decision, the Borough Council was not targeting the Orthodox Jews, but was instead targeting permanent religious installations on property to which the public typically does not have a right of access. Under the circumstances of this case, this decision as to how municipal property should be used was

ultimately a legitimate legislative decision by an elected representative body whose responsibility it was to make just this kind of decision, and who acted out of a compelling interest. Since the Borough Council's decision was narrowly tailored to prohibit only conduct that might generate the appearance of an entanglement between church and state, no constitutional infirmities resulted, and there is no cause for a court to second guess such a decision.<sup>43</sup>

Given the conflicting decisions of two United States District Court Judges (Judge Thompson found in favour of the eruv and Judge Bassler against it) the eruv's proponents appealed to the United States Third Circuit Court of Appeals. The Third Circuit allowed the appeal, set aside Judge Bassler's order and enjoined the Borough of Tenafly from removing the eruv. As the Third Circuit stated it:

We believe that the Borough's selective, discretionary application of Ordinance 691 against the lechis (author's note: lechis is synonymous with eruv) violates the neutrality principle of *Lukumi* and Fraternal Order of Police because it "devalues" Orthodox Jewish reasons for posting items on utility poles by "judging them to be of lesser import than nonreligious reasons," and thus "singles out" the plaintiffs' religiously motivated conduct for discriminatory treatment. Just as the exemptions for secularly motivated killings in *Lukumi* indicated that the city was discriminating against Santeria animal

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<sup>43</sup> Ibid.

sacrifice, and just as the medical exemption in Fraternal Order of Police indicated that the police department was discriminating against religiously motivated requests to grow beards, the Borough's invocation of the often-dormant Ordinance 691 against conduct motivated by Orthodox Jewish beliefs is "sufficiently suggestive of discriminatory intent," that we must apply strict scrutiny.

In this case, the plaintiffs are not asking for preferential treatment. Instead, they ask only that the Borough not invoke an ordinance from which others are effectively exempt to deny plaintiffs access to its utility poles simply because they want to use the poles for a religious purpose. To the extent that access to the utility poles on Borough land constitutes a "benefit," the guarantee of neutrality is respected, not offended when religious persons benefit incidentally from neutral criteria and evenhanded policies. In this context, there is "no realistic danger" that, if the Borough treated the plaintiffs' religiously motivated conduct on religion-neutral terms, reasonable, informed observers would perceive an endorsement of Orthodox Judaism. Moreover, even if there is some slight risk that a reasonable, informed observer might "misperceive the endorsement of religion," there is a much greater risk that the observer would perceive hostility toward Orthodox Jews if the Borough removes the lechis.<sup>44</sup>

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44 309 F. 3d. 144.

The Third Circuit of Appeals therefore concluded that the eruv's supporters were entitled to the injunction they sought. The Court determined that the eruv's supporters were likely:

...to show that the Borough violated the Free Exercise Clause by applying Ordinance 691 selectively against conduct motivated by Orthodox Jewish Beliefs.<sup>45</sup>

The United States Supreme Court denied the Town's petition for a writ of certiorari and as such, the decision of the United States Court of Appeals for the Third Circuit is good law. It is of interest that the eruv has now been considered by the highest court in the United States. It is also interesting to note that according to the materials filed in the Tenafly case, even the Supreme Court of the United States sits within an eruv.<sup>46</sup> Obviously the concept of the eruv did not bother the United States Supreme Court sufficiently for it to grant certiorari.

## 6. CONCLUSION

Just as the forensic post-mortem examination is critical to prevent future deaths in similar circumstances,<sup>47</sup> it is equally imperative as students of conflict that we study failed relationships, in order to prospectively create conducive environments in which to resolve disputes. Out of the ashes of lawsuits and other indicia of failed relationships may emerge the creativity necessary to foster

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45 Ibid.

46 Ibid.

47 See Appendix.

workable and positive processes. If we fail to learn from our mistakes, we are doomed to repeat them.

In his book *Staying with Conflict*,<sup>48</sup> Bernard Mayer deals with those long term conflicts which defy quick fixes because they are “likely to be around for a long time”.<sup>49</sup> Mayer advocates “constructive engagement”.

And just what does *constructive engagement* imply? Constructive engagement requires disputants to accept the conflicts in their lives with courage, optimism, realism, and determination. It means learning to engage with both the conflict and the other disputants with respect for each person’s humanity, if not his or her behavior or beliefs. It means articulating the nature of the conflict in a way that opens the door to communication and understanding rather than slamming it shut. It means developing durable avenues of communication that will survive the ups and downs of a long-term conflict. Constructive engagement requires using one’s power and responding to others’ use of power wisely—upping the level of conflict when necessary but doing so in a way that promotes desired behavior rather than becoming destructive. It means negotiating and problem solving within the context of the long-term challenge, and it means developing support systems that can sustain and energize individuals throughout a conflict.<sup>50</sup>

**Out of the ashes of lawsuits and other indicia of failed relationships may emerge the creativity necessary to foster workable and positive processes. If we fail to learn from our mistakes, we are doomed to repeat them.**

Mayer goes on to posit the following:

When faced with enduring conflict, we need to ask a new question. Instead of asking, “What can we do to resolve or de-escalate the conflict?” we need to ask, “How can we help people prepare to engage with this issue over time?” As we seek to answer this new question, our focus will begin to change and significant new avenues of intervention will become apparent. The basic challenge is strategic—it is the broad approach to the conflict that has to be altered. There are no simple steps or tactics that can change the whole dynamic, but the overall way in which parties approach the conflict can make a big difference in how constructive or destructive the conflict process is for them. This means that we have to start by understanding the nature of enduring conflict, and especially what makes it enduring. Once we achieve that understanding, I believe we have six strategic challenges:

- 1) To confront the pervasive and destructive power of conflict avoidance.
- 2) To work with disputants to construct conflict narratives that encourage an effective approach to long-term disputes.
- 3) To assist in developing durable avenues of communication.
- 4) To help disputants use power and respond to power wisely.
- 5) To understand and recognize the proper role of agreements within the context of long-term conflict.

<sup>48</sup> Bernard Mayer, *Staying with Conflict*, (San Francisco: Jossey-Bass Publishers, 2009).

<sup>49</sup> *Ibid* at page ix.

<sup>50</sup> *Ibid* at pages ix-x.

6) To encourage the development of support systems that can sustain disputants over time.<sup>51</sup>

Buried deeply within the rhetoric of some of the xenophobes and to be mined from some of the apparently xenophobic positions lies the kernel of potential solution.

When Claudine Shirardin spoke of the presence of the wall, she also said:

But it's not a hostile wall. It's a wall that's there. We accept it. We'd just like there to be a few more doors.<sup>52</sup>

She went on to state:

They live their lives and we live ours. But we really would like to know them a little better.

Yes, I am curious to know what they do, why they stay on the edge of society.<sup>53</sup>

Garry Beitel interviewed 10 year old French Canadian children and asked them questions about their Hasidic neighbours. Typical answers were:

I don't really like them because they are taking our territory...

I am getting a little fed up after 6 years of living there.

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51 *Ibid* at pages x-xi.

52 See footnote 16.

53 *Ibid*.

We're there o.k. and the Jews—they ignore us.<sup>54</sup>

These comments are depressingly similar to the comments of Gerard Leblanc and Francoise Hebrard as referred to above. However, there is hope and some of it is described in Beitel's film. A class of 11 or 12 year old French Canadian girls visited the Beit Yacov School—a girls only Hasidic school. Both the visiting French Canadian girls and their Hasidic hosts (11 or 12 year old Hasidic girls) were clearly nervous at the beginning of the visit. The girls had a terrific time talking and generally enjoying each other's company. They laughed together and asked each other questions about their respective cultures and religious practices. If the viewer looks away from the television screen and simply listens to the dialogue, it is impossible to differentiate the French Canadian girls from the Hasidic girls. One of the French Canadian girls said:

We don't see you a lot. We don't know a lot about you.<sup>55</sup>

The Hasidic girl responded:

When our teacher said you were coming, we were nervous. Now that you've come, we know you. We're very happy because we know other girls in another school who are our age.<sup>56</sup>

A French Canadian girl said:

I found this really interesting....I also find that you speak French well.<sup>57</sup>

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54 See footnote 9. Children interviews.

55 *Ibid*.

56 *Ibid*.

57 *Ibid*.

A Hasidic girl responded:

...and now you know that, a lot about our....about the things we do. I hope that now you think that we're Jewish but that we're human, too.<sup>58</sup>

Surely this is at the heart of the issue and should form the nub of the solution. The humanity in all of the disputants must be sourced in order to mine the diamonds of a solution. Dialogue and in particular dialogue at an early age is mandatory to inhibit the formation of stereotypes.

In *Bridging Troubled Waters*, Michelle LeBaron describes a meeting of conflict resolution practitioners in Dublin in the early 1990's, to work on issues "relating to the Palestinian-Israeli conflict". For the first few days, nothing happened. "I was not sure that any point was sticking to the walls at all".

On the third day of this five-day workshop, a trip had been planned. We loaded ourselves onto buses and headed up the east coast of Ireland to Belfast. Organizers thought that seeing another deeply divided society would give us food for thought or at least reality therapy. In fact, the visits we paid to an organization dedicated to bicomunal housing and the sites of bombed buildings had less impact than the hours we spent being jostled in the bus. On the bus, we learned that one of the participants was a novelist. He wrote every evening after work for four or five hours and had produced several books. Another raised horses. There was talk about children, spouses, cars, and traffic. We shared stories about travel disasters and childhood dreams, about New York City and the streets

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<sup>58</sup> *Ibid.*

of Cairo. When we arrived back in Dublin, the relational climate among us had shifted.

Over the remaining days, we worked together with energy and imagination. We did not solve the complex issues involved, but we engaged in authentic conversations and exchanged ideas that were followed up after the workshop. The physical act of taking a bus trip got us out of our problem-solving minds, tapping our emotional intelligence in the service of building relationships. We had shared dreams, and this helped us take an imaginative look at our subject, the conflict between Israel and Palestine. We had shown each other parts of our lives that matter deeply and so shared some small part of our ways of making meaning.

What did we learn from all of this? Should we always take bus trips together when trying to address problems? Prescriptive and narrow as that is, it is not as wrong as it might sound. Designing opportunities for movement and relational engagement, as well as for sharing dreams and purposes, is important in our processes. Taking a break and moving our focus away from a problem that we have tried hard to solve without a breakthrough is an important step toward a creative outcome. In so doing, we share parts of ourselves that become relational resources to our processes. We literally share who we are in the service of what we are trying to do.<sup>59</sup>

**Surely this is at the heart of the issue and should form the nub of the solution. The humanity in all of the disputants must be sourced in order to mine the diamonds of a solution.**

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<sup>59</sup> Michelle LeBaron. *Bridging Troubled Waters; Conflict Resolution From The Heart*, (San Francisco: Jossey-Bass Publishers, 2002) pp. 25-26.

This vignette confirms the proposition that bridge building and breaking down walls is possible, perhaps even likely, when people of different backgrounds, cultures, ethnicities, religions and world views sit together, eat together, talk together and share family stories and intimacies. Though it is trite, the act of exposing one's humanity to another, forms the basis of a new way of relating, acting, seeing and doing. This is true of the children Beitel interviewed and is equally true in the context of something like the Belfast bus tour.<sup>60</sup>

The cultural exchange described above between the Hasidic girls and the French Canadian girls took place in March, 1990—exactly 20 years ago. The girls would now all be in their early thirties. Hopefully there were many other cultural exchanges between the Hasidic and French Canadian children. Each of these young girls is a potential ambassador for reconciliation, rapprochement and conflict resolution between the more conservative, hardline orthodoxies of their respective communities.

LeBaron further describes this sharing of experiences in her book *Bridging Cultural Conflicts*. As LeBaron states it:

In the absence of shared experiences, one group may create myths about another group. In South Africa during apartheid, cultural groups developed myths about each other emanating from limited contact and stereotypes perpetuated by a system that kept them apart. As contact between groups increased and the

structure of separation was dismantled, values that had been projected from one group to another could be examined for their fit or lack of fit through dialogue and shared experience. Exploring myths is also fruitful for the misconceptions it reveals about our own groups and who we see ourselves to be.<sup>61</sup>

It is the sharing of experiences, the human contact which is so important to bridge the divide. Dialogue is also critical to establishing human contact and maintaining interaction. As LeBaron says:

People who participate in dialogues report that they maintain their commitment to advocacy but also develop caring relationships with their adversaries. As they come to belong to each other and to the quest for peaceful engagement across differences, they become part of a culture of common ground.<sup>62</sup>

One of Beitel's interviewees was a woman named Gisele Lalande, a wonderfully articulate, intelligent, urbane French Canadian. Lalande described how when she moved into the neighbourhood, one of the Hasidic women welcomed her by bringing her a plant—the only person, French Canadian or Hasid to do so. Lalande talks about French Canadian xenophobia from the perspective of a French Canadian and in a profound way encapsulates the problem:

I know it's delicate to use the term "racist" when

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60 See the excerpt from Dr. Izzeldin Abuelaish's book *I Shall Not Hate: A Gaza Doctor's Journey* in National Post, Friday, April 30, 2010 at p. A18. Dr. Abuelaish's three daughters were killed by Israeli shelling in Gaza in January, 2009. He eloquently argues that "getting to know each other and establishing mutual respect" is critical to get past the ugliness of war. He persuasively argues that "trust, dignity and shared humanity" are the keys to unlock the door of hatred and tragedy. Dr. Abuelaish's thesis is remarkably similar to those of Dr. Seuss, Professor LeBaron, Bernard Mayer and others.

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61 Michelle LeBaron. *Bridging Cultural Conflicts; A New Approach For a Changing World*, (San Francisco: Jossey-Bass Publishers, 2003) p. 280

62 *Ibid* at pp. 294-295.

we refer to the Jewish community. It recalls all these horrible stories. So it might be better to say xenophobic—to avoid the horrified responses of people who say “me, racist—never”. But in spite of this, I think it’s racist or xenophobic no matter what word we use, because the community is judged as a whole. People say the Hasidic Jews are like this, they are like that. That’s what racism is all about, judging an entire community and not seeing the individuals.<sup>63</sup>

Lalande then described an episode where her son walked into the neighbouring Hasid’s house and she, an enlightened, liberal French Canadian had to chase after him:

This summer my son walked into my neighbour’s house. My reaction—with my prejudices, with all my little problems...was to stop at the balcony, not to go into the house. I thought I wasn’t welcome, for religious reasons...because of all these stories we’ve put in our heads—living together and not talking. Immediately my neighbour said, “come in there’s no problem”. So I did—it was totally normal. Of all my neighbours, it’s the only house I’ve ever gone into...usually we’ve only talked at the edge of the sidewalk. It seemed to me there were limits to our contact. How can we know which limits are due to being neighbours and which are due to cultural differences that stop us from going further in

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63 See footnote 9. Gisele Lalande, interview.

our relationship? That I don’t know. But for the moment it’s me that sets most of the limits.<sup>64</sup>

Lalande’s observation that she is the one who sets most of the limits is profoundly insightful for it acknowledges the responsibility that the “insider” must take in terms of categorizing the “outsider” or the “other”.

It is extremely difficult to escape the gravitational pull of one’s culture of origin. It is that which makes one an insider.

In December 1970, I wrote my first examination at McGill University. I had graduated from a Jewish parochial high school and had spent 11 years in that school system. I was the beneficiary of a non-religious but culturally rich Jewish education. The first year psychology exam was taken in McGill’s Sir Arthur Currie Gym and about 700 people were in the room. I sat down near two Jewish students wearing skullcaps. The skullcaps identified them to me as Jews and no matter how religious they were, they were infinitely more religious than I was. Imagine my surprise when I saw them cheating on the exam. This was shocking to me and somewhat heretical—Jews cheating on an exam. How could that be? The vision of that sticks in my mind some 40 years later—and it is only since the completion of the Culture and Diversity course that I have been able to understand why the cheating Jewish students bothered me. I identified with them—for a reason that makes no sense—but obviously because I’m Jewish and so were they. Why would that be an important identifying characteristic for me? Why wouldn’t I identify myself as an honest McGill student or a resident of Ville St. Laurent (a Montreal suburb) or a skier or a voracious reader or a fan of the Montreal Canadiens hockey team? Why was my primary

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64 *Ibid.*

identification a religious one when I'm not a religious Jew at all? This continues to be a perplexing question for me. The concept of identity infuses everything that we all do every day. In the last month, I asked five Jewish male friends of mine (who are lawyers) whether they have more in common with a Hasid or with a French Canadian. They all answered this intentionally vague question by identifying more with the Hasid. That had been my initial reaction too; but on reflection the answer is counter-intuitive. As members of contemporary society, we live in the modern world. We watch television, go to the movies, eat in restaurants, read magazines, say hello to our friends' wives and travel on the Sabbath. Even the more liberal Lubavitch Hasidim don't have televisions in their homes, don't have internet connections in their homes, don't go to the movies, won't speak with women other than their own wives and won't travel on the Sabbath. It is an absurdity for my five Jewish male lawyer friends and me to offer primary identification with a Hasid as opposed to a French Canadian. How is this even remotely possible?

LeBaron describes the sensitivity that is necessary in order to relate; and it is relating which expresses our humanity and this permits us to see the other's humanity:

Our lived experience of sustaining connections across differences reminds us that it is possible, again and again, to live transformation into being. We know it because we have embodied it. We know it because our very cells rebelled, straining to keep us defended, but we made a different choice. We made the choice to walk out of the crowd of people who stood pointing fingers at the others, made the choice to be uncomfortable, to ask with the curiosity of a child who the other might be.

We did this not out of a sense of self-righteousness but out of our humanity, listening to the inklings that quietly affirmed that in all of their strangeness, others were also like us. Still, we remembered that this shared humanity exists alongside real and deep differences, differences that fuel conflict and limit resolution to something other than "seeing it my way". We are at once different from others and the same. We belong, in the course of our lives, to many pictures—to a very large one that encompasses us all and to many smaller ones that separate us, giving our lives purpose, meaning, flavor, and vibrant colour.<sup>65</sup>

Theodor Geisel, writing as Dr. Seuss describes absurdity of attempting to define who the insiders are and who the outsiders are. In *The Sneetches and Other Stories*, the Star-Belly Sneetches won't fraternize with the Plain-Belly Sneetches. They won't invite the Plain-Bellies to their parties, to their frankfurter roasts or to their marshmallow toasts:

But, because they had stars, all the Star-Belly Sneetches Would brag, "We're the best kind of Sneetch on the beaches." With their snoots in the air, they would sniff and they'd snort "We'll have nothing to do with the Plain-Belly sort!" And whenever they met some, when they were out walking, They'd hike right on past them without even talking. When the Star-Belly children went out to play ball, Could a Plain-Belly get in the game...? Not at all. You only could play if your bellies had stars And the Plain-Belly children has none upon thars.<sup>66</sup>

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65 See footnote 61 at p. 300.

66 Dr. Seuss. *The Sneetches And Other Stories*, (New York: Random House, 1961) pp. 4-5.

Eventually, Sylvester McMonkey McBean constructed a machine which converted the Plain-Belly Sneetches into Star-Belly Sneetches. When the former Plain-Belly Sneetches advised the Star-Bellies that they were going to join all the fun now that they had acquired stars, the Star-Bellied Sneetches got McBean to remove their stars. The converts from no stars to stars, now wanted to have their stars removed so that they would be starless. McBean obliged them of course. McBean collected lots of money converting and re-converting the various Sneetches. Eventually no-one could identify which Sneetches originally had stars and which didn't. This is similar to what LeBaron refers to as "acknowledgment of connection" which she says is pragmatic and ignored at our peril.

...its denial ultimately leads to war and environmental degradation. War relies for its continuation on an enemy "other". If the other is seen as part of the human web of relations, then dehumanizing actions are limited and finding ways to coexist takes priority. Environmental degradation is justified if we imagine that the earth is there for the use of selective peoples at a particular time without acknowledgment of responsibility and interdependence with future generations or people in other regions. Both war and environmental degradation leave us poorer, diminished in our resources and our sense of interconnectedness.

Perhaps the greatest measure of our work is the extent to which it adds to our humanity, to our consciousness of caring as the key to bridging conflict. Mother Teresa put it this way as she accepted the Nobel Prize for her life's work. "It's

not how much we do, but how much love we put in the action that we do".<sup>67</sup>

Dr. Seuss's way of putting it may be more poetic or lyrical than LeBaron's way of putting it—but their very profound points are identical. As McBean drove off:

he laughed as he drove  
In his car up the beach, "They never will learn.  
No. You can't teach a Sneetch!"

But McBean was quite wrong. I'm quite happy to say  
That the Sneetches got really quite smart on that day,  
The day they decided that Sneetches are Sneetches  
And no kind of Sneetch is best on the beaches.  
That day, all the Sneetches forgot about stars  
And whether they had one, or not, upon thars.<sup>68</sup>

Dr. Seuss ultimately reached the same conclusion that Gisele Lalande reached—we are all the same in our humanity and in our aspirations. This holds great promise for those of us who resolve disputes for a living. We must employ visionaries like Gisele Lalande; teaching tools like Dr. Seuss's *The Sneetches*; and the teaching methodologies of Mayer, LeBaron, Menkel-Meadow and other scholars to penetrate the fog of those whose xenophobia would stand in the way of understanding.

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<sup>67</sup> See footnote 59 at p. 303.

<sup>68</sup> See footnote 66 at pp. 22-24.

# Appendix

## i) \* ERUV

The Bible specifically prohibits the carrying of anything outside one's private residence on the Sabbath. Orthodox Jews take this prohibition very seriously and observe it. The prohibition was a nuisance but not a major hardship in ancient times. However as Jews congregated in the small villages (shtetls) of Eastern Europe in the late 1700's and early 1800's, this Biblical prohibition meant that they were effectively confined to their homes on the Sabbath. In contemporary society the prohibition strictly means that when one walks to synagogue, one cannot carry house keys, prayer books, umbrellas, canes, hats, medication or even sunglasses. One cannot push baby carriages, walkers or wheelchairs. To alleviate this hardship, rabbinical scholars interpreted the Bible to permit carrying in certain very limited circumstances. These circumstances are described in an intricate, elaborate, detailed and confusing way. The *Income Tax Act* is easier to understand than the rabbinical definition of "eruv". A simplistic and less than thorough description is sufficient in the context of this paper.

Eruv is a Hebrew word which literally means "mixing". This "probably connotes the insertion of the forbidden into the sphere of the permissible".<sup>69</sup> Observant Jews have therefore established eruvs. The creation of an eruv is done by stretching a thin fishing wire or its equivalent between two homes or around a geographical area. If two homes are connected by fishing

wire or a similar device, then carrying is permitted between the homes. If an area is circumscribed by fishing wire, then carrying is permitted within that geographical area. This rabbinical interpretation is an exception to the perceived harshness of the Biblical prohibition against carrying. It is hardly surprising that Gentiles (and many Jews too) consider the concept of eruv to be sophistry and find the concept difficult to stomach.

## ii) \*\* POST MORTEM

A post mortem examination is an investigation to determine the cause and manner of death. This includes obtaining the past medical, occupational, social and any other relevant history of the deceased. When all of this information has been obtained, a dissection of the body takes place. Following this, special additional tests may be carried out by other experts. Only when all of this has been completed can a "true" cause and manner of death be established.

The next step is to consider whether anything has been learned from the death that could prevent a similar death in the future.

By way of example, a 10 day old healthy baby dies completely unexpectedly. The police and the coroner obtain the relevant history and an autopsy is performed. At the end of this examination, it appears that the baby died of "SIDS". The toxicology report shows acetaminophen and a fatal level of morphine in the baby's blood.

Is this a homicide? A case conference was held with all the experts who had worked the case. It was discovered that the mother had been breast feeding and was taking Tylenol No. 3 which contains codeine. Codeine breaks down to morphine in the

<sup>69</sup> Encyclopaedia Judaica, (Jerusalem: Keter Publishing House, 1972) at page 849.

body. Could the mother have given the baby acetaminophen and morphine by way of her breast milk?

The consultant toxicologist advised that the source of the morphine was in fact the mother's breast milk. She was an ultra rapid metabolizer of codeine to morphine. The cause of death was morphine overdose from breast feeding and the manner of death was "accidental".

With this knowledge the mother went on to have two more healthy babies. Articles were written in medical journals warning about the danger of using Tylenol No. 3 while breast feeding.<sup>70</sup>

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<sup>70</sup> T. James Cairns, M.D., Deputy Chief Coroner, Province of Ontario (1991-2008), in a private e-mail to the author dated April 16, 2010.

<sup>71</sup> In order to write this paper I read each of the books and articles listed in this Bibliography. Though not specifically quoted or footnoted in the body of the paper, each source contributed immeasurably to the formulation of my thinking. I am greatly indebted to each of the authors for their contributions to this paper.

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## **Frank Gomberg**

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Frank Gomberg was called to the Ontario Bar in 1979 and for 20 years acted principally for plaintiffs in wrongful death and personal injury claims. He represented families at a number of landmark Coroners Inquests, including the inquests into the 1995 TTC subway crash and the 1998 in-hospital death of Lisa Shore.

Mr. Gomberg was designated a Specialist in Civil Litigation by the Law Society of Upper Canada in January 1990. He resigned as a specialist in 2005 given his evolving practice to full-time mediator. He now spends all of his professional time mediating civil cases pending in the Ontario Superior Court of Justice. He has mediated over 3,900 such claims since he began mediating in 1995.

Mr. Gomberg is a graduate of the Harvard Mediation Workshop (1995) and of the Advanced Mediation Workshop (1996). He believes in the transformative power of apology as an element in mediated settlements. He has written a major research paper entitled *"Apology for the Unexpected Death of a Child in a Healthcare Facility: A Prescription for Improvement"*.

Mr. Gomberg has taught Trial Advocacy for the former Ontario Centre for Advocacy Training (OCAT), The Advocates' Society, to law students at Osgoode Hall Law School and at Osgoode's annual Intensive Trial Advocacy Workshop (ITAW). He has lectured and written extensively on personal injury, mediation, negotiation and related topics. He has chaired or co-chaired numerous Advocates' Society, Law Society and Ontario Trial Lawyers Association programs.

He has taught for the Toronto Police Service and has been on many panel discussions on damages; settlement of civil cases at mediation; ethical considerations at mediation; strategies for success at mediation and related topics.

Mr. Gomberg is an avid downhill skier. He lives in Toronto, though he is a Montrealer at heart.



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