JUDGMENTS OF PEACE

an unorthodox court for the orthodox and not-so-orthodox Jewish community of Montreal, 1923-1976[1]

by Joseph Kary

In 1939, a hotel manager brought a commercial lawsuit over the latent defect of anti-semitism. He had rented a country hotel building for the summer months in rural Quebec, planning to run a Jewish resort on the premises, but lost business because of anti-semitic propaganda and outrages in the neighbourhood. Guests who had planned to stay the summer left early and when stories about the troubles hit the newspapers new guests stopped coming. The manager sued the hotel-owner from whom he had rented the property, claiming that the man had known the depth of anti-Jewish agitation in the area and kept it secret from him. He had leased the hotel for $900; the court ordered a reduction in rent on the condition that he pay the remainder owing by a deadline.[2]

The case was heard, not in the courts of the province, but in a private arbitral tribunal called the Mishpat HaShalom, or Court of Peace. This tribunal was administered by the Jewish Community Council of Montreal and was open to resolve disputes amongst Québecois yiddishophones, from the ultra-orthodox to the secular. Cases were decided by a panel of three members, a rabbi, a lawyer and a businessman, and their decisions were enforceable under provincial law.

The Mishpat HaShalom, and the many other similar Jewish courts that spread like dandelions across North America in the first half of the twentieth century, had roots in two intellectual streams: attempts by jurists to reform court procedure and create simpler, faster and fairer tribunals, such as the small claims courts that got their start about a hundred years ago; and a drive to create culturally relevant bilingual courts in which Jewish cases could be heard without fear of becoming fodder for anti-semitic contempt and derision.

This paper examines and evaluates surviving files and decisions of Montreal's Mishpat HaShalom. I first look at precedents for such a court: in pre-1948 Palestine; in the United States, particularly New York City, where Jewish organizations were extensively involved in adjudication of both civil disputes and labour conflicts; and in the City of Montreal itself, where an earlier Jewish Court of Arbitration was started in 1915,

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1 I would like to thank Sarah Hamill, for raising a question; Janice Rosen, for not providing an easy answer; and Hélène Vallée, Shannon Hodge, and Janice Rosen, for generous archival research assistance.

2 B. v. P., Box 2, file 14, Le Fonds Conseil Communautaire Juif de Montréal/ Jewish Community Council of Montreal (Vaad Ha'ir), Canadian Jewish Congress (Charities Committee) National Archives. Further references to this Fonds are by Box and file number only, while the archives will be referred to as CJC Archives. To protect their privacy litigants other than institutions or prominent public figures will be referred to by initials only.

deciding cases in an open courtroom draped with the Union Jack and a Zionist flag. In doing so, I take the opportunity to explore a neglected part of the New York courts' history: the scandals and feud that led to the existence of two rival Jewish courts, each offering their services free to the public. I then turn to the origins and procedure of the Mishpat HaShalom, studying its case law both as social history and as a part of the history of Quebec law and legal institutions. Finally, I consider present-day debates over religious and ethnic courts, and private legal ordering in general, in the light of the experience of the Mishpat HaShalom. The experience of the court shows the limitations of the knee-jerk legal positivism that emerged so often in Ontario's debate over Islamic courts; and it also challenges the conventional history of the corporate oppression remedy, demonstrating that its introduction into statutes concerning business corporations beginning in the 1970s was not the radical change as which it has so often been portrayed.

1) Faith and The Courts

Minority groups tend to keep internal quarrels private.[3] The reasons are many: a fear that disclosure of bad behaviour will be used to tar all members of the group with the same brush; a desire to resolve quarrels in their own way or according to their own laws; a feeling that the larger community will not deal fairly with and be particularly harsh to members of one's group; and as a way to help maintain the cohesiveness and collective identity of the group. Sometimes this tendency is nothing but a shared sentiment. Other times, it is reinforced by explicit injunctions and religious prohibitions,[4] and one can find many examples of such restrictions in Jewish law and tradition.[5] When

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3 see, e.g. Zadie Smith, "Speaking in Tongues", in her Changing My Mind: Occasional Essays, Penguin, 2009, p. 139; and Beverly Horsburgh, "Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community", 18 Harvard Women's L. J. 171 (1995) at p. 211.

4 e.g., St. Paul instructed to Christians to appoint judge's from amongst themselves rather than go to the courts of secular rulers in I Corinthians 6, lines 1-7. On arbitration and dispute resolation within Christian churches and communities, see my "From Bonnets, Ruffles and Slavery to Sexual Abuse: The Jurisdiction of the Methodist Church and the United Church of Canada Over Secular Matters", Ecclesiastical Minefields, Outerbridge and Kary, eds., Or Emet Publishing, 1994; and, e.g., the provisions on dispute resolution in The Doctrine and DIscipline of the Methodist Episcopal Church in Canada, Ryerson and Metcalf, York, 1929 and The Doctrines and Discipline of the Wesleyan Methodist Church in British North America, York, 1834; the Articles of Association of the Community at Zoar, Ohio, in William Alfred Hinds, American Communities, Office of the American Socialist, Oneida, 1878, reprinted by Citadel Press, 1973, p. 167; Perry Sekus, "Dispute Resolution Among the Old Order Amish", 4 Ohio St. J. of Disp. Resol. 315 (1988-1989); and Robert E. Rodes, Jr., "Secular Cases In The Church Courts: A Historical Survey", 32 Cath. Law. 301 1988-1989 at 307, 309.

5 see e.g., Anon., "Rabbinical Courts: Modern Day Solomons", 6 Colum. J. L. & Soc. Probs. 49 (1970), describing a rabbinical synod decree of 1150 A.D. that no Jew could bring a fellow Jew to gentile courts except by mutual agreement; Arthur Hertzberg, The French Enlightenment and The Jews: The Origins of Modern Anti-Semitism, Schocken Books, 1970, at 193, mentioning a regulation amongst Sephardic Jews of London in 1664 requiring them not to take each other to the general courts of law without first trying to arbitrate their business disputes before the authorities of the Sephardi community; Ron Shaham, "Jews and the Shari'a Courts in Modern Egypt", Studia Islamica 82:113-136 (1985); and, with respect to Eastern

Montreal's newly-formed Jewish Community Council set up its private court to regulate disputes, it was honouring a long-standing tradition of intra-community dispute resolution. Two models within that tradition were of particular importance.

2) Predecessors

Montreal's Mishpat HaSHalom court borrowed a name from the secular Zionist courts of pre-Israel Palestine[6] and some of its structure from the Jewish arbitral courts that flourished in America in the early twentieth century. To understand the court, we have to first understand the history and structure of the similar courts that preceded it.

a) The Mishpat HaShalom Ha-ivri

The early Zionists who came to Palestine from Eastern and Central Europe tried to create a new Jewish culture going back to Biblical roots, stripped of the habits of exile and the European ghetto. They revived Hebrew as a vernacular language, in the process discarding the Ashkenazi pronunciation of Eastern Europe and adopting one closer to that used by the Jews of the Middle East. For a time, they tried to take the same approach to law, setting up secular courts that were intended to develop and apply a modern system of law built on Biblical precedent stripped of talmudic interpretation. The new courts freed Zionists "from the tentacles of Palestine's rabbinical courts"[7] which under Ottoman law had jurisdiction over Jewish citizens in matters of personal status such as marriage and divorce.

The first of the secular courts began in 1909, when Palestine was under Turkish rule, and was known as the Mishpat ha-Shalom ha-ivri, literally Hebrew Courts of Peace. After the First World War, Mishpat Ha-Shalom courts were set up in all of the major Jewish towns and colonies of British Mandate Palestine. They were more structured than before the War, divided into upper and lower courts, with the upper courts hearing appeals while also serving as courts of original jurisdiction for more important matters.[8] Under British law the courts were arbitral tribunals whose judgments were binding in law once the parties consented to the arbitration, and as such their decisions were enforced by the official courts. Although the original intent was to develop a Biblically-rooted secular system of law for modern times - and there were at least two law journals devoted to that project - they more often fell back on

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Euroropean traditions, Alan Sokobin, "Jewish Law Responds to American Law", in Re-examining Progressive Halakhah, Walter Jacob and Moshe Zemer, eds, Bergahn Books, 2002, ch 5 , p. 141. See also Yaacov Feit, "The Prohibition Against Going to Secular Courts", International J. of Beth Din of America 1:30 (2012).

6 as suggested by Ira Robinson, Rabbis and their Community; Studies in the Eastern European Orthodox Rabbinate in Montreal 1896-1930, U. of Cal. Press, 2007 at p. 100 and p. 153 note 32.

7 Assaf Likhovski, Law and Identity in Mandate Palestine, U. of N. Carolina Press, 2006, p. 140.

8 "Law and Order Enforced in Palestine by Pressure of Public Opinion", The Sentinel (The American Jewish Weekly, Chicago) January 9, 1920, volume 27(2), p. 19

principles of common law and equity[9]. Popular into the 1920s, usage of them declined as the Jewish population turned more and more to the state courts, and they closed up in the 1930s.[10]

The Palestinian courts were in full operation when the Montreal Mishpat HaShalom was set up in 1923. The Montreal court took from them a name, and a common practice of trying Jewish disputes before Jewish arbiters without applying rabbinical law; but models for the structure of the court were closer to hand.

b) The Jewish Courts of Arbitration

As Zionists were creating an alternative to the national courts of Palestine, a number of American jurists were becoming increasingly critical of the courts of their own country. Justice, they said, was becoming increasingly slow and more costly, burdened with procedural technicalities.[11] The saw the courts, perhaps patronizingly, as being ill-suited to America's growing immigrant population, who were unfamiliar with American language and culture.[12] The problems were sometimes blamed on lawyers, seen as adding needless complexity and delay to simple matters,[13] whose involvement biased the process against the poor who could not afford their services.[14]

These concerns led to proposals for small claims courts: tribunals that would render simpler, more affordable justice, where lawyers would be prohibited or discouraged and appeals eliminated. They would place more emphasis on conciliation, hearings would be less formal, and the role of court officials and judges would expand to fill the gap left by the lawyers. Court staff would assist the litigants while judges would take a more active role in resolving cases and be given the procedural discretion to do so.[15] Courts of lower monetary jurisdiction were nothing new; but here the

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9 Likhovski, above, pp. 35ff. and 130ff; and Harry Sacher, "The Future of Jewish Law", Canadian Jewish Chronicle, Aug. 24, 1923, p. 12.

10 this account of the court is based primarily on Likhovski, supra; see also Ronen Shamir, The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine, Cambridge U. Press, 2000, pp. 30ff.; and Israel Goldstein, "Modern Courts of Arbitration and the Jewish Historical Background", in Justice, Justice Shalt Thou Pursue: Papers presented on the occasion of the 75th birthday of the Rev. Dr. Julius Mark, Sobel and Wallach, eds., Ktav Publ. House, 1975, p. 49 at 63-66 (hereinafter "Modern Courts").

11 Marc Patry, Veronica Stinson and Steven M. Smith, Evaluation of the Nova Scotia Small Claims Court: final report to the Nova Scotia Law Reform Commission, St. Mary's University, Halifax, March 2009, pp. 346-47

12 Ian Ramsay, "Small Claims Courts in Review", Rethinking Civil Justice: Research Studies for the Civil Justice System, vol. 2, Ontario Law Reform Commission, Toronto, 1996, p. 489 at 496; and Eric Steele, "The Historical Context of Small Claims Courts", American Bar Foundation Research Journal, 6(2):293 (1981) at 316ff.

13 Patry, above, pp. 347, 354; Steele, above, 308ff.

14 Alan W. Houseman, "Legal Aid History", Poverty Law Manual for the New Lawyer, National Center on Poverty Law, pp. 18, 25

15 Steele, above, p. 330; Ramsay, above, p. 492; E. Eugene Clark, "Small Claims Courts and Tribunals in Australia: Development and Emerging Issues", 10 U. of Tasmania L. R. (1991) 201 at 202-205; and Arthur Best et al, "Peace, Wealth, Happiness and Small Claims Courts: A Case

jurisdictional limit was combined with a Progressive-era drive to modernize and reform court procedure and practice.

The first North American small claims court was set up in Cleveland in 1913, for claims of $35 or less.[16] At roughly the same time, addressing many of the same concerns, a Jewish Arbitration Court was established in Baltimore. Like the Mishpat HaShalom Ha-ivri, it was a lay tribunal whose judgments were enforceable by the state courts pursuant to an arbitration agreement.[17] Attorneys were barred from practicing before the Jewish arbitration court or sitting on the bench; cases were tried by a panel of three judges composed of businessmen or professionals other than lawyers. Instead of having the parties prepare pleadings, the litigants attended before the court clerk who would give them advice and draw up an outline of the case that would be presented to the judges. The fee for filing a case was 50¢, there was no upper limit on the dollar amount of a claim, and no legal costs were awarded to either side. The court heard some "matters of religious discipline which have no place in our civil courts", but it was not a religious tribunal and many plaintiffs who were not Jewish also brought their cases to the court.[18]

Jewish arbitration, modeled after the Baltimore court, became a significant institution in the United States and particularly in New York City, where there developed competing arbitral courts whose proceedings were reported in newspapers or aired live on the radio.

i) Kehillah courts, 1909-1920

The first of the New York courts were begun by the Kehillah, an umbrella Jewish organization founded in 1909[19] on the initiative of a dynamic American-born Reform rabbi named Judah Magnes.[20] Named after the communal organizations that had once governed Jewish life in Europe, the Kehillah was a federation of New York organizations

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Study", 21 Fordham L. J. 343 (1993) 343 at 346-47, 354. For a sarcastic contemporary view opining that small claims courts promoted frivolous lawsuits, see Montague Glass, "Potash and Perlmutter Discuss How Mr. Rothstein Danced on Miss Goldman's Foot and She Sued Him for $10 In the Small Claims Court Together With a General Discussion of Other American Small Claims", The Delmarvia Star (Wilmington, Delaware), Oct. 3, 1927.

16 Patry, above, p. 8; Houseman, above, p. 25; and Reginald Heber Smith and John S. Bradway, Growth of Legal Aid Work in the United States, rev. ed. (1936) at 34, 50.

17 J. Lewis Schohet, "Jewish Court of Arbitration", Bulletin of the National Conference of Jewish Charities, 1913-14, volume VI:11, Lee Frankel, ed. , Baltimore, p. 12, reproduced at research.policyarchive.org/10437.pdf, accessed Sept. 26, 2013; and Jerold Auerbach, Justice Without Law? resolving disputes without lawyers, Oxford University Press, 1983, p, 80.

18 B. H. Hartogensis, "A Successful Community Court", 12 J. of the Am. Judicature Soc. 183 (1928-29)

19 Judah L. Magnes, The Jewish Community of New York City, New York, 1909, an address delivered at the opening of the Constituting Convention of the Jewish Community of New York City on Saturday, February 27, 1909.

20 Arthur Goren, New York Jews and the Quest for Community: The Kehillah Experiment, 1908-1922, 1970, pp. 24-37; David Kotzin, Judah L. Magnes: An American Jewish Non-Conformist, Syracuse U. P., 2010, 103ff.

ranging from the orthodox to the secular, with a sweeping variety of goals that included education, social and philanthropic work, religious organization and the regulation of kosher food and slaughter, defending against anti-semitism, cleaning up crime in Jewish neighbourhoods and showing the City that Jews could be and were good responsible citizens, and lobbying of government on Jewish issues.[21]

In the first year of the Kehillah's existence it discussed setting up a Bet Din, or religious court, to which cases that would normally be heard by the state courts could be diverted.[22] When it eventually incorporated in 1914, one of the objects listed in its Charter was "to adjudicate differences among Jewish residents or organizations located in [New York], whenever thereunto requested by the parties thereto, by arbitration or by means of board of mediators or conciliators..." [23]

New York was in the midst of revising the rules of its municipal court system, and the new organization proposed to the Municipal Court Code Commission a plan for Jewish arbitral tribunals whose judgments would be recognized in the civil courts.[24] The proposal was not accepted,[25] and the Kehillah's focus shifted to setting up voluntary tribunals while participating in lobbying efforts to make arbitral agreements more enforceable under New York State law.[26] By the end of 1914, the organization had established a Court of Arbitration and a number of local arbitration boards were operating in the Jewish neighbourhoods of New York City, staffed by volunteer lawyers, rabbis and lay leaders.[27] Their case load was primarily disputes among the religiously observant, or involving Jewish community organizations.[28] The official language of the

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21 Goren, above; David Kotzin, above.; and Norman Bentwick, For Zion's Sake: A Biography of Judah L. Magnes, Jewish Publn. Society, 1954, p. 77.

22 Report of the Executive Committee, presented at the First Annual Convention of the Jewish Community (Kehillah), New York, Feb. 26-27, 1910, published by The Jewish Community (Kehillah) of New York City.

23 excerpts from the organisation's Charter are reproduced in Jacob Rader Marcus, The Jew in the American World: A Source Book, Wayne St. U. P., 1996, pp. 334-37.

24 Proceedings of the 5th Annual Convention of The Jewish Community (Kehillah), New York, April 25-26, 1914, published by The Jewish Community (Kehillah) of New York, pp. 22ff.

25 More generally, the revisions process did lead New York City to amend the rules of procedure in its municipal courts in 1917 to provide for conciliation and arbitration in claims for small amounts before they went to trial: Everett H. Northrop, "Small Claims Courts and Conciliation Tribunals: A Bibliography", 33:2 Law Library J. 39 (March 1940) at p. 40. On the details of the new process see Edgar Lauer, "Conciliation and Arbitration in the Municipal Court of the City of New York: A New Sphere of Usefulness for the Progressive Modern Court", 35 Medico Legal Journal 22 (1918). New York City did not set up a separate small claims court until 1934: Reginald Heber Smith and John S. Bradway, Growth of Legal Aid Work in the United States, rev. ed. (1936) at p. 38

26 Alan Sokobin, "Jewish Law Responds to American Law", in Re-examining Progressive Halakhah, Walter Jacob and Moshe Zemer, eds, Bergahn Books, 2002, ch. 5 , p. 134 at 142. Cf. Julius Cohen, Commercial Arbitration and the Law, D. Appleton and Company, 1918, in essence an extended legal brief on behalf of bringing New York law into line with commercial arbitral practice in London and elsewhere.

27 Auerbach, above, p. 80.

28 according to Arthur Goren, New York Jews and the Quest for Community: The Kehillah Experiment, 1908-1922, 1970, pp. 198-99.

courts was English but opinions were also announced in Yiddish, and no lawyers were allowed in the courtroom.[29]

The Kehillah's concern about dispute resolution was also reflected in its involvement in industrial disputes. Magnes and members of his staff acted as independent mediators in management-labour conflicts in the garment industry and other sectors which had a large Jewish labour force, and served as neutral parties on the boards of grievance and arbitration that were set up under collective agreements in those industries. [30]

Magnes' pacifist convictions led him to oppose American involvement in the First World War, costing him much of his popularity and weakening the institution he had founded.[31] The Kehillah faded away after its founder left for Palestine in 1922, disappearing entirely by 1925.[32] However, New York state law had finally been amended to make arbitration agreements more binding,[33] so that tribunals in New York could acquire jurisdiction pursuant to an arbitration agreement and issue judgments that were enforceable through the official courts. With the changes in the law, other Jewish courts emerged.

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29 Auerbach, above, p. 81.

30 Norman Bentwick, For Zion's Sake: A Biography of Judah L. Magnes, Jewish Publn. Society, 1954, p. 87-88; Report of the Executive Committee, presented at the First Annual Convention of the Jewish Community (Kehillah), New York, Feb. 26-27, 1910, published by The Jewish Community (Kehillah) of New York City, p. 17; Kotzin, ibid., 116-17; Report of the Executive Committee, presented to the 4th Annual Convention of the Jewish Community (Kehillah), New York, April 12-13, 1913, published by The Jewish Community (Kehillah) of New York City, 1913; Arthur Goren, above, pp. 60, 200ff. Magnes' sympathies were with the workers; he could be found picketing along with the striking shirtwaist (blouse) makers and was once charged with disorderly conduct when he challenged police officers who were arresting two women strikers on a picket line: Marie Waife-Goldberg, My Father, Sholom Aleichem, Schocken Books, 1968, p. 307; "Rabbi Held Guilty: Quizzed Policeman: Dr. Judah Magnes Gets Suspended Sentence for Garment Strike Offense", The New York Times, Feb. 19, 1921; and "Dr. Magnes Is Vindicated: Judge Rules Rabbi Had a Right to Question the Arrest of Two Girls", The New York Times, April 17, 1921.

On dispute resolution in the "Hebrew Trades" generally, see among many others: Nora Levin, While Messiah Tarried: Jewish Socialist Movements 1871-1917, Schocken Books, 1977, p. 194; Christine Ruane, The Empire's New Clothes: A History of the Russian Fashion Industry, 1700-1917, Yale U. P., 2009, chapter 7; Julius Henry Cohen, Law and Order in Industry: Five Years' Experience, The McMillan Company, 1916, esp. chapter 2, "The Closed Shop", p. 15; Lucy Dawidowicz, "The Jewishness of the Jewish Labor Movement in the United States", in The American Jewish Experience, Jonathan Sarna, ed., 2d ed., 1997, Holmes and Meier Publishing, p. 185; Rita Morgan, Arbitration in the Men's Clothing Industry in New York City, Teachers College, Columbia University Contributions to Education No. 823, 1940, pp. 22ff.; and Stephen Birmingham, "The Rest of Us": The Rise of America's Eastern European Jews, Little, Brown and Co., 1984, p. 70-71. On similar experiences in Toronto, see Ruth Frager, Sweatshop Strife: Class, Ethnicity and Gender in the Jewish Labour Movement of Toronto 1900-39, U. of T. Press, 1992, chapter 3; and Shmuel Mayer Shapiro, The Rise of the Toronto Jewish Community, Now and Then Books, 2010, pp. 112, 124.

31 Rebekah Kohut, More Yesterdays: An Autobiography (1925-49), Bloch Publ. Co., 1950, p. 107; Kotzin, above, pp. 151ff.; and Goren, above, pp. 231-35, 250-51.

32 Arthur Goren, p. 244.

33 over-riding older New York case law according to which such agreements had been revocable at will: Julius Cohen, "The Law of Commercial Arbitration and the New York Statute", and Julius Cohen, Commercial Arbitration and the Law, D. Appleton and Company, 1918.

ii) Two Jewish Arbitration Courts, and the scandals of Samuel Buchler

The Jewish Arbitration Court was started in 1919 in anticipation of the new legislation and began holding hearings in 1920 once the law came into effect.[34] According to The New Yorker, the Court began "through the efforts of a group of leading Jewish citizens, partly at the request of puzzled Nordic members of the local judiciary who didn't know a tallith from a toothpick, and were as much befuddled by the psychology of the Jewish race as by its terminologies." [35] Louis Richman, a lawyer who administered the court for most of the years of its existence and served as one of its judges,[36] recalled that it had been created by a group of rabbis, judges, lawyers and businessmen, including himself, and that one of their motives was to "improve and liberalize the administration of justice in general and serve as an example for other courts and arbitration societies."[37] His phrasing underlines the connection between the establishment of the Jewish arbitral courts and the larger movement for simplified justice that inspired the small claims branches of the various state and municipal courts.

The core of the group who founded the Jewish Arbitration Court would have been Richman and his law partner, Rabbi Samuel Buchler, who ran the court together for its first few years. The literature on the court has little mention of Buchler, who had in the beginning often been identified as the court's founder.[38] Because of this, the published histories of the New York arbitration courts do not give a full account of how the City came to have, for about fifteen years, two rival and at times antagonistic

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34 Auerbach, above, 81, Israel Goldstein, Jewish Justice and Conciliation: History of the Jewish Conciliation Board of America, 1930-1968, and a Review of Jewish Juridical Autonomy, Ktav Publ. House, 1981, 88 (hereinafter Jewish Justice); and Tehila Sagy, "What's so Private about Private Ordering?", 45 Law and Society Review 923 (2011)

35 Zelda Popkin, "A Reporter At Large: Conciliation Court", The New Yorker, September 10, 1932, p. 36 at 38. The expression used is a trilingual pun: the Hebrew word "tallith", pronounced "tallis" in the Ashkenazi Hebrew of Central and Eastern Europe, literally means a prayer shawl but is also a para-rhyme allusion to the American "ass" and the Yiddish "tuchis". An anonymous writer celebrating the opening of a Jewish arbitration court in Harrisburg, Pennsylvania appreciated the witticism so much that he plagiarised Popkin's sentence almost word-for-word: "The Jewish Arbitration Court", Community Review, November 1933, 8:1; reproduced in Simon J. Bronner, Greater Harrisburg's Jewish Community, Arcadia Publishing, 2010.

36 He is named as one of the presiding judges in "Jewish Conciliation Court Plans Session", The New York Sun, Feb. 2, 1937, p. 7; a full list of the court's judges is appended to Goldstein, Jewish Justice, above.

37 Louis Richman, "The Court Without A Gavel", Two Generations in Perspective: Notable Events and Trends, 1896-1956, Harry Schneiderman, ed., Monde Publishers, 1957, p. 317.

38 He is named as founder of the court in: Samuel Buchler, "A Jewish Tribunal", The Jewish Monitor, July 30, 1920, pp. 6-7; "Jewish Court in Row: Opposing Groups in Arbitration Tribunal Hold Meetings", New York Evening Post, June 21, 1928, p. 7; and "8,000 cases Arbitrated: Jewish Body Marks 16th Year at Celebration Attended by 400", The New York Times, April 26, 1937, p. 10.

Jewish arbitration courts.

In the late 1920s, Buchler, a former prison chaplain with connections to the Tammany Hall political machine, became embroiled in a series of scandals. He had been involved with a New York charitable drive to support a Jewish hospital in Transylvania and was charged with perjury after testifying at an inquiry into fraud in its fund-raising practices.[39] A jury found him not guilty,[40] but the law partnership did not survive the controversy. He and Richman parted ways and their court split between them. [41]

By the summer of 1928 two separate courts were operating out of separate premises, each calling itself the Jewish Court of Arbitration, one run by Buchler and the other by Richman. Buchler incorporated the name and sought an injunction to restrain Richman's court from operating.[42] The fight was resolved in 1929, when Richman's court changed its name to the Jewish Conciliation Court.[43] The following year, RIchman's tribunal incorporated under its new name, as the Jewish Conciliation Court of America,[44] only to change its name again ten years later to the Jewish Conciliation Board of America.[45]

Buchler faced new problems. A client sued him for breach of promise of marriage.[46] The lawsuit was dismissed because the woman had been married when she claimed the promise had been made.[47] However, other clients came forward with allegations of influence-peddling, saying that Buchler had taken money in return for assurances of using his political connections to get their overseas relatives into the country past immigration barriers and that he had failed to honour his promises to return their deposits if unsuccessful. Several of his clients sued him for their money back, and he was indicted on five counts of larceny.[48]

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39 "Lawyer Indicted as Perjurer in Jewish Aid Probe: Samuel Buchler said to Have Sworn Falsely Regarding Hungarian Hospital Fund", The Brooklyn Daily Eagle, Ag. 2, 1927, p. 3; "Indicts Dr. Buchler in Charity Inquiry; Federal Grand Jury Accuses Him of Perjury in Testimony on Hospital Pencil Sale", The New York Times, Ag. 3, 1927; "Buchler Asks Quick Trial: Pleads Not Guilty to Perjury Charges based on Charity Inquiry", The New York Times, Ag. 4, 1927, p. 37.

40 "Buchler Acquitted of Perjury Charge; Jury Decides Rabbi Did Not Give False Testimony at Charity Drive Inquiry", The New York Times, Sept. 1, 1927.

41 "Jewish Court in Row: Opposing Groups in Arbitration Tribunal Hold Meetings", New York Evening Post, June 21, 1928, p. 7.

42 "Supreme Court to Decide Individual's Property Rights in Public Institute: Dr. Buchler Claims he owns Jewish Court of Arbitration" (*sic)* , Jewish Daily Bulletin, Ag. 24, 1928, p. 3.

43 For the date of the change in name, see Goldstein, Jewish Justice, p. 88.

44 "Jewish Arbitration Court Changes Name with Charter"(*sic)* , Jewish Daily Bulletin, Dec 17, 1930, p. 4.

45 Goldstein, above, Jewish Justice, above, p. 88.

46 "Woman Brings Suit against Dr. Buchler: Miss Helen Schroeder Asks $50,000, Asserting He promised to Marry Her", The New York Times, March 29, 1929, p. 25.

47 "Dr. Buchler Wins Suit: $100,000 breach of Promise Action by Married Woman Dismissed", The New York Times, June 22, 1929.

48 See the following articles, all from The New York Times: "Tells Of Passport Deal: Woman Witness at Theft Hearing Says She Gave $800 to Buchler", Dec 27, 1930; "Dr. Buchler Rearrested; Former Sing Sing Chaplain, Freed on Larceny Charges, Faces Another", Dec 31, 1930; "One Buchler Juror Picked: Lawyer-Rabbi on Trial on Charge of $200 fraud", Ap. 16,

After a closing submission in which the Assistant D.A. argued that "If Dr. Buchler had been on the level not a single Jew would have testified against him"[49] the jury found him guilty of larceny.[50] His conviction was upheld on appeal a year later. He received a suspended sentence, but was automatically disbarred from the practice of law.[51]

Lobbying political connections on behalf of clients in the 1920s would not have been an unusual activity[52] for someone like Buchler, a Tammany Hall affiliated lawyer who had held a number of government patronage posts[53] and once tried to run for Congress[54] during the years when the Democrats of Tammany Hall controlled New York City. However, he was being accused and tried in the midst of sensational public judicial inquiries into the endemic corruption and influence-peddling of the political bosses who had appointed him to those positions. While his case was going through the courts, the mayor of New York testified before a public judicial inquiry, resigned from office, and went into self-imposed exile in Europe.[55] What had once been politics-as-usual had become a target for prosecutors.

Buchler continued to run his Jewish Arbitration Court until 1942, when he faced

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1932, p. 34; “Accuser Says Rabbi Boasted of 'Pull': Lawyer-Clergyman Took $200 Promising to Get Aliens In, Their Relatives Testifies [*sic*]”, April 20, 1932, p. 14; “Four Accuse Buchler of Selling Influence: Woman and Three Men Say Former Prison Chaplain Failed to Help Get Aliens Admitted”, Ap. 21, 1932, p. 10; “State Rests Its Case In Trial of Buchler: Three Witnesses Tell of Giving Him Money to Use 'Pull' in Admission of Aliens”, April 26, 1932, p. 22; “Buchler Explains Why He Took 'Fees': Former Chaplain of Sing Slng Denies Fraud in Offering to Help Aliens Enter Country”, April 27, 1932; “Buchler On Stand Denies Any Fraud: Took No Fees for 'Pull', He Says - Tried to Get Alien Rabbi In by Finding Him Pulpit”, April 28, 1932, p. 22; “Charges of Fraud Denied By Buchler: In Finishing Testimony, He Calls Untrue Allegation He Took Fees to Get Men Jobs”, April 29, 1932, p. 15.

49 “Buchler is Termed "Religious Racketeer": Prosecution, Summing Up at Fraud Trial, Says He ‘Dragged His Rabbinical Robes Through Mud’ ”, The New York Times, May 4, 1932, p. 12.

50 “Buchler Convicted of Stealing $200: He Will Be Sentenced May 13 to Sing Sing, Where He Once Was a Chaplain”, The New York Times, May 5, 1932, p. 7.

51 “Dr. Buchler's Conviction Upheld”, The New York Times, April 22, 1933, p. 4.

52 It was part of normal practice for Montreal lawyers to lobby political contacts on behalf of families trying to bring their relatives into the country, according to Mario Nigro and Claude Mauro, "The Jewish Immigrant Experience and the Practice of Law in Montreal, 1830 to 1990", 44 McGill L. J. 999 (1998-99), pp. 1026 and 1034.

53 appointed as secretary of New York City’s Docks Department by the mayor on the recommendation of a Tammany Hall boss, he would work from five minutes to two hours a day for a salary of $4,000 per year, while maintaining his law practice: “Buchler Explains Why He Took 'Fees': Former Chaplain of Sing Sing Denies Fraud in Offering to Help Aliens Enter Country”, The New York Times, April 27, 1932.

54 "Rabbi in New York Runs for Congress: Buchler announced his candidacy to be the Democratic nominee for member of Congress", The Washington Herald, July 24, 1922, p. 10; and "Buchler Out for Congress: If Elected, He Will Be First Rabbi to Sit in House", New York Tribune, July 22, 1922, p. 6.

55 For a chronology of the scandals of the Jimmy Walker administration, see Norman Thomas and Paul Blanshard, What’s The Matter With New York?, MacMillan, 1932, Appendix 1, pp. 331ff.

new charges.[56] After a seven day trial at which he represented himself, he was found not guilty of practicing law without a license but convicted of fraud and larceny and sentenced to jail for a year. His sentence prohibited him from affiliating with any charitable or religious organization for the purpose of making money for himself, and he was not allowed to hold himself out as a rabbi or a lawyer.[57]

Relying on the allegations that Buchler was taking fees from litigants in the Jewish Arbitration Court without the knowledge of its Board of Directors, the state began proceedings in 1943 to revoke the court's corporate charter.[58] Later histories of the rival Jewish Conciliation Board that he had co-founded with Richman omit or downplay his early role in its establishment.[59] They make scant if any mention of his legal problems and no mention of the legal dispute over the name of the court.[60]

Richman's court kept on going at least into the 1970s, a much-lauded institution that earned praise from public figures like Eleanor Roosevelt. Richman continued as executive secretary until his death in 1956,[61] when his widow took over the role.[62]

iii) Practice and procedure at the Jewish Conciliation Court

When Buchler and Richman founded their original court together, Buchler had talked about applying "the principles of the old Hebraic law" in the court, "law wholly

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56 "Buchler Out On Bail: Ex-Lawyer, Indicted for Grand Larceny, Charges Persecution", The New York Times, July 25, 1942, p. 26.

57 The course of these charges were also reported in the Times: "Denied Bail, Then Gets It", July 2, 1942, p. 23; "Buchler Guilty on Theft Charges: Former Chaplain of Sing Sing is Convicted of Six of Seven Counts in Indictment". Nov. 26, 1942, p. 56; "25-Year Prison Term for Fraud Cut To One: Goldstein Lenient to Operator of Jewish Arbitration Court", Dec. 2, 1942, p. 13.

58 "To End Arbitration Court: State Moves to Void Charter After Buchler Conviction", The New York Times, Jan. 22, 1943, p. 16.

59 In the semi-official history of the Jewish Conciliation Board by Buchler's successor, Israel Goldstein, Jewish Justice and Conciliation: History of the Jewish Conciliation Board of America, 1930-1968, and a Review of Jewish Juridical Autonomy, Ktav Publ. House, 1981, the only hint of Buchler's role is a passing reference to an un-named dissatisfied rabbi who left to briefly run his own court.

60 Auerbach, above, pp. 82ff., acknowledges Buchler as the founder of the court and mentions allegations of lawyers using the court to enrich their practices, but does not mention the litigation over the name of the court or give the complete story of Buchler's problems. Zelczer, above, p. 6, suggests that Buchler left the court to dissociate himself from internal problems that plagued its first decade, and does not discuss Buchler's legal problems or the rivalry between the two courts. Buchler wrote his own book about some of the cases that came before his courts, which has not been reviewed for this paper: Samuel Buchler, "Cohen Comes First" and Other Cases: Stories of Controversies Before the New York Jewish Court of Arbitration (1933).

61 "Louis Richman", The New York Times, December 16, 1956, p. 86.

62 Tom Henshaw, "Jewish Board's Decisions Binding in Family Quarrels" (AP), The Milwaukee Sentinel, Jan 20, 1960, p. 5; also published as "Religion in The News", Nevada Daily Mail, Jan. 4, 1960, p. 4.

and strictly Jewish, modified and adjusted to the plainest American principles agreeable to the Jewish mode of life." Many early cases had focussed on conflicts within or involving religious and other communal institutions, and Buchler explained that "In religious matters the Jewish people is a very turbulent, factious and uneasy temper. Here his mind and heart are free from the contaminations and admixtures of his business life, and he is agitated by a heavenly contemplation of justice. Bracton, Littleton, Coke and Blackstone are good enough for him in business; in the synagogue he wants his own laws and authorities."[63] There was no talk of this in later writing; as with the secular Zionist courts in Palestine, ideals of applying Biblical law gave way to ad hoc decisions based on fairness and equity.

An ethnic court can easily be seen as a form of community-based dispute resolution, but here this would be misleading. Observers of the courts have pointed out a significant gap in class and social status between judges and judged,[64] little different from the official courts. The Jewish Arbitration Court was from its beginning integrated with New York's system for the administration of justice. The District Attorney and the City's Borough President authorized the court to hold sessions in the Criminal Courts Building one day a week after regular court hours,[65] and at the start judges from the state or municipal courts served on hearing panels.[66] The first session was announced and reported on in the popular English-language press.[67] The tribunal was presented as a way for the regular courts to clear their over-crowded dockets and save the City money.[68]

Similar to the Baltimore model, cases would be tried by a three-judge panel, normally consisting of a rabbi, a lawyer and a layman, with the intent of balancing secular and religious interests, tradition with the laws of the land.[69]

To start a case at New York's Conciliation Court, or Board, the plaintiff would come to the Court's office and set out the particulars of his claim; the Court would then contact the other side and ask them to participate. If the other side agreed, the matter

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63 Samuel Buchler, "A Jewish Tribunal", The Jewish Monitor, July 30, 1920, pp. 6-7.

64 Auerbach 86-87; and see Goren on the Kehillah; Popkin's contempt.

65 "Court of Arbitration to Convene Wednesday", New York Tribune, Monday Feb. 16, 1920, p. 4.

66 "Special Weekly Letter from New York", The Jewish Monitor, February 27, 1920, p. 11; Samuel Buchler, "A Jewish Tribunal", The Jewish Monitor, July 30, 1920, pp. 6-7; "Jewish Court Arbitrates", The Brooklyn Daily Eagle, February 20, 1920, p. 21; "Jewish Court Meets and Renders Six Verdicts", ibid., October 24, 1923, p. 9.

67 "Court of Arbitration to Convene Wednesday", New York Tribune, Monday, Feb. 16, 1920, p. 4; "Jewish Court Begins Well: Synagogue Dispute Quickly and Amicably Settled as First Case", The (New York) Evening World, February 19, 1920, p. 23.

68 "Court of Arbitration to Convene Wednesday", New York Tribune, Monday Feb. 16, 1920, p. 4; "Jewish Court Arbitrates", The Brooklyn Daily Eagle, February 20, 1920, p. 21; and Samuel Buchler, "A Jewish Tribunal", The Jewish Monitor, July 30, 1920, pp. 6-7. On how community arbitration can become co-opted by the state court system, see Timothy Hedeen, "Institutionalizing Community Mediation: Can Dispute Resolution 'of, by and for the People' Long Endure", 108 Penn St. L. R. 265 (2003-04)

69 Popkin, above; Auerbach pp. 82-86; Ernie Pyle, "Rambling Reporter: Ernie Sits as Judge in Conciliation Court", The Pittsburgh Press, April 9, 1937, p. 32.

would be scheduled for a hearing and the parties would sign an arbitration agreement at the beginning of the trial.[70] No fees were charged by the court; the judges on the panels were unpaid volunteers and the parties could not bring lawyers. Proceedings were bilingual, with the people before the court speaking in the language of their choice, English or Yiddish.[71] In 1937, when the court was meeting biweekly and hearing up to 30 cases a session, the delay between the initial request for a hearing and the trial was said to be no more than two weeks.[72] Cases would be referred from the state courts when a judge considered that the case required some knowledge of Jewish customs or practice.[73] By 1962, the caseload had declined; the court was processing about 600 cases a year, of which about 150 went to a hearing. A hearing would last about one hour from the initial presentation of the case to the panel until judgment was rendered.[74] In 1969, there were twenty court sessions and 96 cases went to a hearing;[75] the court faded out in the 1970s.

The court could have no jurisdiction unless both sides agreed to arbitrate. One newspaper article about the court, however, hinted at another factor that might encourage defendants to participate; it mentioned that the court also had its own investigators, and that Richman might himself represent the plaintiff and bring the case to the regular courts if the opposing party did not attorn to the jurisdiction of the arbitral tribunal.[76]

The panels hearing cases in the Richman court included rabbis from different denominations, Orthodox, Conservative and Reform. The first female judge sat on a panel in 1927.[77] The lay member of the panel was often a merchant or businessman, but could also be a social worker[78], a journalist or some other visitor. Celebrity lay representatives over the years included Nobel-Prize winning author Elie Wiesel and the best-selling writer and journalist Harry Golden, as well as, among many others, an American military general and a visiting South African jurist.[79]

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70 on procedure, see Pyle, below, and Popkin, above.

71 Israel Goldstein, Jewish Justice and Conciliation: History of the Jewish Conciliation Board of America, 1930-1968, and a Review of Jewish Juridical Autonomy, Ktav Publ. House, 1981, p. 89.

72 According to a syndicated newspaper columnist who sat as a lay judge for one of the sessions: Ernie Pyle, "Rambling Reporter: Ernie Sits as Judge in Conciliation Court", The Pittsburgh Press, April 9, 1937, p. 32; and Ernie Pyle, "Rambling Reporter: From Seat on Bench Ernie Sees Hatreds", ibid., April 10, 1937, p.12.

73 Zelda Popkin, "A Reporter At Large: Conciliation Court", The New Yorker, September 10, 1932, p. 36 at 39; and Goldstein, Jewish Justice, above, pp. 184-85.

74 Martin Tolchin, "Jewish Family Problems Are Settled Out of Court", The New York Times, August 24, 1962, p. 28.

75 Anon., "Rabbinical Courts: Modern Day Solomons", 6 Colum. J. L. & Soc. Probs. 49 (1970) at p. 53, fn. 174

76 " 'Oldest Court in World' Settles Disputes on New York's East Side", Canadian Jewish Chronicle, Feb 26 1932, 19:41, p. 2

77 "Mrs. Rebekah Kohut first woman judge in Jewish Court of Arbitration", Jewish Daily Bulletin, March 17, 1927; and Sabina Kaufman, "Woman Judge of Unique Court", The Brooklyn Daily Eagle, Book Section, May 22, 1927, p. 15

78 "Special Weekly Letter from New York", The Jewish Monitor, Feb. 27, 1920, p. 11.

79 Goldstein, Jewish Justice, above.

When the court first began in 1920, many of its cases were brought against rabbis and synagogues, fraternal orders and burial societies. People could bring claims concerning entitlement to membership, sick benefits and burial rights, or raise issues relating to the financial management of the organizations. Particularly after the Depression hit, the court began hearing more and more matrimonial and family law matters.[80] Aging parents made claims against their children for support; in one case a son and son-in-law went to the court to say that what they had been paying to support a parent was too much for them and asked the court to set a fair amount that would be respected by the parent.[81] The court also heard civil and commercial disputes, debt collections, labour-management conflicts and internal labour union disputes, and landlord and tenant matters. [82] When the Certified Yeast Corp. sued the Jewish Bakers Voice magazine in 1934 for printing defamatory allegations that the company imported goods from Nazi Germany, the case was brought to the Conciliation Court.[83] Other cases dealt with disputes rooted in Eastern European customs and Jewish ritual, such as marriage brokers suing for fees. The court heard disputes over the granting of *chalitzah*, the ceremony by which a childless widow and her brother-in-law are formally released from the Biblical obligation of marrying and having children to carry on the dead husband's name, allowing the woman to have legitimate children with a new spouse. In the beginning at least primarily a court for newly-arrived Eastern European immigrants, it was staffed mostly by second- and third- generation American Jews. By 1962, 80% of its caseload involved matrimonial problems, and the remainder included disputes amongst family members over support for and the care of aging parents.[84]

Assessments of the value of the court depend on how one views mediation and arbitration in general. For those who extol mediation as a more flexible, less adversarial and less expensive alternative to litigation, the Jewish Court of Arbitration is a model example. It pioneered a multi-disciplinary approach to dispute resolution, with social workers as part of its staff. Cases were referred to it by the regular courts and public agencies. The court embodied the reforming ideals that had guided the creation of the early small claims courts: quick, affordable justice; the elimination of the lawyer's role; removal of procedural technicalities and making courts more accessible to new immigrants; and an emphasis on conciliation.

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80 Beth Wenger, New York Jews and the Great Depression: Uncertain Promise, p. 49.

81 The latter case is described in Harry Golden, "The Retirement of Hymie", Ess, Ess, Mein Kindt, G. P. Putnam's/Berkley Medallion, 1967, p. 51.

82 On the caseload of Richman's Conciliation Court, see Goldstein, "Modern Courts", above, pp. 49, 67; and Goldstein, Jewish Justice, above, pp. 99-100, 133ff., 142. On the caseload of Buchler's Jewish Court of Arbitration, see "8,000 cases Arbitrated: Jewish Body Marks 16th Year at Celebration Attended by 400", The New York Times, Ap. 26, 1937, p. 10.

83 The defendants agreed to print a retraction after it was confirmed that the alleged German goods came from Budapest transshipped through Hamburg: David Bernstein, "Conciliation Court, Revival of Ancient Sanhedrin, Metes Out Justice to Rich and Poor Alike", Jewish Daily Bulletin, Jan. 19, 1934, p. 8.

84 Tolchin, ibid. Harry Golden, who served as a judge on the court, similarly mentioned in his syndicated column that most of the disputes were domestic matters, with some cases of breach of contract or of employment law: Harry Golden, "Only in America!", Canadian Jewish Chronicle, April 29, 1966, v 51(39), p. 9.

Others, however, see arbitration as a form of second-class justice for the poor. The various attempts to create Jewish diversion courts have been characterized as mechanisms for the co-option and control of newly-arrived Eastern European Yiddish-speaking immigrants by a more assimilated German-Jewish elite[85], and a way to lessen public embarrassment by keeping the newcomers' problems out of their Gentile neighbours' eyes.[86] One legal scholar, Tehila Sagy has taken this a step further, maintaining that in general such private legal ordering does not exist without the sanction and encouragement of the state and that the choice to encourage the creation of such courts and the decisions of judges to divert cases to them are a devaluation of the dignity of marginalized groups. For her, the Jewish Conciliation Board's emphasis on conciliation is a patronizing assertion that the personal issues of the poor matter less and are not deserving of full adjudication on their merits.[87]

Arbitration courts were most visible in New York but by no means restricted to it. The Kehillah for the City of Philadelphia started its Jewish Court of Arbitration in 1928.[88] By 1930, there were at least 14 American Jewish courts in existence and more in the planning stages.[89]

These tribunals thrived during the golden age of radio, when broadcasts of trials from the state courts were a ratings success. The NBC network had aired Goodwill Court in 1936, a popular show in which real defendants were brought from the courtroom to explain their case to the audience and get advice on the air from state court judges. That experiment soon ended when the New York Supreme Court banned

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85 Tehila Sagy, "What's so Private about Private Ordering?", 45 Law and Society Review 923 (2011). The same criticism was levelled against the New York Kehillah: see Ira Robinson, "The Foundation Documents of the Jewish Community Council of Montreal", Jewish Political Studies Review 8:69 (Fall 1996) at 69; Goren, above, p. 250. On the differences between established Jews and newcomers in New York, see Stephen Birmingham, "Our Crowd": The Great Jewish Families of New York, Black Dog and Leventhal Publ., 2004, orig. pub. 1967, pp. 338ff.; and Stephen Birmingham, "The Rest of Us": The Rise of America's Eastern European Jews, Little, Brown & Co., 1984, esp. at pp. 11-32. On how this differs from the Canadian experience, see Gerald Tulchinsky, "The Contours of Canadian Jewish History", The Jews In Canada, Bryn, Shaffir and Weinfeld, eds., Oxford U. P., 1993, p. 5 at 11ff.

86 Auerbach; and see Goren on the Kehillah; Popkin's contempt.

87 Tehila Sagy, "What's so Private about Private Ordering?", 45 Law and Society Review 923 (2011); compare her strong criticisms of the culture of conciliation in her "Conversion to Peace: Narratives of Individualism in U.N. Pedagogies", 3 J. Migration and Refugee Issues 64 (2007) and "Treating Peace as Knowledge: UNHCR's Peace Education as a Controlling Process", 21 J. Refugee Studies 360 (2008), and the critical analysis of the "giving personality" in her " 'Your Comfort Is My Silence': The First Israeli Sexual Harassment Hot Line", 13 UCLA Women's L.J. 185 (2003-05) at 196ff.

88 "Jewish Arbitration Court Created in Philadelphia", Jewish Daily Bulletin, July 18, 1928.

89 Heshey Zelcer, "Two Models of Alternative Dispute Resolution", Hakirah, The Flatbush Journal of Jewish Law and Thought 1 at 5ff., citing a list from David Hurwitz, Analysis of the work of the Jewish Court of Arbitration, John Hopkins University 1930, American Jewish Archives. The City of Miami, Florida, got its court in 1934: "Miami Jews Form Arbitration Court", Miami Daily News, Dec. 8, 1934, p. 12.

judges from appearing and lawyers were prohibited from giving advice over the air [90] but such restrictions did not apply to arbitral courts. Buchler's Jewish Arbitration Court had its cases broadcast over the airwaves.[91] Richman's Conciliation Court, by contrast, disdained the showmanship of radio broadcasting and refused requests by commercial sponsors to put its hearings on the air,[92] although its proceedings were generally open to the public and covered regularly in the Yiddish-language daily newspapers of New York.[93]

Yet another New York City arbitration court, the Jewish American Board of Peace and Justice, operating out of a home for retired rabbis called the House of Sages, aired its proceedings on Yiddish-language radio stations from the late 1930s until 1956.[94] It handled real cases and required participants to sign formal arbitration agreements, but it was structured for radio, with sessions timed to the length of a wax recording side and the participants using pseudonyms before the radio audience.[95] Its hearings were also bilingual, parties speaking in the language in which they were most comfortable. In theory, the radio court's orders were as enforceable through the state courts as any other arbitral decision, but in at least one case the state court refused to enforce a judgment for $100, mentioning among other factors the compressed hearing time and the showmanship of broadcast entertainment.[96]

The largest Jewish city in the world throughout the 20th century, New York was the cultural capital of Yiddish in North America[97] and its Yiddish-language newspapers, which reported on the Kehillah and the cases that flowed through the New York Jewish courts, were read widely by Canadian Jewish immigrants.[98] By 1915, six years after the

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90 John Dunning, On The Air, The Encyclopedia of Old-Time Radio, Oxford University Press, 1998, entries on "A. L. Alexander's Mediation Board", p. 2, and "Goodwill Court", p. 288.

91 as mentioned in "Arbitration Court to Hold Dance", The Brooklyn Daily Eagle, February 25, 1939, p. 8.

92 Goldstein, Jewish Justice, above, p. 97.

93 Goldstein, Jewish Justice, above, pp. 95-96; Auerbach, 82, 86; Beth S. Wenger, New York Jews and the Great Depression: Uncertain Promise, p. 49. The current English-language edition of the Forward sometimes refers to older stories about the court in its "Looking Back" columns - e.g., "Looking Back... 75 years ago", December 5, 2003.

94 Auerbach, p. 86, and www.yiddishradioproject.org/exhibits/rubin, accessed Nov 1 2013; the website makes available audio recordings of some of the original broadcasts.

95 :Yiddish Radio Project #9: Court of the Air", National Public Radio Documentary aired on All Things Considered, May 14, 2002, available for listening at both www.yiddishradioproject.org/exhibits/rubin/ and www.npr.org/templates/story/story.php?storyId=1143339, accessed March 18, 2014.

96 In Re Blake, 17 N.Y.S.(2d) 496 (Dec. 18, 1939); and "Private Arbitration 'Courts' ", American Bar Assoc. J. 26(6) 502 (June 1940).

97 according to Pierre Anctil, Jacob-Isaac Segal 1896-1954: un poète yiddish de Montréal et son milieu, Les Presses de l'Université Laval, 2012, pp. 154ff, discussing the draw exerted by New York culture on one Montreal poet. See also, Rebecca Margolis, "*Ale Brider*: Yiddish Culture in Montreal and New York City', European Journal of Jewish Studies 4:1 (2010), p. 137.

98 Shmuel Mayer Shapiro, The Rise of the Toronto Jewish Community, Now and Then Books, 2010, pp. 39ff. and 147ff.; and Israel Medres, Montreal of Yesterday: Jewish Life in Montreal 1900-1920, Vehicule Press, 2000, transl. by Vivian Felsen, pp. 79-80, 86-88.; yiddish ed. published as Montreal fun Nekhtn, 1947. "When a New York policeman arrested a pushcart

Kehillah was formed, Montreal and Toronto had their own Jewish Courts of Arbitration. In 1922, soon after New York had set up The Jewish Arbitration Court to replace the ones that had been run by Magnes' organization, a Montreal version of the Kehillah came to life and established another arbitral court of its own, the Mishpat HaShalom.

3) The Jewish Courts of Montreal

So we arrived at the store, I looked around, and then I dropped a remark in Yiddish. The gentleman asked where I was from.

"From Canada."

"And you speak Yiddish?"

I told him yes, a Jewish family speaks Yiddish! "Ah," he said, "I thought that no-one spoke Yiddish there!" [99]

Before any formal arbitral courts came into existence, Canadian rabbis had been acting as arbitrators in civil cases. A prominent Montreal rabbi, Hirsch Cohen, claimed in 1915 that he had been arbitrating about 150 cases per year, saying that three-quarters of them had begun in the civil courts and then came to him out of frustration with the slowness of the court system.[100]

Dispute resolution mechanisms also existed in the constitutions of synagogues and mutual benefits societies. Montreal's Anshei Azeroff synagogue prohibited members from taking each other to court until after their dispute was brought before the congregation; the membership could meet to debate the issues and had the power to levy fines.[101] Montreal's Bassarabier Hebrew Sick Benefit Association similarly required members "to settle personal disputes within the ranks of the society". According to its constitution, "no member is to take court proceedings against a second member before he has attempted to settle the dispute through mediation of a peace committee of the Society." The Peace Committee held hearings to which the accused member was entitled to bring a lawyer or representative; the Committee then voted on the guilt of the accused by secret ballot and had the authority to levy fines against a guilty member.[102]

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peddler on the Lower East Side for peddling without a license, it was known in Montreal the very next day and Jewish immigrants discussed it as a noteworthy event": Medres, p. 79.

99 Léa Roback, in Madeleine Parent et Léa Roback, Entretiens avec Nicole Lacelle, Les éditions de remue ménage, 1988, p. 117, author's translation.

100 David Dainow, "Montreal Jewish Court of Arbitration", Bulletin of the National Conference of Jewish Charities, Jewish Communal Service Association of North America (JCSA), August 1915, available on-line at http://www.bjpa.org/Publications/details.cfm?PublicationID=1512, accessed March 23, 2114. Cohen would become one of the Mishpat Hashalom judges, as in E B v B K, 1925, box 55, file 6, or S C v D B, undated judgement, ibid. A biographical essay on Cohen can be found in Ira Robinson, Rabbis and Their Community: Studies in the Eastern European Orthodox Rabbinate in Montreal, 1896-1930, U. of Calgary Press, 2007, chapter 2.

101 Sara Ferdman Tauben, Traces of the Past: Montreal's Early Synagogues, Vehicule Press, 2011, p. 69.

102 Constitution of the Bassarabier Hebrew Sick Benefit Association of Montreal, organized the 1st of August, 1907, constitution revised 1937, pp. 10-11, 20-31, 39. The constitution

a) The Baron De Hirsch Society and the Montreal Jewish Court of Arbitration

Following the example of the Baltimore court, Jewish arbitration in Canada became public and institutionalized, moving from the rabbi's study to a formal courtroom. In Toronto, a Jewish Arbitration Court began hearing cases in 1914, deciding 135 cases in its first nine months.[103] Montreal's Yiddish-language daily newspaper, the Keneder Adler, or Canadian Eagle, began editorializing in favour of the creation of a similar court for Montreal,[104] and the inaugural sitting of the city's first Jewish court was held on July 21, 1915,[105] under the auspices of a Jewish charitable organization, the Baron De Hirsch Institute. Known in English as the Montreal Jewish Court of Arbitration, its hearings were open to the public, held in a courtroom in the Institute's headquarters draped with both the Union Jack and a Zionist flag. As with the American courts, cases were decided by a three-man panel composed of a lawyer, a rabbi, and a businessman, and decisions were rendered quickly, before the end of the court session. The court was conducted in both Yiddish and English, and a duty counsel was available to help plaintiffs present their claims.

Litigants were in the beginning charged $1 each; in later years the fees rose to $2 or $2.50. In family law cases the wife was not required to pay, and the fee would be waived where a litigant could not afford it.[106] The most frequently heard kinds of cases were family law matters and disputes between business partners. The rest of the caseload was diverse, covering a range similar to that of the New York tribunals: claims against or amongst mutual benefit societies,[107] suits for breach of contract or damages and business disputes between relatives,[108] loan repayment, unpaid wages, loans and debts, compensation for injuries, a pledgees liability for pledged goods stolen from him, a claim of persecution by neighbours,[109] libel and slander.

The court began auspiciously and with fanfare in Montreal's Jewish newspapers

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was published in book form and distributed to members, with ledger pages to record dues as they were paid; quotes are from the English text of the constitution, which was bilingual in Yiddish and English. Dispute resolution mechanisms in the landsmanschaft organizations were not unusual: Goren, above, p. 198.

103 Dainow, ibid. Brief references to the Toronto court can be found in: "Hyman Siegel: Jewish Leader, Talmudic Scholar", The Globe and Mail, June 17, 1950, p. 4; and "Revival of the Jewish Court is Planned", Canadian Jewish Review, June 15, 1923

104 ibid., and "Baron De Hirsch Institute, 52d annual report of the Board of Directors", Canadian Jewish Chronicle, October 29, 1915, vol. 2 no 24, p. 2.

105 "Report of Montreal Jewish Court of Arbitration", Canadian Jewish Chronicle, October 29, 1915, vol. 2 no 24, p. 4.

106 "Montreal Jewish Court of Arbitration", Canadian Jewish Chronicle, March 3, 1916, vol. 2(42): 4.

107 "The Montreal Jewish Court of Arbitration", Canadian Jewish Chronicle, October 29, 1915, vol. 2 no 24, p. 4.

108 "The Jewish Court of Arbitration", Canadian Jewish Chronicle, December 20, 1918, vol. 5 no 32, p. 9.

109 "Report of Montreal Jewish Court of Arbitration", Canadian Jewish Chronicle, October 29, 1915, vol. 2 no 24, p. 4. The annual reports of the Federation of Jewish Philanthropies for the years 1917-1937 provide breakdowns of the subject matter of the cases heard in any given year.

but after a few active years its caseload began to decline. By 1930 it was hearing only a handful of trials a year: sometimes none, never more than three, as shown in the table below. The small number of cases over the years is in marked contrast to the activity of the affiliated Legal Aid Department, which could handle one or two thousand inquiries each year. The Legal Aid Department brought cases to the regular state courts, in matters such as prosecutions of husbands for desertion, and the number of such cases far exceeded the total caseload of the arbitration court.[110]

The court was administered by Max Goldstein, who was its Chairman and acted as one of the judges on most of the cases tried; and by Abraham Kaplansky, the superintendent and staff lawyer of Baron De Hirsch's Legal Aid Department, who served as the clerk of the court. The two men died within a week of each other, in 1939.[111] The report of the court's activities for that year states that "we are very pleased to note that the services of the Jewish Court of Arbitration were not called for during the past year which is evidently due to the fact that there is less litigation going on."[112] After that the court appears to have been abandoned. There is a brief mention of its existence in the 1940 report, without any statement about the number of applications received or trials held,[113] and nothing further about it in subsequent annual reports.

Montreal Jewish Court of Arbitration - table of cases

Year heard	inquiries received	applications filed	cases
1915-Oct. 1, 1916		*Reports unavailable*	
Oct. 1-Dec. 31, 1916		11	6
1917		42	21
1918		47	18
1919		59	23
1920		64	22
Jan. 1-Nov. 30, 1921	297	63	26
Dec. 1-Nov. 30, 1922	257	47	16
Dec. 1, '22-Dec. 31, '23	151	34	17
1924		*Report Unavailable*	
1925	124	32	15
1926	62	14	5
1927	77	16	6
1928	62	20	6
1929		*Report Unavailable*	
1930	41	9	2
1931	77	9	3
1932	43	7	2
1933	"several"		0

110 based on numbers and statistics from the 14th through 23d Annual Reports of the the Federation of Jewish Philanthropies of Montreal, infra.

111 23d Annual Report of the Federation of Jewish Philanthropies of Montreal and Constituent Societies for the Year Ending Dec. 31, 1939, Baron De Hirsch Institute, Montreal, p. 23.

112 ibid., p. 29

113 24th annual report, p. 20

1934			1
1935		6	3
1936	17	6	2
1937	16		
1938	14		
1939			0

All figures are taken from the Federation's annual reports; blanks for any given year are due to variations or omissions in the Federation's record-keeping.
Reports for the relevant years from the Baron De Hirsch Institute, for the period before it became part of the newly-created Federation of Jewish Philanthropies in 1916, and Federation reports from the years 1918, 1929 and 1934, are not found in the archives of either the Montreal Jewish Public Library or the Canadian Jewish Congress. Statistics for 1918 are taken from a table in the 1921 report showing the court's activity over previous years.

The diminished caseload of the Arbitration Court after 1922 coincided with the creation of the Mishpat Hashalom, a new court under the auspices of Montreal's version of the Kehillah.

b) The Formation of the Vaad Ha'ir

> *You apparently forget that we live in a "nationalitaten state"; that particularly in the Province of Quebec, the greatest discentralization of authority on ethnical grounds has been in practice since the British North America Act was promulgated; that the school system of the country is denominational; that land buying from Catholics carries with it a denominational tax, etc. Therefore the right of each religious group to deal with its religious and communal problems is recognized in theory and in practice. (if not in law)*
>
> *H. M. Caiserman* [114]

> *Having... disposed of the national issue I will now devote myself to the local issue which is the dago Rinaldo. He is from Italy. I am from Ireland. Are you in favour of Italy or of Ireland? Having thus disposed of the local issue and thanking you for your attention, I will now retire.*
>
> *- campaign speech at a clambake in New York's Bowery district, ascribed to Tammany Hall congressman "Big Tim" Campbell* [115]

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114 letter from H. M. Caiserman, General Secretary of the Canadian Jewish Congress, to Mr. E. P. Irany, June 25, 1935; the lst four words in parentheses were a handwritten addition to the typed text. Control of social programs in Quebec shifted from religious bodies to the province over the period from 1920 to 1960, as summarized in Anne Saris, La Compénétrations des orders normatifs: Etudes des rapports entre les ordres normatifs réligieux et étatiques en France et au Québec, McGill Faculty of Law Doctoral thesis, Feb. 2005, pp. 463ff.

115 Harry Golden, "Beer and Clams", Ess, Ess, Mein Kindt, G. P. Putnam's/Berkley Medallion, 1967, p. 71

The New York Kehillah had started in response to anti-semitism; Montreal's Jewish Community Council, the Vaad Ha'ir,[116] began in response to two crises within the Jewish world of Montreal, one to do with kosher meat and the other with religious schools.

Until 1922, certification of kosher meat in Montreal was done by individual rabbis, each with his own associated slaughterers and butcher shops. In 1922, the rabbis and butcher shops ended their rivalries and reached an entente.[117] As a result, the price of kosher meat more than doubled.[118] Angry customers protested and picketed the butcher stores.[119] They formed a Consumers' League which started its own butcher shops, selling meat at close to the old price. Meanwhile the Talmud Torahs, religious day schools, were in a financial crisis and had not been able to pay their teachers for many months; they were reaching the point where they could no longer remain open.[120]

Hirsch Wolofsky, publisher of the Keneder Adler and the English-language weekly the Canadian Jewish Chronicle, had been editorializing in favour of creating a Montreal Kehillah since World War I.[121] In response to the food and education crises, which he publicized in his newspapers,[122] he put forward a proposal for a central community council that would solve both problems, taking over the supervision and certification of kosher meat for the entire City while using the fees it charged for the service to subsidize Montreal's Jewish schools, secular as well as orthodox.[123] He published a

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116 In the early years of the Vaad there was no standard orthography for the transliteration of Yiddish. I generally use 'Vaad Ha'ir' and 'Mishpat HaShalom', but when quoting from documents or citing archival records I have preserved variant spellings of this and other Yiddish words, out of faithfulness to the texts and as an indication of the accents and pronounciation of the writers.

117 Robinson, Rabbis and Their Community..., p. 94.

118 Judith Seidel, "The Development and Social Adjustment of the Jewish Community in Montreal", McGIll University Dept. of Sociology Masters Thesis, September, 1939, mentions that the price went up from 12¢ to 25¢ per pound; M. Peters, "Twenty-Five Years of Community Service", Canadian Jewish Chronicle, Feb. 20, 1948, vol 35(39), p. 6, talks about an increase from 8¢ to 18¢ per pound; neither mentions any particular cut of meat.

119 Seidel, above; and "The 'Kosher' Meat Agitation", Canadian Jewish Chronicle, September 8, 1922, 9(14):1.

120 Seidel, above, pp. 158-59; "A Community Council for Montreal", Canadian Jewish Chronicle, November 3 1922, 9(22):1; "The Plight of the Talmud Torahs", ibid., Nov. 10, 1922, 9(23) 1; "The Talmud Torah Must Be Reopened", ibid., November 17, 1922, 9(24):6; and M. Peters, "Twenty-Five Years of Community Service", ibid., Feb. 20, 1948, vol. 35(39), p. 6.

121 Stephen Lapidus, "Orthodoxy in Transition: The Vaad Ha'ir of Montreal in the Twentieth Century", Concordia U. Ph. D. thesis, Dept of Religion, 2011, p. 34; Rebecca Margolis, Jewish Roots, Canadian Soil: Yiddish Culture in Montreal, 1905-1945, McGIll-Queen's U. P., 2011, 56; "The New York Kehillah and What We Can Learn From It", Canadian Jewish Chronicle, July 31, 1914, 1(11): 8; letter from A. J. Levinson, "Regarding a 'Kehillah' ", Canadian Jewish Chronicle, December 11, 2014, 1(30):10.

122 M. Peters, above

123 "A Kehillah for Montreal", Canadian Jewish Chronicle, October 13, 1922, 9(19):l; "Montreal Jewry to Have a Community Council", ibid., November 3, 1922, 9(22):9.

manifesto in pamphlet form, in both English and Yiddish, proposing goals and a structure for the organization.[124] Soon after the Consumers League and representatives of many of Montreal's Jewish community organizations held a meeting at which resolutions for the creation of a Jewish community council were passed, and a slate of Directors was elected at a further meeting in December 1922.[125]

The Vaad Ha'ir proclaimed itself as the representative of the "Synagogues, Fraternal, Educational and Social Organizations of the Jewish Community of Montreal"[126] and at its founding it claimed to represent more than 90 per cent of Montreal's Hebrew synagogues, benevolent societies, loans and labour organizations.[127] It was launched with the purpose of representing the full spectrum of the Jewish population, from Orthodox to atheist,[128] and its early goals, modelled on the activities of the New York Kehillah, included mediating in labour disputes along with the supervision of kashruth and the funding of Jewish schools.

The Vaad set up a Mishpat Hashalom court that began hearing cases no later than the summer of 1923.[129] It was structured along the same lines as the earlier arbitral courts and was occasionally called the Jewish Arbitration Court of Montreal,[130] the same name as the court that had been set up under the aegis of the Baron De Hirsch foundation. It was run by lawyers: Lyon Jacobs was Chairman of the court for

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124 Hirsch Wolofsky, Mayn Lebns Raze: Un demi-siècle de vie yiddish à Montréal, traduit du yiddish par Pierre Anctil, Septentrion, 2000, ch. 19, pp. 177ff.; "Now Is The Crucial Moment for the Foundation of a Jewish Kehillah", Canadian Jewish Chronicle, October 6, 1922, 9(18) 5; Ira Robinson, Rabbis and Their Community: Studies in the Eastern European Orthodox Rabbinate in Montreal, 1896-1930, U. of Calgary Press, 2007, chapter 6; and Lapidus, ib., p. 34.

125 Ira Robinson, "Toward A History of Kashrut in Montreal: the fight over Municipal By-law 828", in Renewing Our Days: Montreal Jews in the 20th Century, Robinson and Butovsky, eds., Vehicule Press, 1995, p. 32; Hirsch Wolofsky, above, p. 178.

126 according to the letterhead it used in the 1950s.

127 Ira Robinson, "Toward A History...", above, p. 37.

128 the evolution of the organisation, and how it has moved from a broadly representative structure to a primarily Orthodox institution with narrower purposes, has been charted in Lapidus, above, and in several articles by Ira Robinson: "The Foundation Documents of the Jewish Community Council of Montreal", Jewish Political Studies Review 8:69 (Fall 1996); Rabbis and Their Community: Studies in the Eastern European Orthodox Rabbinate in Montreal, 1896-1930, chapters 6 and 7; and "'A Strike in Heaven': the Montreal Rabbis' Walkout of 1935 and its Significance", The Concordia Institute for Canadian Jewish Studies, Working Paper Number 2, December 20, 2012. See also Hirsch Wolofsky's call for a new Kehillah because the Vaad had not lived up to its initial promise: Hirsch Wolofsky, "Give Us a Central Authority", Canadian Jewish Chronicle, November 14, 1930, 18(26):5.

129 when the Minute Books of the Finance Committee begin to document income from the costs allocated to the Vaad by judges of the court: see records of meetings dated June 14 and 21, Sept. 6, Nov. 8 and Dec. 13, 1923, in Vaad Hair Montreal Minutes Finance and Budget Committee January-December 1923, and entries for Feb. 21, March 13, May 20 and April 26, in Vaad Hair Montreal Minutes Finance and Budget Committee February 1924 - March 1926: CJC Archives Box 23. Monthly revenue from the Mishpat HaSHalom during this early period was small, ranging from a low of $2.50 in April 1924 to a high of $87 in December 1923.

130 Vaad Ha'ir Annual Report on Activities, October 31, 1964, in CJC Archives Box 13, "History", file 1, JCC/VAAD 1930-78.

the first two years, Leon Crestohl was its first secretary and was president of the court for 15 years.[131]

The different institutional context might have been one of the reasons why litigants stopped using the older court and began bringing their disputes to the new one. The Baron De Hirsch Institute, and the later Federation of Jewish Philanthropies into which it merged, were organizations run by the rich to help the poor. Compared to the Jewish population of Quebec as a whole, a high proportion of its staff were Canadian-born culturally-assimilated Jews whose primary language was English,[132] the language in which its annual reports were written. Max Goldstein, one of the founders of the Federation and the chairman of the Jewish Court of Arbitration, had before the First World War been critical of "the vast influx of foreign Jews" who "form ghettos amongst themselves and create a great deal of prejudice", saying in an interview with a Jewish newspaper in England that it would be better if immigration "could be restrained for a few years longer" to allow the existing immigrants to be assimilated.[133] The Vaad, by contrast, was in its beginning a more populist institution whose official language was Yiddish.

Although the cleavage in Montreal and Quebec City between immigrant downtowners and wealthy native-born uptowners was never as fierce as in New York City,[134] the complaint sometimes made against the New York courts, that they were part of a mechanism by which the assimilated and native-born controlled the recent immigrants, would have had resonance here. I suspect that the immigrant generation would have felt more comfortable bringing their disputes to private hearings at a community-based organization like the Vaad than to the more British-flavoured open court of an uptown charity like the Baron De Hirsch. The Mishpat HaShalom court can be seen as one example of how Montreal's downtowners over time created charitable

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131 "Lyon W. Jacobs Appointed King's Counsel By Cabinet", Canadian Jewish Chronicle, 10:17 p. 14; see entry for June 14, 1923, in Minutes Jan - Dec 1923, above; and letter from Leon Crestohl to B. G. Sack, September 27, 1948, in D. Leon Crestohl fonds, Box 22, file 6 - varia, CJC Archives.

132 Tamara Myer, "On Probation: The Rise of Fall of Jewish Women's Antidelinquency Work in Inter-War Montreal", in Negotiating Identities in 19th and 20th Century Montreal, Bradbury and Myer, eds., UBC Press, 2005, p. 175 at 180-81.

133 "Jewish Affairs in Canada: interview for the Jewish Chronicle with Mr. Maxwell Goldstein, K.C.", The Jewish Chronicle, July 16, 1909, p. 16. The interview is mentioned in Myer, above, at 185 and in Gerald Tulchinsky, Taking Root: The Origins of the Canadian Jewish Community, Lester Publ. Ltd., 1993, p. 247. His sentiments were shared by other Jewish community leaders in North America attempting to aid and assimilate the newcomers: cf. Samuel Joseph, "Jewish Mass Immigration to the United States", Trends and Issues in Jewish Social Welfare In the United States, 1899 - 1958, Morris and Freund, eds., Jewish Publn. Society of America, 1966, p. 15 at 20-21

134 Gerald Tulchinsky, "The Contours of Canadian Jewish History", The Jews In Canada, Bryn, Shaffir and Weinfeld, eds., Oxford U. P., 1993, p. 5 at 11ff. On Montreal, Stephen Lapidus, "The Jewish Community Council of Montreal: A National *Kehillah* or a Local Sectarian Organization?", 16/17 Canadian Jewish Studies 27 (2008-09) at 34-37. On Quebec, Christian Samson, "Les Réprésentations Des Juifs de Québec Dans le *Quebec Chronicle* de 1900 à 1924", 20 Canadian Jewish Studies 115 (2012) at 118

and community institutions separate from the uptowners.[135]

In the following sections, I will first describe how and which records of the Mishpat Hashalom court have been preserved, and look at the court's procedures and how they intersected with provincial law. I then consider the reasons why litigants chose to go to this court rather than the courts of the state and the jurisprudence that emerged from the court, focussing on cases that are of interest either because of legal doctrine or because of the light they shed on Quebec society and history.

c) The surviving records of the Mishpat HaShalom

The case-law and records of the Mishpat HaShalom survived by happenstance. In the mid-nineties a Concordia University professor, Ira Robinson, who has written extensively about the history of the Vaad saw that they were throwing out old documents and with the help of a librarian from the Jewish Public Library was able to salvage 40 bankers boxes worth of records before they were picked up by the garbage trucks. They were catalogued at the Library and eventually turned over to the Canadian Jewish Congress Archives.[136]

The portion of these records that has to do with the Mishpat Hashalom court consists of almost a hundred case files spanning the years 1933 to 1976, plus general correspondence files to 1974 which include copies of other arbitration contracts and judgments. There are also a series of minute books covering, with one gap, the period 1932 to 1968. The minute books were kept for administrative purposes, recording the names and contact information of the litigants, sometimes with a brief description of the nature or amount of the claim and a note about disposition.

These records are complemented by a smaller collection of similar documents from the years 1924-26 that had been given to the Archives earlier, roughly spanning the period when Lyon Jacobs was chairman of the court.

The records are by no means complete. There are no minute books for the first decade of the court's operation, or for the period from June 1953 to August 1961; apparently they switched to an index card system in 1953 only to return to the use of minute books a few years later.[137] There are only two case files for the period from 1927 to 1938, one preserved because the Vaad Ha'Ir itself was a party to the arbitration,[138] the other because the parties re-opened the case in 1946 and the older file material was placed together with the new.[139] Cases were filed alphabetically by name of claimant; for the period after 1938, the Archive has case files from A-M and for the letter Z, but none from N to Y. The surviving case files are only a portion of the cases

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135 On this trend, see Medres, Montreal of Yesterday, above, p. 74; with regard specifically to orphanages, see M. Ginzberg, "The Montefiore Orphanage", The Kanader Adler, August 18, 1931, transl. by Rebecca Margolis, in Judy Gordon, 400 Brothers and Sisters: Their Story Continues..., MJ Publications, 2004, p. 24.

136 as mentioned in Lapidus, above, p. 1.

137 index cards can be found in the surviving files of this period.

138 M v Jewish Community Counsel 1931-32, File 95, Box 2

139 H v Kahal Yeshurun Congregation, 1933, 1946, File 77, Box 2]

actually processed by the court in any given year.

No case records for the years since 1976 are available, although the court continued after that year, under the supervision of an annually elected committee.[140]

The subject matter of the surviving files is varied. Some of the cases reached hearing and judgment, while in other files nothing of event occurred because a party refused to participate or the matter was settled before a trial could be held. The 1940s and 1950s are better represented than the 1960s and 1970s, reflecting the decreased volume of cases dealt with by the court as time wore on. Some of the litigants in the surviving files were prominent (as for example a claim initiated against Harry Bronfman of Seagrams Distilleries by his long-time antagonist and former business partner, Meyer Chechik,[141] but this was an exception rather than the rule. There is nothing in the surviving records to suggest that what remains is other than representative of the court's caseload and decisions.

The official language of the Vaad Ha'ir was Yiddish[142] the language of many of the organization's records and minutes, as well as of the decisions of its religious courts.[143] The records of the Mishpat HaSHalom Court itself, however, are predominantly in English, with some correspondence in French, Yiddish or Hebrew and some judge's notes[144] and one surviving judgment[145] written in Yiddish. This Yiddish-language judgment was, exceptionally, written by the rabbi member of the panel rather than the lawyer.

d) Procedure of the Mishpat HaShalom court

The court's procedure changed little over the years. A party with a claim would come to the Jewish Community Council office and tell a staff member what their case was about. They would then be asked to sign a standard-form arbitration agreement on which a brief description of the nature of the claim would be filled in by hand. The Council would then send a letter to the respondents, almost always by registered

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140 Beverley and Eiran Harris, "History of the Jewish Community Council (Vaad Ha'Ir)", Le Fonds Conseil Communautaire Juif de Montreal / Jewish Community Council of Montreal (Vaad Ha'Ir), Archives de la Bibliotheque Publique Juive, Montreal, 1996, p. 3

141 Chechik v Bronfman 1944-46, Box 2, file 29; on the feud between the two men, see Nicholas Faith, The Bronfmans: The Rise and Fall of the House of Seagram, Macmillan, 2007, pages 44-45.

142 according to its 1958 by-laws: Ira Robinson, "They work in Faithfulness: studies in the constitutional documents of Canadian Jewish organizations other than synagogues", in Not Written in Stone: Jews, Constitutions and Constitution in Canada, Elazar, Brown and Robinson, eds., U. of Ottawa Press, 2003, p. 111 at 125

143 The decision of the Bet Din in Rabbi W. v Montreal Chicken Shochtim, Aug. 15, 1957, filed with the Mishpat HaSHalom records at Box 3, file 117, "U and T" correspondence, is written in Yiddish; by contrast, the decision of the Rabbinical Court of Greater Montreal in the case of Braun v Cohen, undated, was written in English: Box 2, file 100, various "B" 1946-63.

144 C v M, box 2, file 32.

145 F v G & L, box 2, file 54.

mail,[146] asking them to come down to the office. Usually, the letter would explain that a claim had been initiated against them and name the complainant; sometimes the letter just asked the person to come to the office without explaining why. In a few cases, involving claims against Jewish community organizations or embarrassing family disputes, the letter might include wording stressing why it would be wrong to have the matter heard through the civil courts. If the respondent was a synagogue or community organization, the letter would ask the organization to appoint a committee to deal on their behalf. There were no written pleadings, other than the arbitration form itself, and generally no pre-trial disclosure of information.

These procedures were similar both to those of the New York arbitration courts and those that had been implemented in the pioneer small claims courts a few years earlier. The small claims courts had innovated in replacing personal service with the cheaper method of service by mail; in Cleveland, the bailiff had to be the one to drop the envelope in the mailbox, satisfying the formal need for service by a bailiff while allowing the U.S. Postal Service to take care of the actual delivery. Some of the courts used registered mail, while others preferred ordinary mail because undeliverable letters would be returned faster. Originating processes in the small claims courts were drafted by the court based on information given orally by the plaintiff. Some of the courts dispensed with the need for any pleading by the defendant, although others required a written defence as a way of determining in advance of the hearing which cases would not be opposed.[147]

If the respondent in a Mishpat HaShalom case declined to accept arbitration or simply did not respond to the Vaad's initial letter, that was usually the end of the matter. The practice of the Vaad's separate rabbinical court was to write three letters, in accordance with a tradition that a claimant was free to summon a fellow Jew to the civil courts if the respondent had thrice refused to come to the religious court.[148] The Mishpat HaSHalom did not follow this tradition, although they might follow up the initial letter with a phone call,[149] or a letter in Yiddish if they perhaps suspected that the original English letter was not understood. The Court would not hear a dispute unless all parties signed the formal agreement of submission to arbitration, a step that was necessary in order to make their judgment enforceable through the courts of the Province.[150] In rare cases, they could bend the rule slightly. For example, on one

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146 registration receipts can be found attached to the file copies of the letters in individual case files. The practice goes back to at least 1924, per letters found in CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25. (This is a separate fonds from the one referenced in note 2, above)

147 Reginald Heber Smith, Justice and the Poor: A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal their Position Before the Law with Particular Reference to Legal Aid Work in the United States, Charles Scribner's Sons, 1919, pp. 41ff., with discussion of service by bailiff at pp. 47-48; and Reginald Heber Smith and John S. Bradway, Growth of Legal Aid Work in the United States, rev. ed., 1936, pp. 34ff.

148 the custom of issuing three summons is discussed in Yaacov Feit, "The Prohibition Against Going to Secular Courts", International J. of Beth Din of America 1:30 (2012).

149 as in G v Nussach Hoari Congregation North End, 1945, file 63, Box 2; H v D 1946-47, File 80, Box 2; and letter from JCC Exec. Director to Pinsker, July 12, 1950, Various "P" correspondence, file 113, box 3

150 CCP, aa. 1434-35. The provisions on arbitration in the Quebec Code of Civil Procedure

occasion a party who refused to sign the arbitration agreement was told the Court would try the case if he signed a letter agreeing to abide by the decision of the panel, but he still declined and the case did not proceed.[151]

Sometimes people entering into business relationships would include in their contracts provisions that all disputes should go to the Mishpat HaSHalom. One such agreement from 1946 was particularly specific. It stated that a "dispute or difference shall be submitted within ten days to the decision of three Arbitrators who shall also act as Amiable Compositeurs, who shall be appointed by the Jewish Community Council of Montreal, Inc., at the request of the parties hereto after notice of such request by registered mail to the other party advising him thereof."[152] However, it was doubtful whether such contracts were valid at that time under Quebec civil law. Arbitration contracts relating to a specific already-existing dispute were enforceable in the courts of the province; but provincial law back then did not necessarily accept open-ended contracts that required parties to submit all their future disputes to arbitration.[153] This did not stop people from entering into open-ended arbitration agreements.

The first Mishpat HaShalom arbitration forms were typed documents and could vary somewhat from case to case. By the late 1930s the content of the arbitration agreement had gelled, and the court used a standard form, professionally printed by a stationer, with blanks for the names of the parties and judges and the nature of the dispute. The content of the form changed little if at all thereafter.

The earliest form, used in 1924 and the beginning of 1925, simply asked the "Court of Arbitration to hear and decide as arbitrators and mediators, without legal formalities."[154] In 1926, the agreement became more specific about procedure, stating

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remained substantially the same over the period of time covered by this paper: Code of Civil Procedure of Lower Canada, 2d. ed., Thomas Foran, ed., Carswell, 1886; Surveyer's Quebec Code of Civil Procedure, Fabré Surveyer, editor, John Lovell & Son, 1912; Code de Procédure Civile de la Province de Québec, Dorais & Dorais, editors, 3d ed., Wilson et Lafleur, 1915; The Code of Civil Procedure of the Province of Quebec, Alec Griggs, editor, Wilson and Lafleur, 1935; Code de Procédure Civile de la Province de Québec, Robert Lévêque, editor, Wilson and Lafleur, 1956; Code de Procédure Civile de la Province de Québec/Code of Civil Procedure of the Province of Quebec, André Nadeau, editor, Kingsland Publications, looseleaf updated to October 8, 1965; and see, e.g., Somberg v Zaracoff, [1949] C.S. 301.

151 Miller v B., Various "M" correspondence, 1938-74, file 111, box 3

152 quoted in a letter from Louis H. Rohrlik to the Jewish Community Council of Montreal, November 15, 1946, in B vs W, 1946, Box 2, File 26. For another example of such an agreement, see the undated Agreement of Submission to Arbitration in Gordon v Williams.

153 On the enforceability of such an agreement see Quebec Civil Law: An Introduction to Quebec Private Law, Brierly and Macdonald, eds., Emond Montgomery, 1993, para 665, p. 580. The argument that arbitration by a religious court is an implied term in all contracts entered into by observant Jews, so that the court should defer to a procedure before a religious Beit Din even though one of the parties had not signed any arbitration agreement, was rejected in the case of Finkelstein v Bisk, [2004] OTC 265, para 13.

154 this form was used in, among others, I v P, agreement dated Nov. 9, 1924; C v B, Nov. 20, 1924; D v Chevra Shaar of Montreal, Dec. 12, 1924; Montreal Hebrew Sheltering Home v M, 1924; all in CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25.

that the decision of the panel was to be treated as if it was issued by the Superior Court of the province, with no appeal; the parties waived ordinary rules of procedure and witnesses were to be examined without taking oaths.[155] The 1927 form said that "The decision, whatever it will be, shall stop the Parties from going to Court to obtain a re-hearing of the settlement of the matter in dispute."[156]

The form in use from the 1930s through the 1970s stated that the parties consented to having their dispute arbitrated by a panel of three "gentlemen", that the judgment could be enforced, and that there was no appeal from it. Like earlier versions of the form it provided that the parties consented to waiving procedural rights applicable to trials in the Superior Court, specifically including a waiver of the right to have witnesses sworn under oath or have depositions taken.

The Quebec Code of Civil Procedure required that a deed of submission made out of court had to state the names and addresses of the parties and the arbitrators, the object of the dispute, and the delay within which the award of the arbitrators was to be issued.[157] The Mishpat HaShalom's standard form had spaces for all these things to be filled in, but they often weren't. Agreements were most often signed leaving the names of the judges blank; the panel was selected by the Jewish Community Council later. In some of the case files, the only information on the form is the names of the parties and their signatures, with the spaces for the nature of the dispute and even the date left blank as well.[158]

In its beginning, the court experimented with ways to add weight to its judgments and give the parties incentive to abide by them. In some cases the parties were asked to sign an acknowledgment at the bottom of the judgment issued by the court, stating that they agreed to the decision and to abide by all its terms and conditions.[159] One 1926 judgment was registered with a notary before being served on the litigants.[160]

The agreements of submission used from 1924 through 1927 stated that the applicant would pay a preliminary deposit to be forfeited to the other side if the applicant did not follow the decision reached, and there was a provision empowering the court to require both parties to pay additional deposits before hearing the case.[161]

There was a space on the standard typed form for the amount of the deposit to be filled in by hand. Typically, the amount was either $2 or left blank. However in one 1926 case, which concerned a claim for $72 owing for payments on a bedroom

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155 see, e.g. Agreement of Submission to Arbitration, G v L, Feb. 21, 1926, ibid.

156 B v B, Agreement of Submission to Arbitration, May 15, 1927, ibid.

157 in the relevant time periods, C.C.P. a. 1434.

158 as in for example the undated Agreement of Submission for M. v R., Box 3, file 111, various "M" 1938-74.

159 M. D. v M. M., decision dated Feb. 18, 1925, CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25

160 S. v S. draft judgment, c. Dec. 1926, ibid.

161 1927 arbitration agreement: CJC Archives, Jewish Community Council of Montreal (Vaad Hair), ibid.

furniture set, the initial deposit was $200.[162] Forfeiting an amount three times the value of the claim would be a strong disincentive towards taking the matter further to Superior Court.

The 1924/25 arbitration agreement referred to the judges of the court only as arbitrators and mediators. Beginning sometime in 1925,[163] the agreements began referring to the Committee of Arbitrators as "amiables compositeurs", a phrase that was included in all agreements from then on. The expression is taken from the French text of the Quebec Code of Civil Procedure. It is translated in the English version of the Code as "mediators", but the French term has a more specific meaning. "Amiables compositeurs" is a civil law term of art meaning that the arbitrators can decide matters according to equity and good conscience rather than the laws of any specific jurisdiction.[164] Using this term allowed the panel to impose the solution they thought best, incorporating Jewish law if they so chose, without necessarily following Quebec legislation and precedent. Their decision would still be enforceable through the Superior Court as a valid arbitration award.

As the court evolved, it relied simply on the agreement of the parties to arbitrate in order to ensure enforceability of the decision by the Superior Court; there were no provisions for forfeiture of deposits in the 1930s or later.

The early constitution and by-laws of the Vaad Ha'ir say that the court's purpose was to "receive claims and disputes submitted to it voluntarily by members of the Jewish faith, residents of the City of Montreal".[165] However, the court took an expansive view of its jurisdiction, one not nearly so limited by either faith or geography.

The court would accept jurisdiction over civil claims against Jews, including Jewish-owned businesses and community organizations. Although the Vaad Ha'ir became more and more Orthodox as time wore on, the Mishpat HaSHalom was always willing to try claims involving non-orthodox and secular Jews. As one claimant pleaded in a letter, asking that his case be heard quickly, "though I am not an orthodox Jew, I think I am a good Jew."[166] The court heard complaints made against secular Jewish organizations, as for example one brought against the Action Committee of the Labor *(sic)* Zionist Movement in Canada.[167] The claimants were often but not always Jewish;

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162 J. Gustovsky v Levikoff, Feb. 21, 1926, ibid.

163 comparing drafts of arbitration agreements contained in CJC Archives, ibid.

164 According to what was then a. 1436 C.C.P., "s'ils sont établis amiables compositeurs en même temps ou amiables compositeurs seulement, ils sont exempts de juger suivant les règles de droit". On the use of the term in civil and international law, see William Tetley, The General Maritime Law -- The Lex Maritima (With a Brief Reference To The Ius Commune In Arbitration Law And The Conflict Of Laws), 20 Syracuse J. Int'l L. & Com. 105 at page 135; and Quebec Civil Law..., Brierly and Macdonald, eds., above, para 666, p. 581.

165 Constitution and By-Laws, Jewish Community of Montreal Inc., a. 2(h): CJC Archives, Jewish Community Council of Montreal (Vaad Hair), CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 5

166 G v B, 1942, Box 2, file 64.

167 C v Labor Zionist Organization of Canada, 1954, Box 2, file 34.

when asked, the court would adjudicate disputes between Jews and non-Jews.[168]

The court was not limited to Montrealers. It accepted a claim from a plaintiff in Vancouver[169] and heard cases against people living anywhere in the Province of Quebec.[170] In one case, they took jurisdiction over a matter that had already given rise to both civil and criminal proceedings in Ontario.[171]

The Mishpat HaShalom was a secular court that existed parallel to rabbinical courts, known as Bet Din or Din Torah, and there was extensive overlap in the kind of cases that each could decide. The rabbinical member of the judging panel at the Mishpat HaSHalom might also serve on the bench of a Din Torah.

Matters of religious law, such as religious divorce and conversions, had to be brought before religious court to be adjudicated on by rabbis. Some cases concerning Jewish ritual were also referred by the Mishpat HaShalom to a Din Torah.[172] However, a civil dispute could be brought before either kind of court. Some claimants seemed not to care which kind of court they went before, asking for either a Mishpat HaSHalom or DIn Torah to be arranged;[173] others would ask for one and then change their mind and ask for the other.[174] One litigant first tried to sue his brother before the Mishpat HaSHalom; when his brother did not agree to arbitrate, the claimant tried again with a Din Torah, whose three requests to arbitrate were also refused. In another case, the parties had been to a Din Torah and then the claimant tried to take the matter to the Mishpat HaShalom. According to a notation made on the correspondence, "Mr. S___ claims that they had a DIN TORAH at Rabbi Hirshorn and he wants no more Hearings about it."[175]

A purely rabbinical court is guided by Jewish law when dealing with civil matters. For example, in a 1948 letter concerning a wrongful dismissal complaint by a teacher against a Halifax synagogue, the executive director of the Montreal Council of Orthodox rabbis cites the Hebrew tradition of a "bonus of notice" called anakah, referring to a moral duty in Jewish law to give a departing employee a bounty or largesse over and

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168 Jacob Bellis, The Va'ad Ha'ir - Montreal's Jewish Community Council - The Model of Kehilla", unpublished undated ms. c. 1964, Box 19, history file 1.

169 Chechik v Bronfman 1944-46, Box 2, file 29.

170 e.g., against a Quebec City businessman in Frost v Pollack and Master Craft Uniform, 1954, File 57, Box 2

171 B vs B and M, 1953-54, File 19, Box 2

172 The Minute book for the period October 1934 - February 1938 shows cases concerning the chalitzah ritual and cases involving jewish synagogues or community organizations as being referred to the Council of Orthodox Rabbis, or simply as being referred to rabbis: CJC Archives, Box 23.

173 A January 15 1957 letter from Rabbi Isaac Halpern to a respondent says that the claimant had "asked us to arrange for either a Din Torah or Mishpat Hashalom": Box 19, Rabbinical Court (Beth Din), file 7, "various 1940s-50s". Similarly, a July 27 1972 letter from the Chaikeson and Chaikeson law firm to the Vaad Ha'ir mentions that the claimant has "on numerous occasions requested that a Din Torah or Mishpat HaShalom be arranged", file ; see also letter dated Aug 5, 1946 in file 77.

174 B v United Talmud Torah, 1944, Box 2, file 8

175 Fagan v. Shechter, letter of February 13, 1951.

above what is legally owed to him, grounded in an injunction from Deuteronomy.[176] The judgments of the Mishpat HaSHalom, by contrast, are marked by an absence of any citation of law or precedent. Although the rabbi on the panel would be familiar with Jewish law and the lawyer with the civil law, their decisions contain no references to legal authority, whether to the Talmud or to the Civil Code and jurisprudence.[177] Neither does the court refer to its own previous judgments. The written decisions often borrowed the form of a civil court judgment but they made no reference to the substance of the civil law.

A Din Torah decided cases according to Jewish law; a Mishpat HaSHalom decision, by contrast, was set up so that the panel would be knowledgeable about both Jewish and state law, but did not explicitly decide cases according to either.

Once the dispute was brought to the Mishpat HaSHalom and the parties signed the arbitration agreement, the matter would proceed to a hearing before a panel. The lay member of the panel is sometimes described as a member of the Vaad Ha'ir, at other times as a businessman. All of the ad hoc judges were volunteers, as with the New York arbitration court, and did not charge for their services.[178] There was no formal pre-trial discovery process, but the parties would be asked to bring their "witnesses, documents and evidence" to the hearing.[179] The court would hear testimony from the witnesses and unlike in the Blatimore or New York courts parties were often represented by lawyers.

Litigants requesting a different procedure were turned down. In a 1960 case, the plaintiff told the Mishpat HaSHalom office that the parties had agreed that each side would appoint one arbitrator with the Vaad Ha'ir appointing a third member of the panel. The court refused, with a note in the file saying that "we cannot arrange such a mishpat Hashalom ----- as per telephone conversation with [the executive director]."[180]

One of the hazards of professional arbitration is that the arbitrator may favour the party who is most likely to bring him future business. The lawyer is favoured over the self-represented litigant, the corporate creditor over the individual debtor. As the Mishpat HaShalom court had rotating panels of volunteer judges, this kind of bias would be far less expected.

Hearings were commonly held at the Jewish Community Council offices in the evenings - it was standard for the letters announcing the time and date to say that "if the front door is locked, please ring the bell on the right hand side facing you, and the

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176 Deut. xv:14, discussed in Feldman, above, pp. 166-67

177 The closest thing to a caselaw citation is a typed copy of a decision from a Massachussets court, Henry Cohen v Eliezer Silver et al., Dec. 2, 1931, about whether a butcher can be denied kosher certification because he did not follow the rules of the Sabbath or obey a summons to a religious court. The copies of the case are found loose in the correspondence of the Mishpat HaSHalom (Box 3, file 114, "R" correspondence) and given the subject matter it was likely simply filed there without being related to any actual Mishpat HaSHalom case.

178 "Mishpat Hashalom: a unique court", The Voice of the Vaad, 11:3, Nov. 1972, p. 14.

179 e.g., per letter from the court to O. Miller, Dec 15, 1947, "S" cppdce, 115

180 S v E, per note on file card attached to correspondence, Sept. 28, 1960, Box 3, "S" correspondence, file 115

doorman will admit you"[181] - but could also occur at the home of the presiding rabbi[182] or the office of the presiding lawyer.[183] The hearings were private, in contrast to both the New York arbitration courts and the older Montreal Jewish Court of Arbitration. A Mishpat HaSHalom panel would normally hear one case per evening session, occasionally two.[184] Trials were scheduled quickly, and the parties received only short written notice of when the hearing would be held. In one partnership dispute, for example, a letter dated February 2 informed the parties that the hearing would be held February 6.[185]

Although the Court would hear the testimony of witnesses, it had no power to compel them to attend. In one case where witnesses from outside Montreal refused to come to a hearing, the court decided to "discharge the case from the Mishpat HaShalom so that both parties are at liberty to seek redress before any Tribunal of their choosing."[186] Sworn affidavits could be accepted as evidence, judging by the presence of such an affidavit in one of the files.[187]

The lack of any authority to summons witnesses did not stop the court from requesting their attendance. In one letter the Vaad Ha'ir's Executive Director wrote "we have been advised by [a litigant] that you are an important witness in the case on his behalf. We therefore ask that you be kind enough to appear before the Mishpat Hashalom Committee at the above-mentioned time and place to testify in that case."[188] This was an exception; usually it was left to the parties to bring the witnesses. As the court would often write to litigants in the early years, "If you have any witnesses, it is to your advantage therefore that you bring them along."[189]

The most common exception to the general absence of pre-trial disclosure was in business cases, where the panel might ask that financial records be submitted beforehand.[190] In one case involving a dispute over work a plumber had done installing fixtures in a house, the matter was adjourned to a later day to allow the parties to bring expert witnesses. Ultimately neither did, the plumber explaining that "I will not bring any experts because I am an expert myself."[191]

After a hearing, a formal written judgment would be issued. The practice was that the lawyer member of the panel would write up the decision, often having it typed

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181 e.g., G v K 1953, box 2, file 60

182 e.g., B v G, 1943, Box 2, file 22

183 as in Adath Jeshurun Cong. v Chevra Kadisha Cong., 1953-54, Box 2, File 2

184 for an instance in which two cases were to be heard in the same night, see Dec. 15, 1947 letter from the court to Ornstein, "S" 115]

185 M v R, Box 2, file 89

186 Go. v Ge., 1942-44, Box 2, file 68

187 G v K 1949, Box 2, file 58

188 letter from Rabbi Hechtman to A. M., January 22, 1960, Box 3, "S" correspondence, file 115; similarly, see letter dated Sept. 4, 1925, CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25

189 letters from Jewish Community Council to Mr. M. P., November 18, 1924; to Mr. W. M., Nov. 18. 1924

190 G v G, 1950-51, Box 2, file 62

191 M v L 1946, Box 2, file 90

up in his office and sending out copies to the other two judges for their signature.[192] The court had a precedent form of judgment that looked like a standard Civil Code decision, listing a series of clauses beginning with "Whereas", then a series beginning with "Considering that" followed by the conclusion and order. Sometimes the lawyers appended a formal backsheet of the kind used in a Superior Court filing [193]. Other times the judgments did not strictly follow the style that would be used in a civil court.

The pre-printed Agreement of Submission to Arbitration says that the parties "agree and undertake to respect whatever decision may be rendered by the... Arbitrators, or a majority thereof...", but the provision for majority vote may have been unnecessary. All cases in the surviving files are unanimous judgments; there is no record of any dissenting reasons. In some cases, where one of the three adjudicators could not come, the Court might ask the consent of the parties to proceed with a two-person panel.[194]

The standard fee of two dollars for the arbitration remained constant through most of the court's existence.[195] In cases involving larger sums of money the Mishpat HaShalom would ask that a charitable contribution be made to the Jewish Community Council. The fee When further costs were awarded, they could range from a few dollars to a few hundred. In a 1940 case, each side was taxed $2.50; in a 1945 case, the parties were ordered to pay $5.00 each to the Vaad Ha'ir to defray its costs. In a 1925 case concerning a partnership dispute, involving an order for the payment of $610, the court ordered $10 for costs[196] and in a 1954 feud involving competing claims of assault and libel, the court ordered the person who committed the assault to pay $10 to a Vaad Ha'ir fund for the assistance of needy families overseas.[197] When the case involved larger amounts of money, the amount asked as a charitable contribution could become more significant; in one claim, the Jewish Community Council asked for a tax-deductible contribution of $200.[198] In a 1926 case, a family dispute in which the court awarded $2000 plus thirty tons of coal and $5 per year for life, the court also ordered each party to pay $100 in costs to the court.[199]

Virtually all civil courts have some form of appeal process. Appeals are, however, the bane of a court that seeks to keep things simple. They protect against bad judging but they also create rigidity in the system. The appeals court lays down rules that the

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192 as stated in a standard-form typed note to the lawyer member of the panel that appears in several of the files. The records of one partnership dispute, S v N , O v S and N, February 17, 1950, preserves a paper trail; it includes draft notes of the decision written at the hearing, the correspondence from Mishpat HaSHalom staff sending it to the lawyer, and the formal decision as written up by the lawyer member and signed by the other panel members: Box 3, "S" correspondence, file 115]

193 e.g. as in E vs S , 1945, Box 2, file 45

194 G o. v. Gu. and Silver Paper Mfg. Co., 1954, Box 2, file 73

195 "Beginnings of the Vaad", Voice of the Vaad II(2 and 3) 1 (Dec. 1962) at p. 11

196 E. B. v B. K., Sept. 9, 1925 judgment: CJC Archives, Jewish Community Council of Montreal (Vaad Hair), Box 55, file 6

197 B v S-O, 1954, box 2, file 17

198 B v W, 1946, Box 2, file 14.

199 S v S, draft decision c. Dec., 1926: CJC Archives, Jewish Community Council of Montreal (Vaad Hair),file 6, Jewish Court of Arbitration 1924-25

lower court has to follow thereafter, and the lower court judges will write judgments with an eye towards protecting their decisions against possible appellate review rather than with the purpose of explaining their reasoning to the litigants. The early American small claims courts were constitutionally obliged to preserve a right of appeal, but did their best to minimize its availability.[200]

By 1926, the Mishpat HaShalom's arbitration contract stated that there was no appeal from the judgments of the court.[201] Despite this, however, there may have been a form of appeal process in the late 1920s and the 1930s, when Leon Crestohl was the chairman of the court. According to a surviving draft article from 1932 about the court and its procedures that was sent to Crestohl for his review, one could appeal a decision by writing to the Chairman. If the letter persuaded the Chairman that the matter should be reconsidered he would appoint a new panel to hear the case again.[202] However, the records for this period in the court's history have not survived, and there are no files or other records of any case in which such an appeal process took place.

In later years, a dissatisfied party sometimes wrote wanting to appeal[203] or alleging bias with little result. For example, after he had lost a wrongful dismissal claim brought against him by one of his employees, a prominent businessman of the time, Maurice Pollack, wrote to the court in 1954 saying that he thought the lawyer and the businessman on the panel had understood his position but that "this is my opinion and you could verify it only, no doubt the Rabbi influenced them, thinking that I had more money than [the plaintiff], which may be true or not, but when justice is given there is no account taken of who is richer or poorer…. If you have an appeal I will go before the appeal as I have confidence that Jewish people could render justice as well as any judges in court."[204] The executive director of the Vaad wrote back offering to discuss the matter with Pollack, but there are no further records in the file. Similarly, in a 1952 case, one of the litigants complained after the decision was rendered that the lawyer member of the panel had been biased because, the litigant claimed to have learned,

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200 Restrictions could include requiring plaintiffs to renounce a right of appeal in order to make use of the simplified small claims court procedure and requiring defendants who wished to appeal to post security for the plaintiff's legal fees. Appeals could be limited to points of law, not fact, or to the issue of whether substantial justice was done by the small claims court. See Smith and Bradway, Growth of…, above, pp. 40, 42; and Smith, Justice and the Poor…, above, pp. 46ff.

201 As in the agreement of submission to arbitration for J.G. v L., dated Feb. 9, 1926, CJC Documentation Series ZC, Jewish Community Council of Montreal (Vaad Hair), file 6.

202 according to undated drafts of an article about the court circa 1932: "Mishpat Hasholom", undated draft attached to a letter to Leon Crestohl dated March 22, 1932; and two other undated drafts, titled respectively "MIshpat Hashalam" and "Mishpat Hashalom", all in the CJC Archives, Jewish Community Council/Vaad Box 4, file 51, "Assistance, Legal, Crestohl and Crestohl, 1928-55"

203 e.g., letter from SS to Jewish Community Council, March 7, 1945, B vs S and C , 1945, Box 2, File 20.

204 F v Pollack and Master Craft Uniform, 1954, Box 2, file 57. Pollack was the owner of Quebec City's largest department store and the target of anti-semitic boycotts in the 1930s: see e.g. Lita-Rose Betcherman, The Swastika and the Maple Leaf: Fascist movements in Canada in the Thirties, Fitzhenry and Whiteside, 1975, p. 23]

one of the opposing parties had been a client of the lawyer.[205] There was no rehearing. In the absence of consent of all parties the court took the position, at least in those records that have survived, that they had no power under the arbitration agreement to either rehear a case or conduct an appeal of it.[206] The closest one can find to an appeal is a case in which all the parties agreed to rehear a matter based on new evidence; in that one instance, a new hearing of the Mishpat HaSHalom was held on consent.[207]

Under the provisions of the Code of Civil Procedure concerning arbitration,[208] arbitral decisions could be challenged for a variety of procedural reasons, and bias discovered after the signing of the arbitral agreement would have been one of them. Also, provided that a litigant was willing to tender the amount of the judgment awarded against him to either the other party or the state court, he could bring a civil suit that would challenge the arbitral decision on its merits. According to Vaad Ha'ir publications, however, no case was ever appealed to or reviewed by the civil courts.

If a party did not honour a judgement, the settlement could be filed for enforcement with the civil courts of the province. The arbitration agreement and the decision, and sometimes other documents from the file, were entered as evidence in the Superior Court action.[209] Some of the Mishpat HaSHalom files include annotations stating that absent documents had been filed as exhibits in Superior Court. In other cases, a successful litigant who still wanted to avoid bringing the matter to the civil court might arrange for a further session of the Mishpat HaSHalom to embarrass the other side into compliance.[210]

e) motives

> *There are a thousand disputes suitable to be decided by a lay arbitrator to one which should be determined by a lawyer. True your lay arbitrator may have no judicial sense and his decision may not be worth more than a spin of the coin; but he is cheap and expeditious and his judgment is final. How can the lawyer, unless the whole of his present machinery is crapped, essay to compete with him?*
>
> - W. Valentine Ball, 1918[211]

Why would people go to a Jewish arbitration court rather than to the courts of the province? The most frequently given reasons are those laid out back in 1915, at the inauguration of the Baron De Hirsch court: "...that speedy justice be done; that so-

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205 B and K vs. A, 1952, Box 2, file 24

206 letter from Jewish Community Council to SS, March 23, 1945, Box 2, file 20

207 K vs S, 1952-54, Box 2, file 86

208 during the years of the court's existence, aa. 1431-1444

209 eg H v I, 1950, File 78, Box 2; M v S and K, 1953-54, file 91, Box 2; and see letter dated July 31 1946 in file 77, Box 2, H vs Kahal Yeshurun Cong. 1933, 1946

210 as in G v B, 1952, 1954, file61, Box 2

211 *sic*; W. Valentine Ball, "Arbitration or LItigation?", 54(5) Canadian Law J. 176 (May 1918).

called humourous cases in the regular Courts be banished from the newspapers, that for a minimum fee the parties have their disputes settled by their co-religionists, who understand their language and customs, and to prevent 'chillel a-Shem'".[212]

A closer look reveals additional likely reasons. The courts of the province required witnesses to give testimony under oath, a practice that did not sit comfortably with Jewish religious beliefs. The court would accept kinds of cases that the civil courts would not, and it made use of flexible legal remedies that would not exist in the civil law until the following century. These remedies could allow the court to reach fairer and more helpful decisions, particularly in disputes between business partners and corporate shareholders.

i) fear

> *Most of our kind knew they had to stay hidden to survive, to avoid the mob with pitchforks and torches scenario. Occasionally, though, we had rogues who lacked common sense. We had to police ourselves. The system was archaic, born in the days of monarchs and empires.*[213]

When the Mishpat HaSHalom began, most Montreal Jews were immigrants from countries where anti-semitism was common-place and the courts could not be trusted to give them justice.[214] They had "learned by experience that if both parties to a lawsuit in a Russian court were Jews, both would lose."[215] Anti-semitism across Canada was far less violent than in Russia and Eastern Europe but still pervasive; the public expression of it was particularly strong in the 1930s and the early War years when European fascism was in its ascendancy. Some have argued that anti-semitism was more prevalent amongst Quebec's educated elite - the group from which lawyers and judges come - than it was amongst ordinary French Canadians,[216] and that attempts by Jewish

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212 Canadian Jewish Chronicle, Oct 29, 1915, vol. 2, issue 24, p. 4 . "Chillel a-Shem", literally, Hebrew for desecration of the name, from Leviticus 22:32, "you shall not profane my holy name", is associated with a belief that the public misdeed of one Jew brings disgrace and persecution to the entire community: Leo Rosten, The Joys of Yiddish, Pocket Books, 1968, "chillul hashem", p. 86.

213 Carrie Vaughn, Kitty and the Silver Bullet, Hachette Book Group, 2008, p. 192

214 eg, S. M. Dubnow, History of the Jews in Russia and Poland, Volume 2, translated by I. Friedlander (1918), chapter 22, s. 1, Project Gutenberg EBook #15729, released April 30, 2005; Lucy Dawidowicz, From That Place and Time: a memoir, 1938-1947, 1989, pp. 165-66; Goldstein, Jewish Justice, p. 87; Levine

215 Reginald Heber Smith, Justice and the Poor..., above, p. 71; "Russian courts" referred to the courts of the old Russian Empire, including Poland, Ukraine, and the Baltic States.

216 Medres, Montreal of Yesterday, supra, 121-23; Esther Delisle, Le Traitre et Le Juif, L'Etincelle Editeur, 1992, pp. 27-31, and Esther Delisle, Myths, Memory and Lies: Quebec's Intelligentsia and the Fascist Temptation 1939-1960, transl. by Madeleine Hebert, Robert Davies Multimedia, 1998. See Max and Monique Nemni, Young Trudeau: Son of Quebec, Father of Canada, 1919-1994, vol. 1, transl. by William Johnson, McLelland and Stewart, 2006, for a discussion of the clerico-nationalist and anti-semitic intellectual milieu in which Pierre-Elliot Trudeau and other members of the French-Canadian elite were educated in the 1930s; and Fred Kaufman, Searching For Justice, Key Porter Books, 2005, pp. 96-97, for a brief discussion of

university students to gain entry into elite professions such as law were one of the catalysts for the increased anti-semitism of the 1930s.[217] There were no Jewish judges or crown attorneys in the province during the first half of the twentieth century,[218] and some of the judges, particularly in the pre-war years, were contemptuous of Jews or gave voice to anti-semitic stereotypes in court.[219]

It would not be surprising if many of the Eastern European Jews carried their mistrust of the courts of their countries of origin to the state courts of their new country. The mistrust was in part justified.

ii) scandal

If you are an immigrant and a member of a discriminated-against minority, you do not want to give the natives of your new country fodder for contempt or ridicule. The most-often repeated reason for bringing matters to a Jewish arbitration court was to avoid airing in public matters that might reflect badly on the Jewish community as a whole.[220] The 1928 report of the Baron De Hirsch Institute's Jewish Court of Arbitration noted that the Court "was responsible for the satisfactory adjustment of several cases, which otherwise would have been tried in the civil courts, and might have proved a *Chillul Ha'Shem*[221] to the Jewish Community."[222] Similarly, according to an unpublished description of the functions of the Vaad Ha'ir, the Mishpat HaShalom court settled disputes "to avoid them intruding into the public courts where matters can be aired that may not reflect praise and glory on the Jewish name."[223] A 1925 letter concerning a dispute between two butchers, over an accusation that one of them was selling unkosher meat, stressed that one should "avoid such question being brought before the Courts in a Christian atmosphere."[224]

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the atmosphere for Jews in the Montreal and Toronto bar into the 1950s.

217 Pierre Anctil, "Interlude of Hostility: Judeo-Christian Relations in Quebec in the Inter-War Period, 1919-39", Anti-Semitism in Canada: History and Interpretation, Alan Davies, ed., 1992, pp. 140ff.

218 The first Jewish Superior Court judge in Quebec was Harry Batshaw, appointed in 1950: Mario Nigro and Claude Mauro, "The Jewish Immigrant Experience and the Practice of Law in Montreal, 1830 to 1990", 44 McGill L. J. 999 (1998-99), p. 1016, and interview with Alan Gold in Rachel Alkallay and Bryan Knight, Voices of Canadian Jews, The Chessnut Press, p. 74. The first Jewish Provincial Court judge, Alan Gold, was appointed in 1961: interview with Alan Gold, *ibid*. There were no Jewish crown attorneys until 1957: Bernard Figler, Biography of Louis Fitch, Q. C., Canadian Jewish Profiles File No. 123330, 1968.

219 Mario Nigro and Claude Mauro, "The Jewish Immigrant Experience and the Practice of Law in Montreal, 1830 to 1990", 44 McGill L. J. 999 (1998-99), p. 1017.

220 Goldstein, Jewish Justice, above, pp. 87, 98.

221 Rosten, above.

222 Twelfth Annual Reports, Federation of Jewish Philanthropies, for the year 1928, Baron De Hirsch Institute, Montreal, p. 30, emphasis in the original.

223 Jacob Bellis, "The Va'ad Ha'ir - Montreal's Jewish Community Council - The Model of Kehilla", unpublished undated ms. c. 1964, Box 19, history file 1.

224 March 29 1925 letter; CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25

This sense of a minority community concerned about looking bad in front of their neighbours manifests itself in other ways. In the wrongful dismissal case brought against Maurice Pollack mentioned above, Pollack wrote a letter to the court alluding to the crude manners of the dismissed employee, saying that "it was impossible for me to retain his services, especially when all my staff at the plant are Gentiles, fine English and French-Canadians who have worked at this plant for many years." [225]

This concern played its strongest role in cases involving disputes between family members, or cases concerning Jewish community affairs, such as claims involving synagogues and mutual benefits societies. When the Executive Director of the Jewish Community Council wrote to a synagogue in 1953 with regard to a dispute between various communal organizations over the closing of a cemetery road, he advised that "it is our duty to intervene in this dispute, because it would not be ~~respectful~~ proper to have such strictly religious organizations go to court instead of settling amicably their disputes in a Yiddish way."[226] Two decades later, in a 1972 letter to the Vaad, a lawyer explained that "what I have never wanted to do was to air a dispute which has religious overtones in the secular courts...."[227] Similarly, in trying to resolve a 1946 family dispute, the organization's executive director wrote: "We would like that this bickering around between yourselves and your father should be stopped. We, as the organized Jewish Community Council, would like to avoid any "chilul Hashem" in open court between a Jewish father and his children."[228]

Although it is sometimes said that there is a religious prohibition against bringing fellow Jews to the King's courts, in practice the prohibition was never absolute. Montreal Jews continued to bring lawsuits to the regular courts and the Vaad itself was litigious in its early years, taking its disputes with butchers who did not recognize its authority to the civil courts. Any such religious prohibition appears to have been one consideration to weigh in the balance rather than an absolute ban.

iii) culture

In arbitration court one's case would be heard by judges familiar with Jewish culture and the Hebrew and Yiddish languages. A Jewish court would as a matter of course not schedule matters on annual Jewish holidays or late Friday afternoon on the eve of the Sabbath, and litigants would not stand out by asking for such scheduling concessions.

Even with the best will in the world, a state court could sometimes have trouble dealing with cases involving Jewish custom, and would not be able to consider in the original documents written in Yiddish, Hebrew or Aramaic.[229] The arbitration court dealt

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225 letter from Maurice Pollack to the Executive Director of the Jewish Community Council of Montreal Inc., September 14, 1954, file 57, Box 2

226 crossing out in original file copy. Letter to Chevra Kadisah Synagogue dated Feb. 23, 1953: Adath Jeshurun Congregation v Chevra Kadisah Congregation, Box 2, file 2

227 Box 2, file 100, B correspondence, letter from Morris Chaikeson

228 B v Y , 1946, Box 2, file 9; deletion in the original.

229 e.g, Frank v. Carson [1865] OJ 147, 15 UCCP 135 para. 62, pp. 157-58, where an Ontario court struggled with the question of whether a couple had ever really been married,

as a matter of course with synagogue bylaws written in Yiddish[230] and would have no trouble dealing with business and accounting records written in that language.[231]

iv) oath-taking

> *"My cousin in Boston actually had to put his hand on the Holy Book to swear in court. I'll shoot any man that makes me do that!"* [232]

Another reason to go to the Mishpat HaSHalom was to avoid the need to give testimony under oath.

The custom of having witnesses swear to the truth of their testimony was not unknown in Jewish religious courts, but it was a borrowing from the societies in which Jews had lived over the centuries,[233] one with which Jewish law was never fully comfortable. Jewish courts preferred to avoid oaths, on the grounds that Biblical commandments already required witnesses to tell the truth in court.[234]

Court procedure in Quebec generally followed English law, under which Jewish witnesses had been giving testimony by swearing on the Old Testament since the late 1600s.[235] The older Goldstein/Kaplansky Court of Arbitration had followed English

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given that the court could not read the traditional Jewish marriage contract written in Aramaic. The court determined that the contract should be treated as if it had never existed but found that the couple had been married based on oral evidence, declaring that the written marriage contract was not a prerequisite to a valid marriage.

230 in a 1957 case in which a member of a synagogue challenged a decision of the synagogue Board refusing to allow him to renew his membership "for reasons considered in the best interests of the Synagogue and Congregation", the Mishpat Hashalom found in favour of the member after examining the yiddish-language bylaws of the congregation, without the problems or expense of obtaining a translation.

231 In C. v. K.. box 2, file 31, the court directed the parties to consult with an accountant who could read yiddish as some records of expenses had been noted down in that language.

232 Elizabeth George Speare, The Witch of Blackbird Pond, 1958: Bantam Doubleday Dell edition, 1993, p. 141

233 Aaron Schreiber, Jewish Law and Decision-Making: A Study Through Time, Temple U. P., 1979 at 356, mentions how Talmudic law had held that a witness who could not be trusted to tell the truth without an oath should not be allowed to testify, but that later European commentaries accepted oaths because their pervasiveness in state courts had led Jewish witnesses to consider them necessary.

234 A. Feldman, "The London Beth-Din (The Jewish Court, or the Court of the Chief Rabbi)", 41 Juridical R. 158 (1929) at 162, 165

235 The Law Reform Commission / An Coimisión Um Athchóiriú An Dlí (LRC 34-1990), Report on Oaths and Affirmations, Dublin, 1990, pp. 6-11; see also John H. Wigmore, Evidence in Trial at Common Law, Chadbourne revision, Little Brown and Co., 1976, vol. 6, ss, 1818ff.; Cheshin, below, p. 37; and Frank v Carson, [1865] OJ 147 at para 52, 15 UCC p 135 at 153. By the 19th century it was accepted that one could make an oath on whatever would best bind the witnesses' conscience: for examples, see R. v Curry, [1913] NSJ 1, 21 CCC 273. One of the more dramatic anecdotes from this case, about oaths involving the killing of a chicken for some Chinese witnesses, has contemporary validity: Wang Qiliang, "Religion, Legal Pluralism and Order

procedure in this respect, its witnesses sworn in pursuant to the Canada Evidence Act.[236] However, some Jews still did not wish to give evidence under oath because they considered it to be taking the name of God in vain.[237] A religious vow was something too sacred to become a common-place in the courtroom.

The custom of swearing Jewish witnesses on the Hebrew Bible, long-established though it was, could nonetheless become a matter of attention and controversy. In 1934, a young Montreal lawyer raised an objection to an oath taken by a Jewish witness, claiming to the Court that Jews had religious license to perjure themselves against Christians. After cross-examining the witness on whether he followed his religion and went to synagogue, the lawyer maintained that the Kol Nidre prayer recited each year on Yom Kippur exonerated Jews from oaths, and therefore that the witness could not give reliable sworn testimony.[238] The objection was of course over-ruled, but gave rise to headlines such as "The oath of a Jew" in the clerico-nationalist newspaper Le Devoir and "Does the OATH of the JEW have any worth?" in the anti-semitic weekly Le Patriote.[239] Le Patriote was published by Adrien Arcand, a passionate admirer of Adolph Hitler who had founded the fascist National Social Christian Party earlier that year,[240] and the lawyer who raised the courtroom objection, Edouard Masson, was or would become a close associate of Arcand virtually until the end of Arcand's life.[241]

Shneor Cheshin, in his reminiscences of being a judge in British Mandate Palestine, maintained that "there remains a deep-seated opposition on the part of many Jews - outspoken freethinkers as well as the most pious - to taking an oath. The

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in a Multiethnic Society: A Legal-Anthropological Study in Contemporary China", J. of Legal Pluralism 2009 nr 59, p. 10.

236 "The Montreal Jewish Court of Arbitration", Canadian Jewish Chronicle, October 29, 1915, 2(24):3.

237 "Mishpat Hashalom: a unique court", The Voice of the Vaad, 11:3, Nov. 1972, page 14. For a cautionary Biblical tale about oaths gone horribly wrong, see Judges XI: 30ff.

238 The case was *National Public Finance Corporation* v. *George Enosco*. "Le serment d'un juif", Le Devoir, vol 25 issue 287, Dec 14, 1934, p. 3; "La priere dite 'Kol nidre' ", Le Devoir, vol 25 issue 288, Dec 15, 1934, p. 3; "Le SERMENT du JUIF a-t-il guelque valeur?", Le Patriote, vol. 2 no. 35, Dec 27 1934, p. 4; "Kol Nidre on Trial in Local Court: Justice McKinnon Overrules Objection", Canadian Jewish Chronicle, vol. 22 no 31, Dec 21 1934, p. 7; and "Kol Nidray", ibid., p. 4; "Our Weekly Chat: After Kol Nidre", ibid., vol. 22 no 32, Dec 28 1934, p. 4; "Our Weekly Chat: Echoes of 'Kol Nidre'", ibid. vol. 22 no 34, Jan 11 1935, p. 4; Nathan Gordon, "Kol Nidre", 1935, memo circulated by the Anti-Defamation Committee of the Canadian Jewish Congress, in Nathan Gordon collection, CJC Archives, Fonds P0074 - Varia; "Jewish Court Oath Challenged, Charge Kol Nidre 'Absolution' " (Jewish Telegraph Agency), Jewish Daily Bulletin, Dec. 17, 1934, p. 1; Israel Medres, Between the Wars: Canadian Jews in Transition, translated by Vivian Felsen, Vehicule Press, 2003, p. 85, originally published as Tsvishn Tsvey Velt Milkhomes, 1964.

239 "Le serment d'un juif", ibid.; and "Le SERMENT du JUIF a-t-il guelque valeur?", ibid.

240 On Arcand and Le Patriote, see Jean-François Nadeau, The Canadian Führer: The Life of Adrien Arcand, James Lorimer & Company, 2011; Lita-Rose Betcherman, The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties, Fitzhenry and Whiteside, 1975, pp. 36-44, 130; and Martin Robin, Shades of Right: Nativist and Fascist Politics in Canada 1920-1940, U. of T. Press, 1992.

241 Nadeau, ibid., pp. 252, 301.

orthodox and the non-believer alike will use every subterfuge to avoid it."[242] "It is not unusual" he wrote, "for a plaintiff to withdraw his charge rather than take an oath, or for both parties to settle their dispute by a compromise so as to avoid being sworn in court."[243] He mentions a contract between two litigants which specified that in the event of a legal dispute they would not require each other to take an oath in court[244] and describes how a plaintiff in another case dramatically jumped up as the defendant was about to be sworn in, exclaiming that he would withdraw his lawsuit in order to prevent the person he was suing from committing the sin of swearing to a lie.[245] The judge found "the fear of taking an oath especially strong among the "Oriental Jews", those of the Middle East and North Africa, but describes it as something common to all the Jewish litigants in his court, including the Eastern Europeans who would have a common background with the bulk of the Jewish immigrant community of Montreal in the years when the Mishpat HaSHalom was operating.[246]

Hints of concerns about oath-making can be found in the Mishpat HaSHalom records. In 1968 correspondence, a rabbi who was being summonsed to appear in the state courts was reassured that "you will not have to take any oath or to place your hand on the Bible, but all that you will be required to do is to solemnly affirm that you will tell the truth".[247]

In Quebec, amiables compositeurs were not required by law to take evidence under oath. Although arbitrators often swore in witnesses, the Civil Code did not require them to do so if they were also acting as amiables compositeurs or if the arbitration contract provided that evidence did not have to be sworn.[248] Similarly, under older pre-Code law, there had been no need for testimony before an arbitrator to be under oath.[249]

The Mishpat HaSHalom's standard arbitral contract specified "THAT the Parties hereto hereby waive all legal formalities prescribed by the Code of Civil Procedure of the Province of Quebec, more especially, do they waive the right of having witnesses sworn or depositions taken in writing."[250] New York's Jewish Conciliation Board had also not

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242 Shneor Cheshin, Tears and Laughter in an Israel Courtroom, transl. by Channah Kleinerman, Jewish Publication Society, 1959, p. 39.

243 ibid., p. 42.

244 ibid., p. 41.

245 ibid., p. 42.

246 ibid., p. 41. The vast majority of the Jewish population of British Mandate Palestine was of Eastern European descent and only 11% were "Oriental" Jews: Orit Rozin, The Rise of The Individual in 1950s Israel: A Challenge to Collectivism, transl. by Haim Watzman, Brandeis University Press, 2011, p. xvii.

247 Box 19, file 1, letter from I. R. Prazoff to Rabbi Hechtman, May 22, 1968.

248 Pollack c. Verret (1931), 51 B.R. 109.

249 Tremblay c. Tremblay (1853), 3 L.C.R. 482.

250 the wording of an older form of the contract that predated the pre-printed arbitration form was similar: "The arbitrators shall act as Amiable Compositeurs without any legal formalities, shall not be obliged to swear witnesses or follow the rules of the Code of Procedure, the parties agreeing to waive the ordinary rules of the Code concerning Arbitration"; Hahanovitch v Congregations Kehal Yeshuvim, agreement of submission to arbitration, September 6, 1928, *Box 2, file 77*

sworn in witnesses; one reason being to help litigants feel more at ease in the courtroom.[251]

For those who had concerns about making an oath on the Bible in a secular courtroom, the arbitral court offered a trial in which one could give evidence without the need to formally swear to the truth of one's testimony.

v) jurisprudence

Ultimately, the success of a court depends on the quality of its judges and decision-making and the ability of the court to explain its decisions to the litigants. The following sections focus on the jurisprudence of the court. I describe some of the cases where their details can give some insight into daily life in Quebec in the first half of the last century. I will also argue that the court attracted customers because in certain areas of law it offered remedies that would not be available through the regular courts until the following century. It took cases that the regular courts could not. Although attempts to deal with collective bargaining matters through the court appear to have failed, it offered more flexible solutions than the regular courts to problems of employment law and, especially, in disputes between business partners and corporate shareholders.

4) The Case-Law of the Mishpat HaShalom

a) individual cases: groceries and grease

Some of the court's cases stand out, not because of their jurisprudence, but because of what the litigation can remind us about the way people lived during the time the court was active.

Lawsuits over customer's grocery store accounts, for amounts too small to be worth bringing to the Superior Court, testify to how common such credit arrangements were. In a time when humourists joked about women cheating on their grocers in the same way that comedians now tell jokes about women cheating on their hairdressers, running a tab at the corner grocer was a standard way to buy produce. In a case from the 1920s, a grocer sued for $10, a grocery bill that had accumulated over the last four years; the case was settled with an agreement to repay the debt at the rate of 25 cents per week.[252]

A case from 1950 describes a less readily acknowledged Montreal business practice. The claimant was suing the middle-man who had arranged the purchase of a real estate property for him. The middle-man had asked for $400 to cover bribes to people at the real estate company selling the property. After he bought the property,

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251 Goldstein, Jewish Justice, above, p. 89; Tom Henshaw, "Jewish Board's Decisions Binding in Family Quarrels" (Associated Press), Milwaukee Sentinel, January 20, 1960, p. 3.

252 FB v LF 1928, CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25; and B v G, 1943, box 2, file 22, described below

the purchaser spoke to a French Canadian officer of the real estate company who was supposed to have received $300 of the bribe money. The officer denied receiving anything, and so the purchaser sued the middle-man for the return of his money, claiming it had not been given to the people for whom it was intended. The alleged bribe recipient testified at the hearing, denying that he received this particular amount of money but acknowledging that in the course of his business he would accept other gifts at other times. The court rejected his testimony and found that he had probably received some amount of money, although the wording of the judgement suggests that they believed the intermediary had kept some of the bribe money for himself. The court ordered that both the claim for the return of the $400 and the intermediaries counter-claim for an additional $300 for his fees be withdrawn.[253]

The matter of fact nature of the case indicates that bribery was a normal part of doing business in Quebec. Earlier examples can be found in the accounting records of the Vaad Ha'ir; its first financial statement includes under the heading of miscellaneous expenditures disbursements for "Tips to Police" and "supper with Constable".[254]

Even the way the name of the court is written can tell a story. In the early years, you find transliterations such as Vaad Choir[255] or Vaad Hoir and Mishpot Hasholom, reflecting the Ashkenazi Hebrew pronounciation of most of the immigrants; as time wore on, the names became fixed as Vaad Ha'Ir and Mishpat Hashalom, reflecting the Israeli pronounciation that eventually became the standard.

b) adjudication, conciliation and limitations

> *"In our view, justice must be more than just the settlement of a dispute by the application of the law."* - Israel Goldstein[256]
>
> *"yours for less justice and more charity* - archy*"* [257]

The Mishpat HaShalom judges did not cite precedent, and the constantly-changing roster of judges would likely have been ignorant of the decisions reached in most other cases. Nonetheless, patterns emerge, and one constant motif is an emphasis on conciliation.

An early manifesto of Montreal's Jewish Community Council declared that the organization sought "to bring harmony, to perpetuate justice", and that the Mishpat

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253 F. v S., 1950, Box 2, file 49

254 Financial Statement of the Montreal Jewish Community Council for the period of Nov. 8, 1922 to May 31, 1923, entries for March 9, 14 and 23, 1923: CJC Archives, Jewish Community Council of Montreal (Vaad Hair), Box 55, file 2

255 M v Vaad Hakehiloth of Montreal (Council of Orthodox Jews et al), Box 3, File 111, Various "M".

256 Israel Goldstein, quoted in Tom Henshaw, "Jewish Board's Decisions Binding in Family Quarrels" (AP), The Milwaukee Sentinel, Jan 20, 1960, p. 5; also published under the title "Religion in The News", Nevada Daily Mail, Jan. 4, 1960, p. 4.

257 Don Marquis, "Cursed Fly Swatters" (Oct, 14, 1921), The Annotated Archy and Mehitabel, Penguin Books, 2006, p. 263.

HaSHalom would "strive to reduce friction and diminish litigation.[258] Among the court's goals, harmony ranked with justice and was mentioned first. As the secretary of the Council suggested in 1940, "Our 'Mishpat Hashalom' is more a Conciliation Board than a 'Court'. We are interested in bringing peace between the litigants and settle their grievances in an amicable manner."[259] In practice, this meant that the decisions of the court tended towards compromise. Rather than pick a winner and a loser, the judges sought to find a middle ground between the parties. They looked beyond duties and obligations to consider other factors and come to a decision that was fair to both sides. "The purpose of the Court," wrote the Vaad's executive secretary in 1972, "is not only to render a decision but especially to re-establish peaceful and cordial relationship between the parties.*(sic)* For this reason the Court does not follow any fixed code of law but allows fullest latitude to the parties to unburden themselves. Once this takes place, it is easier to find a just compromise and as a rule the hearing ends with a reconciliation between the parties."[260]

Sometimes, compromise means simply choosing a middle number between a pair of dollar figures. In the decision mentioned earlier that so aggravated Maurice Pollack, his former employee had claimed $1500.00 damages for wrongful dismissal; the Mishpat HaSHalom awarded the employee $600.00 in a short decision that gave no reasons whatsoever.[261] In many jurisdictions, judges are forbidden from hearing about settlement offers, but conciliation courts have no such restrictions. In a 1953 dispute over the amount of real estate commission owing, the claimant asked for $787.50, the defendant offered $300, and the court split the amounts down the middle, ordering the payment of $543.75 without making any decision as to who was in the right.[262]

In a 1926 case, the plaintiff claimed for payment in the amount of $72; the court awarded him $40 worth of merchandise of his choosing from the defendant with a provision that if the goods he chose were worth more than $40 he would have to pay the surplus.[263]

The court tried to restore harmony in other ways. In an application brought by a member who had been expelled from his synagogue, the court ruled that the expulsion had been illegal; but they also recommended that the member write the synagogue a letter of apology "and that he further undertake to respect the decisions of the

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258 A. J. Levinson, M. A., "Manifesto of the Jewish Community Council of Montreal, Incorporated, (Vaad Hoir) to the Jewry of Greater Montreal", Friday, February 22, 1924, unpublished manuscript, CJC Archives, Jewish Community Council of Montreal (Vaad Hair), Box 55, file 1

259 In response to a survey of jewish arbitration courts conducted by New York's Jewish Conciliation Board: letter from Jewish Community Council to Canadian Jewish Congress, January 21, 1940, and from Jewish Conciliation Board of America Inc. to Canadian Jewish Congress, Sept. 26 1939 - jewish arbitration court box

260 "Mishpat Hashalom: a unique court", The Voice of the Vaad, 11:3, Nov. 1972, page 14; echoing similarly-worded sentiments in "Beginnings of the Vaad", Voice of the Vaad 2(2 and 3) 1 (Dec. 1962) at p. 12

261 F v Pollack and Master Craft Uniform, 1954, Box 2, file 57.

262 G v K, 1953, Box 2, file 60

263 J.S. v L., judgment rendered Feb. 21, 1926: CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25;

Congregation."[264]

The desire to effect a compromise could lead to innovative jurisprudence. In the civil courts, delay in filing a claim is a black-and-white matter; if the claim is outside a limitations period it cannot proceed, but if it is filed within the limitations period it can go to a trial over its full amount. The Court in a 1943 case concerning a grocery bill adopted a different approach. "Considering that on the other hand the Respondent should be made to suffer for his neglect in allowing more than three years to pass without making a claim" they reduced the amount of damages that would otherwise have been ordered from $35 to $15, payable at the rate of one dollar per week.[265]

The justice rendered by the Arbitration Court included a strong component of mercy. A 1947 case dealt with an accident in which a woman had fallen through an open trap door in the floor at a poultry store, injuring her leg. The case had begun in the civil courts and been transferred on consent of the parties to the Mishpat Hashalom. The Court found that the accident was entirely the fault of a store employee. However, "CONSIDERING that Defendant [store-owner] is a person in abject poverty, is totally blind, and has very little means of support for himself, his wife and family and especially of one daughter who is a chronic invalid" and "CONSIDERING to (*sic*) that it is fortunate that Defendant is not a dependent on public charity to support himself and that a judgment of any size rendered against him would probably make him and his family a burden to the community", the Court reduced the amount of damages owing. They awarded the full amount paid for pharmaceutical supplies and court disbursements but reduced the amounts paid for doctors bills and the lawyers fees in civil court by two-thirds, and allowed nothing for pain and suffering. The final judgment was for $169.32, and must have been a disappointment to the plaintiff who had submitted a four-year old credit report indicating that the poultry store had revenues of about $3000 per year and that the defendant owned the business premises worth $5000 with only a small mortgage.

Similarly, in a case from the early 1940s, "considering the financial position of the defendant" an amount owing was reduced from $178 to $50, payable at the rate of one dollar per week.[266]

The court took its name literally, and would try to restore peace between individuals. In a 1954 lawsuit between two quarrelling men, one of whom had sued for libel and the other, in return, suing for assault, the court worked out a solution that went beyond simply awarding damages. They found no proof of libel and decided that there had been an assault, but in the home of the person who had committed the assault and with some provocation. The assailant had to pay $10 in damages, which his victim in turn gave to a Jewish Community Council charitable fund for needy families overseas; and each of the two men had to deposit with the Jewish Community Council a demand note of $100 as a guarantee that they would keep the peace for two years and not bother each other. The court wrote: "you are both intelligent men, and it is the heart-felt request of our organization to both of you not to bother one another, which

264 M. v B'nai Jacob Cong. 1954, Box 2, file 94

265 B v G, 1943, box 2, file 22

266 B v B and A, 1940-42, Box 2, file 27

means 'keep the peace' ."[267]

c) conciliation and intervention

The court heard a significant number of cases involving synagogues and community organizations. These could include wrongful dismissal claims by an employee against a synagogue, or actions brought by a member against a mutual benefits society. They could also include disputes between organizations, or disputes brought by members over how the organization was being run. In such cases, the court took an approach more characteristic of American judicial review, intervening in the internal affairs of the organizations more than any Canadian judge of the time would have been likely to attempt.

In a case from 1945, a member complained to the court about transfers of funds from the Dominion Hebrew Sick Benefits Association to its related organization, the Dominion Hebrew Cemetery Association. The judges imposed terms for how the two related associations should account for funds, requiring them to use separate bank accounts and keep separate financial records. The Sick Benefits Association was instructed to hold a referendum, asking the membership to decide by majority vote whether to transfer funds to the cemetery association to cure its deficit. Any money raised from entertainment or other events was to be allocated between the two organizations in proportion to their contributions to the expenses of the event. The court ended its judgment by saying that "It is finally ORDERED that all disputes and litigation between individual members and the Association should cease, since it is very harmful for a non-profit association, which operates solely for the mutual benefit of its members, to be put to the trouble of hearing disputes and the expense of defending lawsuits."[268]

In another case, involving the Ladies Biker Cholm Society, the court settled a dispute involving the organization's president by ordering the Society to hold a meeting to elect new officers and vote on whether a cheque issued by the organization should require two or three signatures, and whose. The rabbinical member of the court panel was to serve as guest chairman of the meeting and count the ballots. The court's decision said that if the president of the organization did not like these things, she should resign. Her resignation letter is in the court file.[269]

d) conciliation and oppression

The largest block of the court's caseload was disputes between business partners or principals of privately-held corporations, often involving family members who had gone into business together.

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267 in a cover letter sent out with the court's judgment: B v S-O, 1954, box 2 , file 17

268 Dominion Hebrew Sick Benefits Association v Ship, 1944-45, File 36, box 2

269 file 100, box 3, miscellaneous "B" correspondence

Until the 1970s, when oppression remedy provisions giving increased rights to shareholders began to be added to Canadian legislation concerning corporations, judges were reluctant to interfere in corporate affairs and minority shareholders had few legal rights. Quebec changed later than other provinces; its provincial corporate statute had no oppression remedy until the 21st century.[270] In the years when the Mishpat HaSHalom was hearing cases, the power of the Canadian courts in a dispute between shareholders was as black and white as their limitations periods. The courts could order the winding up of the corporation, but had little or no jurisdiction to intervene in its conduct. Except in cases of outright fraud judges would not assume power to assist minority shareholders against abuses by the majority. Disputes between corporate stockholders were often settled by the legal equivalent of a game of chicken. One side would bring a wind-up application and the two sides would try to negotiate a deal out of court, knowing that if they failed to reach agreement the corporation would in effect be killed by court order, an outcome likely to benefit no-one.[271] Even after the oppression remedy had been introduced into Ontario law in the late 1980s, older lawyers who were mistrustful or ignorant of it would still bring wind-up applications to settle corporate disputes.

In contrast, the judges of the Mishpat HaSHalom considered themselves free to set the terms of separation between business partners, whether the formal relationship was structured as a partnership[272] or a business corporation.[273] In doing so, they abrogated to themselves powers that the Quebec courts did not consider using until the following century.

Sometimes the business cases involved little more than a judgment stating that one partner should buy out the other at a set price.[274] In a 1925 case, for example, the court resolved a partnership dispute by ordering one partner to buy out the other, for $610.[275] Others were more complex.

In some cases, the court would structure the rules according to which one partner could buy out the other.[276] In a 1924 case concerning a bakery owned in partnership, the court ordered that two partners keep the name and physical assets of

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270 Quebe judges began to express willingness to use the court's general powers to assist minority shareholders in 2001, and a statutory oppression remedy came into effect in 2011: see Grace c. Martineau, Provencher, [2001] R.J.Q. 2414 (C.A.) at para. 172; Laurent c. Buanderie Villeray ltée, [2001] J.Q. 5791(C.S.) at paras. 14-21; 9022-8818 Québec inc. (Magil Constr. inc.) 2005 J.Q. 1495 at paras. 43-45; and Charland c. Lessard, [2012] J.Q. 5441.

271 Brian Cheffins, "The Oppression Remedy in Corporate Law: The Canadian Experience", 10(3) U. Pa. J. of International Business Law 305 (1988) at 308-09.

272 in addition to the partnership cases discussed below, see also D v P, 1946, Box 2, file 38; K v B, 1943-44, Box 2, file 85; and Z v L, 1942, "Various Z 1929-1960", Box 3, file 119.

273 SC v DB and AJ, below; and MH v MW, 1950, Box 2, file 79, a dispute between two shareholders in a company that made fur coats and jackets.

274 e.g., B v M, 1941, Box 2, file 15; E v B 1941, Box 2, file 43; and B v B & M 1953-54, box 2, file 19; and EB v BK 1925, CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25

275 E. B. v B. K., Sept. 9, 1925 judgment: CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25

276 eg B v B & M, 1953-54, Box 2, file 19

the bakery, while the third partner purchase his customer route and book accounts from the others for $100, with the proviso that the first two partners not solicit the customers of the third.[277] A 1925 dispute between two partners who owned a poultry store, decided by an atypical panel of three rabbis, allocated the store and its chicken coops to one partner and the horse, wagon and harness to the other, dividing the eggs, chickens, feathers, corn and twine between them.[278] Similarly, In a 1941 case, the court dissolved the partnership and ordered one partner to purchase the business from the other, setting the price and terms of repayment.[279]

In a 1946 dispute between the shareholders in an electronics company, the court at first ordered the parties to exchange sealed bids for the assets of the company. When the higher bidder then refused to proceed with their purchase due to ill health, the court set the terms on which the other shareholders were to purchase the business, fixing the price at the book value of the shares plus an amount for good will. It was then the turn of the other shareholders to refuse to make the purchase. They asserted that the decision was "absolutely illegal", writing that they did not "recognize the binding effect in any way whatsoever, and reserve to ourselves all rights and recourses under the circumstances."[280] The lawyer for the other party took the judgement, exhibits and executed minutes of settlement from the file, presumably to use in enforcing the decision before the civil courts.

A 1952 case concerned a candy-making corporation showed how the court would not just decide who wins the lawsuit, but also take an active hand in contacting people who were not parties to the case in order to minimize the substance of the dispute. The businessman member of the panel took it upon himself to write to all the manufacturers with whom the company had placed orders, instructing them to stop work on the orders and requesting refunds, asking them to allow any money that would still be owing to be paid in 18 monthly installments. In their decision, they then ordered the defendant to buy out his other two partners at a set price. The defendant was not pleased, saying that the payments ordered would bankrupt the company and alleging that the lawyer member of the panel was biased because, he wrote, one of the plaintiffs had been a client of the lawyer.

True conciliation means healing the relationship rather than ruling on its break-up. In some cases, the court would set out a framework according to which the parties would remain partners and continue doing business together.[281]

A 1953 case concerned a dispute amongst four partners who owned a store together, with two partners suing the other pair.[282] It showed how the court was prepared to set both the terms on which parties would do business together and the terms of dissolution. The panel ordered that the parties remain in business together for

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277 SC v DB and AJ, 1924, Canadian Jewish Congress Dcoumentation series ZC, Jewish Community Council of Montreal, (Vaad Hair) Box, file 6

278 M. D. v M. M., decision dated Feb. 18, 1925, CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 6, Jewish Court of Arbitration 1924-25

279 B v M, 1941, Box 2, file 15

280 letter to court, Dec. 4 1946, Box 2, file 26

281 G v. A, 1942, Box 2, file 74

282 B and W v G and R, 1953, Box 2, file 23

another three months, with profits split 40-60 between the two sets of partners, and that the pair getting 40% also be entitled to "one free day per week" in the store, an arrangement that they were ordered to maintain if they continued to stay in business. On the contingency that the partners wished to end the partnership after the three months, the court ordered that one side would pay the other a percentage of the value of the good will of the business, to be determined by an impartial appraiser.

Even when the partnership had to be ended the court could still structure the terms of an ongoing relationship. In a 1941 case,[283] the court set the terms according to which the plaintiff would buy out his partner, and then went on to order that their commercial space be partitioned so that the plaintiff could lease out one half of the space to his former partner, setting the amount of the rental payment and requiring the plaintiff to loan his former partner $500 for one year without interest.

The judges of the Mishpat HaSHalom were also willing to pierce the corporate veil. In a loan claim from 1940, the court had no difficulty ordering the respondent to repay $240 to a lender, even though the promissory notes and NSF cheque on which the claim was based were signed by the respondent's bankrupt company.[284]

Scholars of Canadian corporate law describe the introduction of the oppression remedy as a radical change in the law. A textbook on the law of corporations characterizes it as a "legislative revolution" of "almost unbelievable scope."[285] Other commentators call it a "dramatic" change,[286] a "revolutionary remedy" that created "shockwaves" so that "the practice of corporate law would never be the same."[287] Yet the changes created by this overwhelming radical revolution in corporate law simply allowed judges to do what the arbitrators of the Mishpat HaShalom had begun doing at least a half-century earlier. It seems implausible that they were the only arbitrators in Canada who ordained these kind of remedies. Historians who look only at the implementation of these remedies in legislation and Superior Court jurisprudence are missing a chapter in the story and exaggerating the innovative nature of legislative changes.

e) <u>conciliation and obligations</u>

In employment cases, the court similarly imposed obligations on the parties that a state court would have considered off limits. In the regular courts, the general rule is that an employer is always free to dismiss an employee. If a worker is fired without cause or contrary to his employment contract, the remedy is monetary damages and the court will not order a return to work.[288] During the years when the Mishpat

283 Z v L, 1941, Box 3, file 119, Various "Z" 1929-1960

284 B. v S., 1940, Box 2, file 18

285 Bruce Welling, Corporate Law in Canada, 2d ed., Butterworths (1991), p. 564

286 Brian Cheffins, above, p. 306

287 Sheila Block, "Corporate Matrimonial Law: an Unofficial History of the Oppression Remedy" (Torys LLP, 2000) at pp. 3-5

288 Pierre-Gabrielle Jobin and Nathalie Vezina, <u>Baudouin et Jobin: Les Obligations</u>, 6th ed., Les Ed. Yvon Blais, 2005, p. 860, para. 860. There are some exceptions, such as under collective labour agreements.

HaSHalom was in operation, Quebec courts were reluctant to specifically enforce obligations to do something, preferring to impose a fine for the refusal rather than compel performance.[289]

By way of contrast, the Mishpat HaShalom had no reluctance in ordering an employer to rehire an employee, even throwing a salary increase into the bargain. In a case from 1939, a delivery man had first brought suit in the state courts against the bakery he had worked for, claiming back-salary and other moneys owing. The bakery brought its own suit against him before the Mishpat HaShalom, claiming that the delivery man had left without notice, taking with him moneys he had collected from customers along with the customer list and route book and begun delivering bread for a rival bakery. The court determined that the bakery owned the bread route. It ordered the delivery man to give back the customer list and stop delivering to those customers. It required him to pay the bakery $135, being the difference between the customer payments the bakery said he had kept for himself when he quit working for them, and the amount of back salary for which he had sued the bakery in the civil courts. The delivery man was ordered to withdraw his civil lawsuit, each side to bear their own costs. And the decision also required the bakery to hire him as a driver, if he was willing, at a salary of $20 per week for a minimum of a year - $5 more per week than he had been receiving before he stopped working for them.[290]

The court imposed obligations "to do" in other circumstances. In a 1949 case in which a landlord sought to evict a tenant in order to occupy the premises for his own use, the eviction was granted, but the owner was required to live in the flat personally for period of at least one year.[291]

In the cases concerning business associations, employment relationships, landlord and tenant matters, andcommunity institutions, we have a paradox. Although the court's judgments were in theory enforceable through the courts of the state as arbitral agreements, they were ordering remedies that the state courts as a matter of law and policy would not enforce.

f) conciliation and labour negotiation

One of the Jewish Community Council's founding goals, likely modeled on the experience of the New York Kehilah, was to help achieve labour peace and resolve industrial disputes. The Council's constituting member organizations included labour unions: the Amalgamated Clothing Workers, the Baker's Union, and the International Ladies Garment Workers Union were all listed on its 1923 letterhead.[292] Louis Fitch, who acted as a lawyer for the Vaad in the 1920s,[293] was also counsel to the ILGWU.[294]

289 ib., pp. 32-34, para. 29; and pp. 859-62, paras. 859-61.

290 April 17, 1939 decision in B v B, 1939, box 2, file 10

291 B v R, 1949, Box 2, file 11

292 CJC Archives, Jewish Community Council of Montreal (Vaad Hair), file 4

293 Mlnute Book, Vaad Hair Finance and Budget Committee, February 1924 - March 1926, p. 17, Box 22

294 Evelyn Dumas, The Bitter Thirties in Québec, transl. by Arnold Bennett, Black Rose

Nonetheless, labour-management disputes were largely absent from the court's docket. In 1941 the Organization of the Hotel and Restaurant Employees Union, attempted to bring labour issues to the Mishpat HaSHalom, filing claims that an employer was not hiring union workers or was not paying an agreed-upon wage.[295] No documents from the cases survive, and the paucity of labour union cases after 1941 suggest that the attempts were not successful.

g) conciliation and separation

> *That the Jewish home is a home in the truest sense is a fact which no one will dispute. The family is knitted together by the strongest affections; its members show each other every due respect; and reverence for the elders is an inviolate law of the house.*
>
> - Mark Twain[296]

The Mishpat HaSHalom had no power to issue divorces; religious marriages could only be dissolved by a religious court, and jurisdiction to dissolve a marriage registered civilly could not be conferred on an arbitrator even if both spouses consented. Some of the matrimonial cases that came to the court were referred to rabbinical courts.

However, the Mishpat HaSHalom would make orders with respect to some of the incidences of marriage, such as spousal or child support and division of property. None of the surviving judgments deal with issues of custody and access, one of the most volatile issues in recent debate over the application of religious law, and in particular sharia law, in arbitral courts.[297]

One 1953 case concerned a cantor who was retiring from a synagogue and, in the same period, separating from his wife. The Congregation offered to pay him an annual pension of $1,800.00 (less any government old age benefits he might receive) on the condition that before the end of the year he and his wife went to arbitration to determine the financial support he would provide her, before either a Bet Din or Mishpat HaShalom.[298]

The Mishpat HaShalom handled a significant number of family law cases, but they were never as large a portion of its docket as was the case with the New York conciliation courts. They also accepted claims for *shadchanes*, the fees charged by marriage brokers on a successful match. Courts in England had held that marriage brokerage contracts were contrary to public policy and therefore unenforceable,[299]

Books, 1975, p. 62

295 Arbitration Court (Mishpat HaShalom) Case Record Book, Jan. 1941-Sept. 1943, Box 22

296 "Concerning the Jews", The Man That Corrupted Hadleyburg and Other Stories.

297 Lapidus, p. 63, describes the subject matter of the Mishpat HaSHalom cases as "labour problems, financial misunderstandings, and of course, divorce", but I have found no references to actual divorces in the surviving records.

298 Sept-Oct 1953 correspondence re Cantor S. M., "M" correspondence, file 111.

299 A. Feldman, "The London Beth-Din (The Jewish Court, or the Court of the Chief Rabbi)", 41 Juridical R. 158 (1929).

leaving it questionable whether Quebec courts would have allowed them. Although never large in number, they were a part of the Mishpat HaShalom docket.

5) Legal Positivism, the Mishpat HaShalom, and sharia courts

> *"...there are no positivists left in the philosophical community. The only practicing positivists are found in the backwards branches of the natural and social sciences, where the main occupation is still data hunting and gathering."*
> - Mario Bunge[300]

Other ethnic and religious courts followed the Mishpat HaSHalom. The Canadian Jewish Congress set up community courts after its revival in the 1930s. Their docket included a war crimes trial, an enquiry into whether the defendant had collaborated with the Nazis during the Second World War. Ismaili Muslims opened up Canadian Conciliation and Arbitration Boards in 1987, dealing with family law, wills and estates, commercial matters and other civil disputes.[301] Gladue diversion courts operate as offices of the criminal courts across Canada, sentencing aboriginal offenders according to native law principles,[302] while in Toronto the Giiwendin Anang Council attempts to resolve apprehensions of children by child welfare agencies in Talking Circles involving the family, the child welfare agency and three volunteer council members.[303]

There are many other examples. The one that attracted the most controversy in recent years was an attempt to establish a Muslim court in Ontario to resolve family law disputes according to sharia law. The project seemed ill-conceived; if there was consideration given to what aspects or school of sharia law would be applied, or how it would interact with the Charter and other aspects of Canadian law, those considerations received little publicity. The proposed sharia law courts became a flash point for controversy, in part because the proposal was made without real context, without any of the accommodations to modernity and local custom that sharia law had made in countries where Islam had deeper roots.[304]

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300 Mario Bunge, "positivism", Dictionary of Philosophy, Prometheus Books, 1999.

301 Genevieve Chornenki and Christine Hart, Bypass Court: A Dispute Resolution Handbook, 4th ed., LexisNexis, 2011, pp. 274-75; relevant rules of the court are excerpted as Appendix 4, pp. 333ff.

302 established pursuant to R. v. Gladue, [1999] 1 SCR 688: see Brent Knazan, "Sentencing Aboriginal Offenders in a Large City - The Toronto Gladue (Aboriginal Persons) Court", paper presented to the National Judicial Institute Aboriginal Law Seminar, January 23-25, 2003, Calgary, reproduced in Experiences in the Gladue (Aboriginal Persons) Court: Innovations in Implementing *R. v. Gladue*, Law Society of Upper Canada, June 12, 2003; and Craig Proulx, "Blending Justice: Interlegality and the Incorporation of Aboriginal Justice into the Formal Canadian Justice System", Journal of Legal Pluralism 2005 nr. 51 p. 79

303 Giiwendin Anang Council: Aboriginal Alternative Dispute Resolution, pamphlet distributed by Aboriginal Legal Services of Toronto, undated c. 2014; see also information at www.aboriginallegal.ca concerning its Child Welfare Community Council.

304 On accommodations in Africa, see J.N.D. Anderson, The Adaptation of Muslim Law in Sub-Saharan Africa, African Law: Adaptation and Development, Hilda and Leo Kuper, eds., U of California Press, 1965, p. 149; in Israel, see Aharon Layish, Women and Islamic Law in a non-

A sharia court differs significantly from the Mishpat HaShalom court, most importantly because one would apply religious law and the other did not. There is, nonetheless, a significant over-lap in the reasons why litigants go to the two kinds of courts. Fear of prejudice and wanting a decision-maker who is familiar with one's language and culture;[305] and remedies, such as in the case of sharia courts a religious divorce,[306] that are not available through the regular courts, are some of the reasons why both courts attracted litigants.

In the Ontario debate over sharia courts, opponents expressed great concern about the likelihood that religious-based legal decisions would be enforced through the courts of the province, while other observers opined that the debate was overblown because there were no actual Islamic arbitral courts and religious officials were making decisions that had only moral force within their communities. Advocates of bringing sharia law inside the tent of arbitration argued that the alternative was backroom Muslim mediation in which women would be cowed by the moral authority of clerics into settling disputes in ways that would not be amenable to judicial review by the courts. Faisal Kutty, a counsel for one of the groups advocating for Sharia arbitration, argued that bringing sharia courts under the umbrella of the Canadian legal system would help Islamic law become more in tune with Canadian values, while excluding them leads to "Back-door" arbitration, making consensual dispute resolution sound vaguely like a back-alley abortion.[307] People on both sides of the debate were adopting a crude kind of legal positivism: law is what can be enforced through a court order, and everything else is either illegitimate or irrelevant.

The example of the Mishpat HaShalom is a reminder that this is not the reality of law, and the boundaries between law and moral suasion are not easily fixed. It became established early in the court's history that once the parties signed the arbitration agreement, a decision of the Mishpat HaShalom could be enforced through the collections mechanisms of the civil courts. After this had been tested a few times, the court left aside other measures with which it had experimented to encourage compliance with its decisions: formalities such as getting the parties to sign their endorsement at the bottom of the final judgment or having the judgment notarized, and the penalty of forfeiting a monetary deposit.

Because the Code of Civil Procedure specified that arbitral tribunals were not bound by the provisions of the Civil Code, litigants could pursue claims in the arbitral

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Islamic State; and Kayam. Adoption of European law alongside sharia in the Muslim Middle East is discussed in L. Clarke, "Asking Questions About Sharia: Lessons from Ontario", Debating Sharia: Islam, Gender Politics, and Family Law Arbitration, Korteweig and Selby, eds., U of T Press 2012; and Anver M. Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence and Multicultural Accommodation", Debating Sharia, ibid., p. 192

305 Julie MacFarlane, "Practising an 'Islamic Imagination': Islamic Divorce in North America", Debating Sharia: Islam, Gender Politics, and Family Law Arbitration, Korteweig and Selby, eds., U of T Press 2012, p. 35

306 Christoper Cutting, "Faith-Based Arbitration or Religious Divorce: What Was the Issue?", Debating Sharia..., above, p. 66

307 , Faisal Kutty, " 'Sharia' Courts in Canada: A delayed opportunity for the Indigenization of Islamic Legal Rulings", Debating Sharia..., above, p. 123

court that would not be entertained in the courts of the province. Lawsuits for a marriage broker's fee or a shareholder's buy-out resulted in dollar verdicts that could be easily enforced through the normal mechanisms of garnishment and seizure, even though the verdict itself was not one that the courts of the province would or could award.

Other judgments made for more problematic enforcement. Orders that a delivery man be rehired, that a benefits society hold a referendum, that a landlord remain on the rented premises for a year after evicting a tenant for his own use, or that a businessman must lease space to his former partner, are not just orders that a Superior Court judge would not make. They are orders that are outside the Superior Court's normal enforcement mechanisms and difficult to enforce through compulsion.

The court was often lax about complying with the minimal steps needed to render the judgment enforceable. The standard form arbitration contract had blank spaces for all the information required by the Code of Civil Procedure, such as the names of the judges, the date by which they had to render their judgment and the nature of the dispute. These spaces are often blank on the signed arbitration agreements in the court's files.

These things mean that enforceability by the courts of the province, although important to the enforcement of the Mishpat HaShalom's decisions, was not the sole basis of its legitimacy. People did not always accept the jurisdiction of the court, and some who did later chose not to accept its decision. But in the cases where the decisions were followed, other factors, such as their desire to bring the dispute to a quick end, some measure of respect for the Jewish Community Council, and all the reasons given above for why people chose to come to the court, also played a role. Litigants respected decisions of the court even when they were not strictly enforceable in the courts of law.

The recent dispute over sharia courts flared when there was talk of enforcing their decisions through the courts of the province, and died down once legislation was passed to prohibit it. This is an oversight. As long as Muslims need religious divorces, there will be clerics making decisions about matrimonial law matters according to sharia law, for good or ill.

6) Conclusions

It was easy and tempting for observers to dismiss the Jewish courts as if they were relics of a by-gone age. The image can be romantic, as when they are compared to the Great Sanhedrin of the first century B.C.,[308] or disparaging, portraying one as a relic of the medieval ghetto in the midst of New York skyscrapers.[309] It is truer to say that they were innovations, growing out of proposals for court reform, attempts to create a more efficient and accessible court system. The founders of these courts

308 "Conciliation Court, Revival of Ancient Sanhedrin, Metes Out Justice to Rich and Poor Alike", Jewish Daily Bulletin, Jan. 19, 1934, p. 8.

309 Popkin, above

wanted them to serve as models[310] and expressed disappointment at how little attention was paid to their example by gentile jurists.[311]

The Jewish Community Council's Mishpat HaShalom followed the pattern of the New York arbitral courts: it took jurisdiction pursuant to an arbitration contract, it heard and decided cases quickly with little formality and no need for sworn testimony, and it used three man panels consisting of a rabbi, a lawyer and a layman. Important differences were that hearings were held in private, in an office or a study rather than in open court, and that litigants were allowed to have lawyers. Where the docket of the New York courts had a large proportion of family law matters, the Montreal court's largest group of customers were business partners dealing with corporate and partnership disputes.

The court shows how small arbitral tribunals can be a laboratory for legal innovation. Some innovations went no further than the individual case: no-one has adopted tapering limitations periods. In other matters the practices of the Montreal court are a missing link in the history of legal doctrine. The corporate oppression remedy existed in arbitral practice long before it became available to Superior Court justices. Historians of the oppression remedy have misrepresented it as a radical innovation because they restrict the scope of their study to the doctrine of the Civil Code and common law.

Legal scholars have begun to complain about the "missing trial", about how the number of trials and final legal decisions are decreasing over the years, casualties of the growing cost of lawyers and the policies of judges to discourage litigants from taking civil cases to their final conclusion. When these cases become sidetracked to private arbitration they fall into a black hole, the final judgments invisible to scholars and the common law deprived of valuable precedent decisions. The records of the Mishpat HaShalom offer insight into one corner of that hidden world.

310 Louis Richman, "The Court Without A Gavel", above

311 B. H. Hartogensis, "A Successful Community Court", above