

**LEGISLATING TOLERANCE:
ARTICLE 976 OF THE CIVIL CODE OF
QUEBEC AND ITS APPLICATION TO MIXED-
INCOME AND MIXED-USE CITY
REDEVELOPMENT PROJECTS**

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I. INTRODUCTION

As global urbanization trends show no sign of slowing down and the urban cores of cities become increasingly dense,¹ their resulting urban development and redevelopment initiatives increasingly turn to creative city regeneration strategies that seek to rebrand cities as havens of mixed and dynamic cultural diversity in order to achieve economic rejuvenation and creative global-city status.² In this context, the tolerance of culture, cultural practices,³ and cultural differences and diversities are

1. See, e.g., U.N. GAOR, 56th Sess., 90th plen. mtg., U.N. Doc. A/56/PV.90 (Dec. 21, 2001) (discussing increased “urbanization trends in developing countries and related challenges in shelter provisions”); U.N. GAOR, 29th Sess., 2321st plen. mtg., U.N. Doc. A/29/PV.2321 (Dec. 16, 1974) (establishing the U.N. Habitat program). To limit the scope of this Article, I will focus on the urban cores of major cities.

2. See Ute Lehrer & Andrea Winkler, *Public or Private? The Pope Squat and Housing Struggles in Toronto*, 33 SOC. JUST. 142, 144 (2006); see also CARL GRODACH & DANIEL SILVER, *THE POLITICS OF URBAN CULTURAL POLICY: GLOBAL PERSPECTIVES 1–2* (Carl Grodach & Daniel Silver eds., 2013) (“[O]ver the last three decades we have witnessed the rise of a specifically *urban* form of cultural policy This has been a global phenomenon, taking place in European nations with a comparatively strong national cultural policy apparatus, countries such as the U.S. that have historically maintained weak and ad hoc federal-level cultural policy efforts, and in rapidly developing East Asian countries such as Singapore and Korea.”) (emphasis in original). Oftentimes these types of strategies are identified as a neoliberalization of city planning and regeneration strategies—notably represented in some cities more than others. For Canadian examples, see Martine August, *Social Mix and Canadian Public Housing Redevelopment: Experiences in Toronto*, 17 CAN. J. URB. RES. (SUPPLEMENT) 82, 93 (2008) (discussing urban redevelopment in Toronto, and Ontario generally). *But see* Damaris Rose, *Discourses and Experiences of Social Mix in Gentrifying Neighbourhoods: A Montreal Case Study*, 13 CAN. J. URB. RES. 278, 288–89 (2004) (suggesting that the municipal policies and regeneration initiatives of Montreal have less of a neoliberal tendency). However, recent development around the Place des Arts district and St. Catherine’s East, as well as more recently the St. Henri neighborhood, may indicate that this is changing. See, e.g., Michelle Lalonde, *Tension Boils Over in St Henri*, MONTREAL GAZETTE, (May 27, 2015, 11:35 PM), <http://montrealgazette.com/news/local-news/tension-boils-over-in-st-henri>; Editorial, *No Sympathy for Anti-Gentrification Thugs* (May 30, 2016, 6:03 PM), <http://montrealgazette.com/opinion/editorials/editorial-no-sympathy-for-anti-gentrification-thugs>; see also Anne Becker & Markus-Michael Müller, *The Securitization of Urban Space and the ‘Rescue’ of Downtown Mexico City: Vision and Practice*, 40 LATIN AM. PERSP. 77, 78–79 (2013) (“Whereas the renaissance of historic downtown areas and their ‘protection’ through new forms of urban policing can be characterized as global phenomena, the form in which they unfold in a particular city is determined by the institutional, political, spatial, social, and economic characteristics of the particular contexts.”).

3. It is first important to clarify that the definition of “culture” I am using is

increasingly pushed to the forefront of neighborhood politics, relations, and planning.⁴ This is especially the case as these redevelopment strategies in the dense urban cores of many large cities move progressively to introduce housing developments characterized by the close-quarters of mixed-use and mixed-income zoning, including those in condominium (condo) high-rises within the urban core of the city.⁵

Where nuisances are bound to arise in the small social spaces of the city that often house competing interests, backgrounds, and objectives,⁶ and within the “lawscapes” where

expansive and flexible, but primarily adheres to the definition that appears in Economic & Social Council Res. 25, Annex I, Universal Declaration on Cultural Diversity (Nov. 2, 2001) (“[T]he set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”).

4. See Preamble, *European Charter for the Safeguarding of Human Rights in the City*, UCLG COMMITTEE ON SOC. INCLUSION, PARTICIPATORY DEMOCRACY AND HUM. RTS., [hereinafter *European City Charter*] <http://www.uclg-cisdp.org/en/right-to-the-city/european-charter/preamble> (last visited Jan. 4, 2017):

The city today is home to all kinds of assemblies and, above all, a space for personal development. At the same time, it is the locus for contradictions, conflict and danger: The urban space with its anonymity on the one hand is a source of all types of discrimination rooted in unemployment, poverty, and disdain for cultural differences, while simultaneously municipal and social practices are appearing, which more and more build on the principle of solidarity.

[La ville] est aujourd'hui le lieu de toutes les rencontres donc de tous les possibles. Elle est aussi le champ de toutes les contradictions donc de tous les périls: dans l'espace urbain aux frontières incertaines, s'inscrivent les discriminations ancrées dans le chômage, la pauvreté, le mépris des différences culturelles, alors que, en même temps, s'y ébauchent, s'y multiplient de pratiques civiques et sociales de solidarité.

5. For an orienting discussion of this notion, see Loretta Lees et al., *Introduction: Gentrification, Social Mix/ing and Mixed Communities*, in *MIXED COMMUNITIES: GENTRIFICATION BY STEALTH?* 1, 7–8 (Gary Bridge, Tim Butler & Loretta Lees eds., 2012) [hereinafter *MIXED COMMUNITIES*] (“To scholars critical of gentrification, ‘social mix’ is nothing more than rhetoric that obfuscates a gentrification strategy whereby the middle class are invited into socially and economically challenged neighbourhoods to ‘save’ them from permanent decline through consumption practices that boost the local tax base [M]ixed-income developments are seen as a ‘neoliberal approach to the problems of the urban poor that seeks to recapture prime urban real estate despite the resultant displacement of many of those households that the strategy is purported to help.”). See also Rose, *supra* note 2 (“Arguably, the focus on increasing the tenure mix in the inner city does amount to what [some scholars see] as municipal promotion of gentrification. However, upwardly mobile working-class households were also targeted, promoting the opportunity for them to become homeowners without having to move to the suburbs, including the option of staying in their neighborhood of origin.”).

6. For a description of a “small social space,” see Sally Engle Merry,

law and the city interact,⁷ it is instructive to study the manners in which these nuisances are treated by the legal complexes of cities in order to look for the relational treatment received by diverse iterations of culture within the city space.⁸ Shauna Van Praagh also suggests that nuisance law provides a useful framework for examining neighborhood relations and the disputes that arise within close, shared spaces where distinct narratives, cultures, and ways of life “are forced into explicit coexistence and mutual acknowledgment.”⁹ Following this vein of thought, and drawing on the mixed-jurisdictional context of Quebec, Canada, I suggest that article 976 of the Civil Code of Quebec (CCQ) uniquely and distinctly exhibits an explicit acknowledgment of tolerance that is applicable to mixed-use and mixed-income neighborhoods.¹⁰ Beyond a useful private-law mechanism for establishing greater tolerance in dealing with the neighborhood nuisances that inevitably arise within the close-quarters of the dense urban cores of cities, this sort of clear language recognizes the give-and-take balance and mutual respect that is needed within the city space. This is especially

Anthropology and International Law, 35 ANN. REV. ANTHROPOLOGY 99, 106 (2006) (“Anthropology can make significant contributions to the understanding and analysis of international law. Its focus on the meanings and practices of small social spaces, whether in villages or the corridors of international tribunals, enables a far deeper understanding of how the various facets of international law actually work.”).

7. *See generally* ANDREAS PHILIPPOPOULOS-MIHALOPOULOS, *LAW AND THE CITY* (2007) (“The interrelation between law and the city, the *lawscape* as it will be defined later in this introduction, is revealed here in its singular multiplicity. . . . This is not simply an exploration of the relation between law and the city, but the flourishing of law’s spatiality and urban legal locality, the unfolding of the juridical urban body and the city’s legal dreams, the ‘urban law’ and the ‘juridical polis’ in one encompassing gesture.”) (emphasis in original).

8. *See* Nikolas Rose & Mariana Valverde, *Governed by Law?*, 7 SOC. & LEGAL STUD. 541, 542 (1998) (defining “legal complexes” as “the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms, and forms of judgement”); *see also* LAAM HAE, *THE GENTRIFICATION OF NIGHTLIFE AND THE RIGHT TO THE CITY: REGULATING SPACES OF SOCIAL DANCING IN NEW YORK* 7 (2012) (“In these chapters I investigate how such legal complexes have been unfolded in relation to the increasing efforts on the part of the city to neoliberalize and post-industrialize the urban economy, attract the ‘creative class,’ gentrify formerly derelict urban spaces and market cities as vibrant subcultural centers with a flourishing nightlife.”).

9. Shauna Van Praagh, *View from the Succah: Religion and Neighbourly Relations*, in *LAW AND RELIGIOUS PLURALISM IN CANADA* 21, 25 (Richard J. Moon ed., 2008) (“Nuisance does not demand a clear resolution of these differing perceptions. Indeed, it demands demonstrated willingness to live with considerable conflict. Only when one neighbour—regardless of motivation or precaution—surpasses the limit of ‘reasonable’ patience can the complaining neighbour effect change.”).

10. Civil Code of Québec, S.Q. 1991, c 64, art 976 (Can.).

true where many condo developments will be shaped and zoned as mixed-use and mixed-income developments that incorporate market-priced private ownership in order to offset the costs of simultaneously providing social housing for displaced/replaced socioeconomically marginalized communities. As Canada's Ontario Court of Appeal noted in *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, "[T]he important principles of tolerance and accommodation necessary to sustain harmony among neighbours in an increasingly dense and complex society require a balancing of the interests of both parties."¹¹ Housed within article 976 is a clear, active reference to the principles of tolerance that are necessary for a sustainable cultural coexistence in the city.¹²

I first examine the increasing need for tolerance required for the cultural sustainability of city redevelopment projects that seek to establish communities of a mixed-use or mixed-income variety. Next, some difficulties that arise in terms of inequality, clashing differences, and a lack of inclusion felt by those within these redeveloped spaces in the urban cores of our cities are discussed with reference to Boaventura de Sousa Santos's notion of cosmopolitan legal struggles and the subaltern cosmopolitan contact zones generated within the small social spaces of mixed-use and mixed-income developments in the urban core.¹³ I then

11. 106 O.R. 3d 81, para 109 (Can. Ont. App.), *rev'd on other grounds*, [2013] 1 S.C.R. 594.

12. See Civil Code of Québec, S.Q. 1991, c 64, art 976 (Can.); Economic & Social Council Res. WS-5, Preamble, Declaration of Principles on Tolerance, U.N. Doc. SHS-96/WS-5 (Nov. 16, 1995) [hereinafter Declaration of Principles on Tolerance], http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/124-129.HTM.

13. See BOAVENTURA DE SOUSA SANTOS, *EPISTEMOLOGIES OF THE SOUTH: JUSTICE AGAINST EPISTEMICIDE* 227 (2014) ("Ecologies of knowledge and intercultural translation can only proceed and flourish in subaltern cosmopolitan contact zones, that is, decolonial contact zones. The impulse for the creation of such zones comes from the social movements and organizations that, in a context of counterhegemonic globalization, engage in intermovement politics, that is, in political articulation across knowledges, practices, and agents with the purpose of strengthening the struggles against capitalism, colonialism, and patriarchy."). I also situate this Article within the growing discussion about inequality in today's cities. See generally DAVID HARVEY, *SOCIAL JUSTICE AND THE CITY*, (Univ. of Ga. Press rev. ed. 2009); SASKIA SASSEN, *CITIES IN A WORLD ECONOMY* (4th ed. 2011); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001); Sharon Zukin, *Cultural Strategies of Economic Development and the Hegemony of Vision*, in *THE URBANIZATION OF INJUSTICE* 223 (Andy Merrifield & Erik Swyngedouw eds., 1997); Saskia Sassen, *The Global City: Strategic Site/New Frontier*, in *DEMOCRACY, CITIZENSHIP AND THE GLOBAL CITY* 48 (Engin F. Isin ed., 2000); *European City Charter*, *supra* note 4.

undertake a discussion of article 976 of the CCQ, where a form of legislated tolerance can be observed, before I examine the differences in the treatment of neighborhood nuisance under article 976 in comparison to its treatment elsewhere. Finally, the discussion culminates by drawing the lessons learned from article 976 back into the discussion of Santos's cosmopolitan legality, the drumbeat of city redevelopment projects in the urban cores of our cities, and the potential of harnessing hegemonic legal tools in a non-hegemonic or counter-hegemonic manner, in order to work towards more tolerant and culturally sustainable cities.¹⁴

II. SITUATING THE NEED FOR TOLERANCE: REDEVELOPMENT AND MIXED SPACES

It seems today that nearly every city and neighborhood is in the throes of some sort of reinvention program, whether framed as redevelopment, rejuvenation, regeneration, or revitalization; or whether it is simply seen as the gentrification of inner-city neighborhoods,¹⁵ and the recolonization, rediscovery, or reconquest of the urban space of the city's inner core.¹⁶ In designing redevelopment strategies, it is common for today's city planners to favor a mixed-community model.¹⁷ This may take the

14. See BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 467 (2d ed. 2002); see also SANTOS, *supra* note 13, at 125–26 (describing a non-hegemonic use of hegemonic legal tools as one of the conditions of a subaltern cosmopolitan legality, which he views as the countermovement to the “return of the colonial and the return of the colonizer”).

15. See NICHOLAS BLOMLEY, UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY 92 (2004) (“For those resisting gentrification, a very different reading of the historical geographies of property rights emerges. The rights of low-income residents to remain within the neighborhood, it is argued, rely upon the simultaneous affirmation of a localized collective entitlement to a space . . . and the moral condemnation of a predatory, profit-driven property regime. Gentrification threatens not only displacement, but also dispossession.”); August, *supra* note 2 (“Justified by appeals to social mix, [public housing redevelopment] programs have been accused of promoting gentrification by removing public housing concentrations in hot real estate markets.”).

16. See Lehrer & Winkler, *supra* note 2 (“Planners and policymakers rediscovered the inner city as a site for good urban and regional planning, fighting sprawl, and contributing to the environmental protection of the city's outskirts, while foregrounding the positive side of city life, particularly its cultural and social aspects.”); Becker & Müller, *supra* note 2, at 79.

17. Mariana Valverde, *Taking 'Land Use' Seriously: Toward an Ontology of Municipal Law*, 9 L. TEXT CULTURE 34, 38 (2005); see JOËL THIBERT, INCLUSION AND SOCIAL HOUSING PRACTICE IN CANADIAN CITIES: FOLLOWING THE PATH FROM GOOD INTENTIONS TO SUSTAINABLE PROJECT 1 (Canadian Policy Research Networks, 2007), www.cprn.org/download.cfm?doc=1781&file=48837_EN.pdf&format=pdf&l=

form of: (a) mixed-use, with condos perched above businesses and live-work spaces abounding, which departs from prior, rigid separations of land use;¹⁸ (b) mixed-income, or what is often termed “social mix,” communities,¹⁹ which capitalizes on an influx of demand for vibrant downtown compact living spaces in the form of condos, while acknowledging the need for increased or renovated rent-geared-to-income housing in the inner urban core;²⁰ or (c) the combination of both mixed-use and mixed-income within the same redevelopment project. Where the influx in market demand for these types of living spaces contributes to their proliferation, the increase is often attributed to a number of factors which, for present purposes, can be loosely boiled down to general shifts in both housing preferences and urban planning strategies.²¹

en; Martine August & Alan Walks, *From Social Mix to Political Marginalisation? The Redevelopment of Toronto's Public Housing and the Dilution of Tenant Organisational Power*, in MIXED COMMUNITIES, *supra* note 5, at 274–76; Rose, *supra* note 2.

18. See Valverde, *supra* note 17 (“For example, it is now common for planners to support mixed-use developments . . . since the strict separation of land uses that gave us the dreary shopless and publess residential streets of the 1950s and 1960s is now unfashionable.”).

19. See Lees et al., *supra* note 5, at 1 (“In recent years there has been a resurgence of interest among urban policy makers, planners, and urban scholars in the concept of ‘mixed communities’ or ‘social mix’ in cities, particularly at the neighbourhood level.”); THIBERT, *supra* note 17, at 7–8 (“I take a similar view and define social mixing . . . as any mix of social housing units (whether in the form of public housing, co-operatives or other forms of non-profit housing) and any other unit types (whether condos or townhouses, for rent or for sale, affordable or not), whatever the ratio.”).

20. See Damaris Rose & Paul Villeneuve, *Life Stages, Living Arrangements, and Lifestyles*, in CANADIAN CITIES IN TRANSITION: LOCAL THROUGH GLOBAL PERSPECTIVES 138, 146 (Trudi Bunting & Pierre Filion eds., 3d ed. 2006); August, *supra* note 2, at 92 (“It is rarely argued that social mix is needed in homogenous middle- or high-income communities . . . This is particularly true in Toronto, where specific commitment to social mix is most evident in redevelopments planned for downtown areas inhabited by poor or marginalized communities . . .”).

21. See BLOMLEY, *supra* note 15, at 31 (“Urban housing markets have become important sites for neoliberalization, as witnessed by the elimination of rent controls, state withdrawal from housing provision, and the facilitation of speculative investment in inner-city sites.”); see also Ute Lehrer, *Re-Placing Canadian Cities: The Challenge of Landscapes of ‘Desire’ and ‘Despair,’* in CANADIAN CITIES IN TRANSITION: LOCAL THROUGH GLOBAL PERSPECTIVES 438, 445–48 (Trudi Bunting & Pierre Filion eds., 3d ed. 2006) (“Continuous pressures in the housing market as well as speculative activities in the real estate business are the driving forces turning former industrial and ‘underused’ land into high-density neighbourhoods.”); August & Walks, *supra* note 17, at 276–77 (“It was in this context of neoliberal restructuring and declining support for social housing that the idea of social mix re-emerged and wedged itself into mainstream principles of ‘good planning’ in Canada.”); Rose &

To briefly canvas these shifts in preference, the rates of those seeking to live alone in a downtown, urban-condo space have increased significantly for a variety of potential reasons, including: (1) a growing demand for, and availability of, employment in professional and managerial sectors, as well as within information and technology industries; (2) a trend towards marriage at a later age, or the decision not to marry, and the delaying or forgoing of childbirth; (3) an increase in dual-career partnerships involving careers that do not leave much time to care for a large living space; (4) a higher prioritization of leisure, entertainment, and the “urban experience/lifestyle”;²² and (5) a

Villeneuve, *supra* note 20 (“Such moves were made possible as private rental apartment buildings became an increasingly common feature of Canadian inner-city landscapes in the 1960s and 1970s. At the same time, increased life expectancy led to growing numbers of elderly widows, who generally continued to live on their own.”).

22. For this element in particular, see STEVEN MILES & MALCOLM MILES, *CONSUMING CITIES* 64–65 (2004) (“In city after city . . . the growth of cultural industries or insertion of flagship cultural institutions is seen by civic authorities and businesses alike as a solution to the post-industrial condition. To this there are at least two responses: first, to ask how evenly the benefits are distributed; and secondly, to ask whether there are solutions . . . at all . . . Besides, the dominant images of city marketing are highly selective, tending to reinforce rather than challenge structures of power and to represent a city for an audience of . . . aspirational consumers more interested in status and leisure.”); ERNST & YOUNG, *CREATING GROWTH: MEASURING CULTURAL AND CREATIVE MARKETS IN THE EU* 7 (2014), <https://www.directors.uk.com/news/creating-growth-measuring-cultural-and-creative-markets-in-the-eu> (follow “You can read the full report here” hyperlink, near the bottom of the webpage) (“A growing body of evidence shows that the cultural and creative industries (CCIs) are sources of growth and jobs, benefitting local communities, regions and states . . . CCIs have impacts that go far beyond leisure, entertainment, jobs or economic growth. They also provide invaluable social cement; they contribute to the feeling of belonging to a society . . .”). See also RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* 165–89 (2002) [hereinafter FLORIDA, *RISE*] (“On many fronts, the Creative Class lifestyle comes down to a passionate quest for experience. The ideal, as a number of my subjects succinctly put it, is to ‘live the life’—a creative life packed full of intense, high-quality, multidimensional experiences . . . They like indigenous street-level culture—a teeming blend of cafes, sidewalk musicians, and small galleries and bistros, where it is hard to draw the line between participant and observer, or between creativity and its creators.”); RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS* 50 (2005) [hereinafter FLORIDA, *CITIES*] (“As it turns out, amenities and the environment have proven to be powerful attractors of creative workers. In turn, they have aided the development of high-technology industries and regions.”). For an example of an attempt to capitalize on leisure interests within the city redesign strategies of a major Canadian city, see AUTHENTICITY, *CREATIVE CITY PLANNING FRAMEWORK—A SUPPORTING DOCUMENT TO THE AGENDA FOR PROSPERITY: PROSPECTUS FOR A GREAT CITY* (2008); CITY OF TORONTO: CULTURE DIV., *CULTURE PLAN FOR THE CREATIVE CITY* (2003); STRATEGIES FOR A CREATIVE CITY PROJECT, *STRATEGIES FOR A CREATIVE CITY: IMAGINE A TORONTO* . . . (2006), <http://web.net/~imagineatoronto/home.htm> (follow

gradual transition within the baby-boom generation into retirement and the divestiture of large suburban living spaces to more compact, central living spaces with easily accessible amenities and leisure opportunities.²³ The type of housing now commonly sought out can be observed in the condo boom in many of Canada's largest cities, and reflects these shifts in preferences as well as the market-driven private supply response by developers to the increasing demand for particular forms of housing.²⁴

Operating in tandem with this demographic shift towards the demand for a particular kind of housing by those who have the requisite purchasing power—and the resulting private-market response of the entrepreneurialism of urban-renewal projects—is a market-oriented focus in urban-planning governance that restructures the space of the inner core of cities through culture-focused redesign, planning, real estate, rezoning, and housing strategies.²⁵ As these planning and redesign

“Full Report (PDF 1.6MB)” hyperlink).

23. See Rose & Villeneuve, *supra* note 20; see also Larry S. Bourne & Damaris Rose, *The Changing Face of Canada: The Uneven Geographies of Population and Social Change*, 45 CAN. GEOGRAPHER 105, 108–09 (2001) (“Specifically, four transformations are rippling through the country’s social fabric and urban landscapes: slow growth and the demographic transition; modifications to family forms and living arrangements; increasing ethnocultural diversity; and the shifting relationships among households, labour markets and the welfare state.”).

24. See Ute Lehrer et al., *Reurbanization in Toronto: Condominium Boom and Social Housing Revitalization*, 46 DISP-PLANNING REV. 81, 84 (2012), https://www.researchgate.net/publication/261631438_Reurbanization_in_Toronto_Condominium_boom_and_social_housing_revitalization (“Two waves of condominium development happened in Toronto: the first one started in the 1970s and lasted for about ten years, the second one started in the late 1990s and is still ongoing.”); Lehrer, *supra* note 21 (“While the increase of population, particularly its concentration in the downtown core, is helping to alleviate some of the pressures on the housing market, the condo boom has also created new fragmentations. Because of their highly speculative nature, the condo towers are geared toward certain clientele: singles, or couples without children.”).

25. See, e.g., August, *supra* note 2 (citations omitted) (“The largest housing operator in [Ontario] (with a portfolio of over 58,000 units) is the Toronto Community Housing Corporation (TCHC), which owes its status as ‘most entrepreneurial’ to its sizeable downtown landholdings which have enabled it to ‘sell off part of its portfolio to fund new development, rent out space to commercial tenants, and transfer some of its properties to homeownership-based units.’”); see also Becker & Müller, *supra* note 2 (“The resulting ‘urbanization of neoliberalism’ . . . largely driven by increasingly transnationalized political (and economic) elites and their objective of (re)igniting market-led urban growth and development . . . has contributed to the rise of ‘entrepreneurial cities’ . . . whose urban policies center on the (re)commodification of urban space through investment in real estate (re)development.”); *but see* Rose, *supra* note 2 (arguing that Montreal is unique among Canadian cities in its

strategies have taken hold, Canadian cities (such as Toronto, Vancouver, Montreal, Ottawa, and Halifax) have latched onto Richard Florida's vision of the creative city in seeking international status as leaders in culture and creativity,²⁶ as laid out in a number of his popular publications like *The Rise of the Creative Class*.²⁷ This strategy, and the desire to attract those individuals deemed the "creative class,"²⁸ has led city planners to focus on mixed-use, compact, downtown living spaces characterized by "diversity,"²⁹ or at least the idea of diversity

comparative escape from neoliberal influences on both its municipal policies as well as its regeneration initiatives).

26. See August, *supra* note 2, at 90 ("Since the 2002 publication of Richard Florida's *The Rise of the Creative Class*, the principles of his new conventional planning wisdom have also been promoted as an economic development strategy for cities, assuming that a city's future depends on its ability to attract 'creative' professionals to bestow a competitive economic edge upon places that cater to them."). Toronto is a good example of this, and, interestingly, is the city Richard Florida now calls home. See, e.g., AUTHENTICITY, *supra* note 22; see also CITY OF MONTREAL, ACTION PLAN 2007–2017; MONTREAL, CULTURAL METROPOLIS (2007); CITY OF OTTAWA, A RENEWED ACTION PLAN FOR ARTS, HERITAGE AND CULTURE IN OTTAWA (2013–2018) (2013); CITY OF VANCOUVER: CREATIVE CITY TASK FORCE, CULTURE PLAN FOR VANCOUVER 2008–2018 (2008); HALIFAX REG'L MUNICIPALITY, CULTURAL PLAN DRAFT #3 (2006); CITY OF OTTAWA, OTTAWA 20/20 ARTS AND HERITAGE PLAN (2003).

27. See FLORIDA, RISE *supra* note 22; FLORIDA, CITIES *supra* note 22.

28. Ute Lehrer, *Urban Development and the Creative Class in a Neoliberal Age: Two Case Studies in Toronto*, in NEOLIBERAL URBANISM AND ITS CONTESTATIONS: CROSS THEORETICAL BOUNDARIES 99, 102 (Jenny Künkel & Margit Mayer eds., 2012) ("The Official Plan emphasizes the creation of new cultural and educational facilities and well-designed public spaces as well as new forms of housing that meet the expectations of the so-called creative class."); Lehrer & Winkler, *supra* note 2 ("This strategy partly involves repopulating the inner city with people from the 'creative class,' as well as with young professionals, by supporting the building boom of condominium towers and arts districts in the downtown core") (citations omitted); see Rose, *supra* note 2 (citations omitted) ("[S]ince the image of the 'liveable city' has become a key aspect of a city's ability to compete in a globalized, knowledge-based economy . . . post-industrial cities have a growing interest in marketing themselves as being built on a foundation of 'inclusive' neighbourhoods capable of harmoniously supporting a blend of incomes, cultures, age groups and 'lifestyles.'").

29. See, e.g., FLORIDA, RISE *supra* note 22, at 304 ("In traveling to cities for my speaking engagements, I have come up with a handy metric to distinguish those cities that are part of the Creative Age from those that are not. If city leaders tell me to wear whatever I want, take me to a casually contemporary café or restaurant for dinner, and most important [sic] encourage me to talk openly about the diversity and gays, I am confident their city will be able to attract the Creative Class."); CITY OF TORONTO: CULTURE DIV., *supra* note 22; see also August, *supra* note 2, at 90 ("According to Florida, the creative class is drawn to downtown living environments with mixed uses, compact form, a diverse population, and a vibrant bohemian street life."); THIBERT, *supra* note 17, at 6 (citations omitted) ("Seeing as social mixing is usually proposed as a solution to 'segregation' and 'exclusion' and as a means of achieving 'diversity,' it is important to clarify the meanings of these various

without serious regard for the realities of life in close-quarters intermeshed with incongruent life/work/cultural/socioeconomic patterns.³⁰ While the creative-city literature may reify buzz words such as “diversity” and “tolerance”—even rating the degree of creative-city success according to a tolerance index³¹—critics suggest that it is really merely the *image* of these notions that is desired, rather than meaningful neighborhood inclusivity and equal exchanges.³²

Turning back to mixed-community-redevelopment models, while mixed-income and mixed-use development may certainly hold positive attributes,³³ urban theorists, such as Nicholas Blomley, caution that “[s]ocial mix’ or ‘social balance’ has become a commonplace in neoliberal planning discourse: the assumption being that a ‘socially mixed’ community will be a ‘balanced’ one, characterized by positive interaction between the classes.”³⁴

concepts . . . ‘[D]iversity’ can take an infinite number of shapes and forms, and be measured in numerous ways . . . [For example], diversity is taken here as that quality of an environment that allow[s] human groups to become ‘more complex, more richly connected, more competent, acquiring and realising new powers—intellectual, emotional, social, and physical.’”

30. August, *supra* note 2, at 91.

31. See, e.g., Richard Florida et al., *Inside the Black Box of Regional Development: Human Capital, the Creative Class, and Tolerance*, in THE CREATIVE CLASS GOES GLOBAL 11, 23 (Charlotta Mellander et al. eds., 2014) (“[Tolerance] is measured as a combination of the concentration of gay and lesbian households and the concentration of individuals employed in the arts, design and related occupations.”); FLORIDA, RISE *supra* note 22, at 251, tbl. 14.1.

32. August, *supra* note 2, at 91 (citing BLOMLEY, *supra* note 15, at 354; Rose, *supra* note 2, at 281) (“Critics have also noted that although creative city literature promotes ‘tolerance,’ it may be that the *image* of diversity is all that is really sought . . . Recent attempts to promote social mix, then, may be motivated by an *economic* imperative more compelling to policy makers than abstract goals of social harmony and equality. Driven by this imperative, particular assumptions regarding who has a right to the city underpin these policies. Engaged with improving the *image* of a liveable city to meet economic goals, social mix policies may perversely promote social *exclusion*, by necessitating the removal of ‘undesirables’ in order to achieve a desired social composition.”) (emphasis in original).

33. This Article does not thoroughly canvas the comparative merits/drawbacks of mixed-use/income strategies. Rather, the intent is to situate a discussion of the tolerance required within these kinds of close-quarter, diverse, and dense redevelopment models. See THIBERT, *supra* note 17, at 8 (“There is no doubt that mixed-income projects contribute to the long-term viability of social housing, but the exact role of ‘mixing’ in this is not exactly clear . . . [T]he desirability of some degree of mixing—if only to preserve a veneer of social cohesion—is rarely contested. On the other hand, social mixing has almost acquired among certain of its advocates the mythical standing of panacea . . . Yet, according to several critics, it is questionable whether mixing itself is responsible for any of these [positive] outcomes.”).

34. BLOMLEY, *supra* note 15, at 88.

Where many of these mixed communities are based on a structure that seeks to leverage the private-market purchase of units in order to fund public housing and rent-geared-to-income housing units within the same complexes, Blomley notes that these strategies are not necessarily harmless and can bring with them potential ill effects.³⁵ Drawing on activists that contest social-mix strategies, Blomley highlights that “[d]ifferences in tenurial status . . . are differences in power.”³⁶ Some examples of these social-mix strategies currently underway in Canada include the multi-stage Regent Park redevelopment project in Toronto, the Little Mountain redevelopment project in Vancouver, and the proposed Bloomfield redevelopment plans in Halifax.³⁷

As Santos states, “Social exclusion is always the product of unequal power relations, that is, of unequal exchanges.”³⁸ Not only does a social-mix strategy potentially result in differences in power and socioeconomic or cultural capital within a neighborhood, the change in composition can also result in the gradual dilution of certain voices, neighborhood customs, and concentrations—political, cultural, and otherwise.³⁹ When public housing and rent-geared-to-income tenants clash with owners and the interests of homeowners (and the valuation of private property), the likely result is that the interests of owners, and

35. BLOMLEY, *supra* note 15, at 90 (“Left-leaning academics also argue for the importance of spaces in which encounters with diversity are possible, seeing them as critical to the inculcation of ‘civil deportment.’ Yet . . . activists challenge social mix, pointing out in essence, that it is not an innocent concept.”).

36. *Id.*

37. See City of Toronto, *By-law 141-2005: To Amend the General Zoning By-law No. 438-86 of the Former City of Toronto with Respect to the Regent Park Area* (Feb. 16, 2005), www.toronto.ca/legdocs/bylaws/2005/law0141.pdf; City of Toronto, *By-law 140-2005: To Adopt Amendment No 337 to the Official Plan for the Former City of Toronto with Respect to the Regent Park Area* (Feb. 16, 2005), www.toronto.ca/legdocs/bylaws/2005/law0140.pdf; GLADKI PLANNING ASSOCS., REGENT PARK PLANNING REPORT PHASES 3, 4 AND 5 (2013), http://www1.toronto.ca/City%20of%20Toronto/City%20Planning/Community%20Planning/Files/pdf/R/Regent_planning_rationale.pdf; CITY OF VANCOUVER, LITTLE MOUNTAIN POLICY STATEMENT (2012), <http://vancouver.ca/docs/planning/little-mountain-policy-statement.pdf>; MACKAY-LIONS SWEETAPPLE ARCHITECTS LTD. & HALIFAX REG’L MUNICIPALITY, BLOOMFIELD MASTER PLAN (2009), <http://www.halifax.ca/property/BCMP/documents/BloomfieldMasterPlan.pdf>.

38. SANTOS, *supra* note 14, at 459.

39. See *id.* at 90 (“In my view, a broad conception of law and the idea of a plurality of legal orders coexisting in different ways in contemporary societies serve the analytical needs of a cultural political strategy aimed at revealing the full range of social regulation made possible by modern law . . . as well as the emancipatory potential of law, once it is reconceptualised in oppositional postmodern terms.”).

those who hold a comparatively stronger property right within the space, will take precedence.⁴⁰ Where differences—socioeconomic and otherwise—between the occupants of a space characterize mixed communities, the gap is perhaps first apparent between property owners and residents who are simply tenants.⁴¹ It is argued that the sale of private units is necessary to offset the costs of public-housing units, but at what price?⁴² The greater rights that property owners inevitably carry within the space are difficult to ignore, along with the comparably higher weight their opinions carry when buttressed by their economic stake in the space—versus the lesser property rights and economic/ownership influence of tenants.⁴³

Disproportionately valuing owners above tenants also seems to follow a larger trend within market-oriented city redevelopment where projects encourage home ownership, which is seen as promoting “economic self-reliance, entrepreneurship, and community pride,”⁴⁴ and is valued for its potentially “reforming” effects that physically contribute to a “fixity and presence” as well as an “interest in responsible citizenship.”⁴⁵ Martine August suggests that, in reality, these social-mix redevelopment iterations answer less to principles of equality and more to principles embodying what is often deemed a “neoliberal” approach to urban-governance strategies.⁴⁶ Upon closer

40. See August & Walks, *supra* note 17, at 280, 289, 294 (“US studies examining the experiences of public housing tenants who have been relocated to mixed communities have not found any evidence that tenants experience improvements via ‘bridging’ or ‘leveraging’ social capital These findings suggest that as redevelopment takes place, the power of tenants to develop or maintain an influential political voice and remain connected to one another in their community is diminished.”).

41. See *id.*

42. See TORONTO COMMUNITY HOUSING CORP., REGENT PARK REVITALIZATION: HOUSING ISSUES REPORT—OFFICIAL PLAN AMENDMENT AND RE-ZONING APPLICATION FOR PHASES 3, 4, 5: LIFTING OF THE HOLDING SYMBOL PHASE 3 9 (2013), http://www1.toronto.ca/city_of_toronto/city_planning/community_planning/files/pdf/regentpark_housingissues.pdf.

43. August & Walks, *supra* note 17, at 280, 289, 294 (“An author of the original *Regent Park revitalisation study* . . . revealed a paternalistic and derogatory attitude towards tenant needs and concerns: when asked how revitalisation will affect tenant political influence, his response was: ‘it doesn’t really matter—they don’t vote anyway’ In light of such attitudes, it may not be surprising that many tenants believe revitalisation is proceeding in the interests of the wealthy.”) (emphasis in original).

44. BLOMLEY, *supra* note 15, at 89.

45. *Id.*

46. August, *supra* note 2, at 88–89 (“The mix of ideology and politics since the

examination, it would seem that this popular “neoliberal vision of gentrified urban diversity”⁴⁷ faces (and will increasingly face) widening cracks amongst neighborhood residents as the reality of close-quartered diversity magnifies inequality and discord.⁴⁸

III. MIXED-USE, MIXED-INCOME, AND SOCIAL-MIX REDEVELOPMENT PROJECTS AS CONTACT ZONES

The conditions that arise within these neighborhood spaces of socioeconomic mix and mixed-use enable their characterization as contact zones containing the mechanics of a cosmopolitan struggle—legal and otherwise—as “subaltern groups fight for equality and recognition against dominant groups.”⁴⁹ Contact zones may be defined, according to Santos, as “social fields in which different normative life worlds meet and clash,”⁵⁰ or, more broadly, according to Mary Louise Pratt, as “social spaces where disparate cultures meet, clash and grapple with each other often in highly asymmetrical relations of domination and subordination.”⁵¹

Within these contact zones “rival normative ideas, knowledges, power forms, symbolic universes and agencies meet in unequal conditions and resist, reject, assimilate, imitate, and subvert each other, giving rise to hybrid legal and political [and cultural] constellations in which the inequality of exchanges are traceable [and may be either reinforced or reduced].”⁵² Furthermore, the cosmopolitan legal struggle that plays out in the contact zones of mixed redevelopment “is a pluralist one that fights for transcultural and intercultural equality of differences,” which must allow each involved group to negotiate their differences—i.e., to decide whether to remain different or to

mid-1970s has moved policy-makers away from notions of collective responsibility for the poor, and towards individual-level explanations for poverty, ‘entrepreneurial’ governance, and welfare-state retrenchment. The popularity of social mix in the 1990s accompanied this neoliberal shift.”)

47. MARIANA VALVERDE, EVERYDAY LAW ON THE STREET: CITY GOVERNANCE IN AN AGE OF DIVERSITY 210 (2012).

48. See THIBERT, *supra* note 17, at 15 (“[S]patial proximity does not necessarily reduce social distance.”).

49. SANTOS, *supra* note 14, at 473.

50. *Id.* at 472.

51. MARY LOUISE PRATT, IMPERIAL EYES: TRAVEL WRITING AND TRANSCULTURATION 7 (1992).

52. Santos expresses this assertion in two slightly different ways, which I have combined in the above portion of text. See SANTOS, *supra* note 14, at 472; SANTOS, *supra* note 13, at 218.

hybridize.⁵³

In a similar vein to Santos's call for an equality of differences, Iris Marion Young asserts that, in order to bring social justice to cities, there must be a "realization of a politics of difference," and that this realization represents "the normative ideal city life."⁵⁴ However, in order to meaningfully engage with difference as a recipe that may lead to more inclusive cities that better incorporate social justice, it is important to undertake a search for the essential ingredients needed for meaningful engagement. Among the everyday laws deployed within neighborhoods of the urban core of cities⁵⁵ one such ingredient is tolerance, especially in the context of neighborhood nuisance.⁵⁶

Without a greater legislative emphasis on tolerance within city-governance structures, the interests and preferences of dominant property-owning individuals risk continuing to significantly trump those of non-owners in mixed city spaces.⁵⁷ As alluded to previously, this is especially true where property ownership is reified and accorded a high urban citizenship value within municipal governance due, at least in part, to the link between property ownership, permanence, and vested interest within the community.⁵⁸ But, as Blomley explains:

It follows, then, that those who do not own property (or, more importantly, those who are imagined as nonowners) are not only incomplete citizens, but partial or deformed subjects. Perhaps it is this that partly explains the enduring suspicion toward, and devaluation of, renters. Our very language suggests the distinction; thus we describe owners of private property as living in "homes," located in "residential communities," while renters live in "units of housing,"

53. SANTOS, *supra* note 14, at 473.

54. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 240 (1990); see also SANTOS, *supra* note 13, at 42–43 ("This potentially unconditional inclusiveness has contributed to the creation of a new political culture that privileges commonalities to the detriment of differences and fosters common action even in the presence of deep ideological differences, once the objectives are limited, well defined, and adopted by consensus.").

55. See arts. 1, 3, *Declaration of Principles on Tolerance*, *supra* note 12.

56. See VALVERDE, *supra* note 47, at 48–77.

57. See August & Walks, *supra* note 17, at 280, 289, 294.

58. See BLOMLEY, *supra* note 15, at 89 ("Real property has long had a special significance in governmental discourse, given its supposed value in the formation of desirable social and political identities. Its stationary condition, supposedly, ensures that the owner has a special interest in his or her immediate community and a stake in a property-owning democracy.").

“apartments,” or “projects” that are, if anything, a threat to “community.”⁵⁹

In promoting these spaces of mixed-use and social mix, developers seek to (re)commodify, market, and sell a vision of urban lifestyle in the urban core, while taking advantage of housing density intensification and compact units to remain attractively affordable in comparison to other property purchasing options for a significant portion of the population.⁶⁰ Unsurprisingly absent from these promotions is the notification that an essential ingredient of tolerance will be needed within this new neighborhood space now characterized by the diversity of the private and commercial occupants of the space. Private property, and the quiet enjoyment of property, take different shapes when spaces are shared by individuals with conflicting life/work schedules, contrary leisure or cultural practices, or businesses that thrive off the nighttime economy, or where a condo might dramatically face the industrial theater of a working port that ultimately results in the bellowing horns of incoming ships docking at night before the onset of noisy nighttime cargo unloading begins.⁶¹

Legislating tolerance in the neighborhood context—at a time where tolerance is increasingly important due to the changing structure of our life spaces, property use, and occupations⁶²—may serve as what Santos describes to be a counter-hegemonic use of a hegemonic tool (of dominant, state-generated law and legislation), to codify and legislate the much-needed tolerance our cities require.⁶³

59. BLOMLEY, *supra* note 15, at 89.

60. See Ute Lehrer et al., *supra* note 24, at 87; Rose & Villeneuve, *supra* note 20.

61. See Megan Marrelli, *Why the Redpath Sugar Factory Isn't Going Anywhere*, TORONTOIST (Oct. 9, 2014, 11:05 AM), <http://torontoist.com/2014/10/why-the-redpath-sugar-factory-isnt-going-anywhere/> (“On a waterfront teeming with condo developments and office buildings the Redpath sugar factory is hard to miss. It takes up a full city block on Queens Quay East, and giant ships from Guatemala or Brazil . . . dock at its wharf every day to deliver thousands of tonnes of raw sugar But the remarkable 4.25 hectare, 24-hour Redpath factory has no plans to uproot. It needs to be on the waterfront to receive its shipments of sugar.”).

62. See art. 3, *Declaration of Principles on Tolerance*, *supra* note 12 (“In the modern world, tolerance is more essential than ever before. It is an age marked by the globalization of the economy and by rapidly increasing mobility, communication, integration and interdependence, large-scale migrations and displacement of populations, urbanization and changing social patterns.”).

63. See SANTOS, *supra* note 14, at 466–67.

IV. NEIGHBORHOOD NUISANCE AND THE LAW, GENERALLY

Nuisance—whether approached through the common law tort of nuisance or through the civilian *troubles de voisinage*—generally arises from and deals with the private conflicts that stem from physical proximity within a space.⁶⁴ Specifically, within the neighborhood space, conflicting interests, practices, and lives are free to coexist unconstrained, but only to the point where the by-products of these interests, practices, and life choices begin to interfere with those of others.⁶⁵ The question then becomes one of determining the reasonable thresholds of acceptable interference—usually according to the context or “custom” of the neighborhood space in question. In order to determine what behavior might exceed the reasonable neighborhood threshold one must measure the precise fabric of the neighborhood or context and the appropriate levels of “give-and-take” reasonably expected of the involved parties.⁶⁶ Once it is determined that a particular by-product exceeds this threshold, the remedy is usually that the behavior in question must be stopped⁶⁷—or, at least, limited to the extent that the by-product no longer exceeds the neighborhood or contextual threshold. Within the mechanics of urban governance, municipal legal complexes, and condo boards, zoning ordinances and the limited language of by-law violations largely comprise the general structure through which neighborhood residents may frame complaints regarding behavior, or behavioral by-products, found to be intolerable.

64. See Van Praagh, *supra* note 9, at 23 (“Nuisance is fundamentally attached to private conflict and literally located in the phenomenon of physical proximity.”).

65. See *id.* (“As individuals, the tort of nuisance tells us, we can live our lives as we wish in our own spaces. But that freedom is constrained by the fact that we live as neighbors; as such, we must take into account another’s perception of our use and realize that our behaviour may bring with it by-products that impose themselves on people living next door. Indeed, those by-products may go beyond what is acceptable from the neighbours’s perspective.”).

66. See *id.*; see also *Antrim Truck Ctr. Ltd. v. Ontario (Transportation)*, [2013] 1 S.C.R. 594, para. 39 (“The distinction is thus between, on one hand, interferences that constitute the ‘give and take’ expected of everyone and, on the other, interferences that impose a disproportionate burden on individuals.”).

67. Van Praagh, *supra* note 9, at 23 (“Given the ongoing nature of the use of property, the classic remedy for nuisance . . . is an injunction. The offending use must be stopped: in principle, the offending neighbours must adjust their behaviour or move away.”).

**V. HOW MIGHT THE LANGUAGE OF TOLERANCE BE
MEANINGFULLY LEGISLATED: A CASE STUDY OF CCQ
ARTICLE 976**

Now I turn to the CCQ, in force within the province of Quebec, which is applied in the province's jurisdiction over property and civil rights. Within the CCQ's chapter on the "Special Rules on the Ownership of Immovables" in the book on ownership⁶⁸ exists a mechanism for acknowledging and incorporating the notion of tolerance within the context of neighborhood nuisance and the civilian concept of *troubles de voisinage*. Article 976 of the CCQ reads:

Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.

Les voisins doivent accepter les inconvénients normaux du voisinage qui n'excèdent pas les limites de la tolérance qu'ils se doivent, suivant la nature ou la situation de leurs fonds, ou suivant les usages locaux.

As Van Praagh succinctly suggests, article 976 embodies a "picture of the neighbourhood mosaic" that underlies "the language of bylaw violations, condominium conditions, and assertions of individual rights and freedoms."⁶⁹

68. It was placed within the book on ownership despite early suggestions in prior drafts of the CCQ that it be included in the book on obligations—likely due to the fact that article 976 essentially deals with neighborhood relations. This is interesting considering that article 976, as will be discussed subsequently, does not stipulate ownership as a necessary prerequisite to its application and places no primacy in ownership rights. See Dorian Needham, *Beyond Geography: Nuisance in Virtual Communities*, 42 OTTAWA L. REV. 189, 215 (2011) ("Article 976 CCQ may appear under the heading 'Special Rules on the Ownership of Immovables' but . . . ownership is no longer at issue: any holder of a real right of usage, or of a personal right of lease, can bring an action in nuisance if her enjoyment of property is infringed abnormally.") (emphasis in original). As noted by the Supreme Court of Canada, the location of a provision or rule within the CCQ, and in the context of codification generally, is important to consider as "[t]he organization of rules is an essential feature of codification." *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 821, para. 14 ("The organization of rules is an essential feature of codification."); *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392, para. 72 ("Although the drafts prepared by the Civil Code Revision Office proposed that an article on neighbourhood relations be included in the book on obligations, the legislature ultimately decided to put art. 976 C.C.Q. in the book on property. The decision to do so is important to the interpretation and application of this provision.").

69. Van Praagh, *supra* note 9.

A. THE HISTORY OF CCQ ARTICLE 976

In order to unpack article 976, it is helpful to trace its history. Article 976 did not have an equivalent provision in the Civil Code of Lower Canada (the previous civil code in force until the CCQ came into force on January 1, 1994). In applying article 976 in the Supreme Court case of *St. Lawrence Cement v. Barrette*, Justices LeBel and Deschamps, writing for the majority, referred to the Minister of Justice's commentary regarding the new CCQ and the chapter on the Ownership of Immovables, within which article 976 is found.⁷⁰ They noted that article 976 finds its origins in judge-made law and legal rules that Quebec courts had generated in response to the concept of abuse of rights, specifically in the context of neighborhood disturbances. Quoting the Minister's commentary, the Justices provided the following explanation for article 976:

This article is new. It refers to the principle that tolerance must be shown in neighbourhood relations and codifies that principle in a general provision that heads up and underlies the entire chapter. It thus codifies the academic commentaries and case law on neighbourhood disturbances, which were originally founded primarily on abuse of the right of ownership before a specific framework was established for neighbourhood disturbances.⁷¹

B. THE UNIQUE ELEMENTS OF CCQ ARTICLE 976

While article 976 of the CCQ is distinct within Canadian nuisance law,⁷² its use of the language of tolerance is particularly unique in its potential for displacing the centrality of dominant neighborhood norms and property concerns when these clash with norms of non-dominant, marginal groups or individuals—especially where the relational non-dominance of these norms is exacerbated by weaker property claims to the neighborhood space.⁷³ Not only does the CCQ provide a codification of the

70. *Barrette*, [2008] 3 S.C.R. at para. 58 (quoting Quebec, Ministère de la justice, *Commentaires du ministre de la justice: Le Code civil du Québec—Un mouvement de société*, vol. 1, at 569 (1993)).

71. *Id.*

72. For a further discussion of Canadian nuisance law, see *id.* at para. 77 (“At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct.”). See generally GREGORY S. PUN ET AL., *THE LAW OF NUISANCE IN CANADA* (2d ed. 2010).

73. This is additionally in line with the principles of *buen vivir*, which calls for a displacing of the centrality of dominant knowledges, ways of knowing, and life

notion of tolerance within article 976, but more importantly, article 976 clearly expresses a *duty* to tolerate. This duty does not entirely transfer the nuisance creator's responsibility to avoid creating a nuisance onto the individual who must now tolerate, or endure, the nuisance up to "the limit of tolerance [the neighborhood parties] owe each other, according to the nature or location of their land or local custom."⁷⁴ Rather, article 976 effectively introduces a balance—or a "give and take"⁷⁵—to the treatment of nuisance within a neighborhood where both the party creating the nuisance and the party experiencing, or tolerating, the nuisance share the responsibility of harmony in the neighborhood.

In addition, article 976's use of the language of tolerance as a consideration within neighborhood nuisance, beyond just a context-based assessment of the local neighborhood customs, is distinct among corresponding provisions in other civil codes, such as the civil codes of France or Louisiana, where these provisions instead focus on the applicable limitations on ownership and the use and control of property.⁷⁶ Unlike article 976, these examples

worlds. *See, e.g.*, Eduardo Gudynas, *Buen Vivir*, in *DEGROWTH: A VOCABULARY FOR A NEW ERA* 201, 202 (D'Alisa, Giacomo, Federica Demaria & Giorgos Kallis eds., 2015) ("In its substantive sense, *Buen Vivir* defends the diversity of knowledges. The dominance of Western ideas is replaced by a promotion of 'interculturality' under which Western ideas are not rejected but seen as one among many options."); Eduardo Gudynas, *Buen Vivir: Today's Tomorrow*, 54 *DEVELOPMENT* 441, 445 (2011) [hereinafter Gudynas, *Today's Tomorrow*]; SANTOS, *supra* note 13, at ix ("This book aims to depart from this Eurocentric critical tradition. It proposes a *teoria povera*, a rearguard theory based on the experiences of large, marginalized minorities and majorities that struggle against unjustly imposed marginality and inferiority, with the purpose of strengthening their resistance."); *see also* Boaventura de Sousa Santos, *Public Sphere and Epistemologies of the South*, 37 *AFR. DEV.* 43, 57 (2012) (explaining that cognitive injustice is the basis of social injustice).

74. Civil Code of Québec, S.Q. 1991, c 64, art 976 (Can.).

75. *Antrim Truck Ctr. Ltd. v. Ontario (Transportation)*, [2013] 1 S.C.R. 594, para. 39.

76. *Compare* Civil Code of Québec, S.Q. 1991, c 64, art 976 (Can.) (stating that neighbors shall tolerate certain nuisances) *with* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 554 (Fr.):

Property is the right to use and control things in the most absolute manner provided this use and control are not prohibited by the law.

La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.

and LA. CIV. CODE ANN. arts. 667–69 (2016):

Art. 667. Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew

do not mention tolerance, nor a comparable duty towards a balanced, give-and-take, reciprocal obligation between neighboring parties.⁷⁷

Nonetheless, in the context of this balance expressed within article 976, the party creating the nuisance is only given leeway to create nuisance up to a certain level, in accordance with the character and custom of the neighborhood, while the party experiencing the nuisance has a duty to tolerate the nuisance created up to this level. While permitting this leeway for nuisance, within the underlying fabric of article 976 remains an implicit acknowledgement of the duty not to harm third parties—neighbors in particular.⁷⁸

In one of the few pieces of scholarship that address article 976, Adrian Popovici suggests that the key to interpreting the article, and to understanding the context of the neighborhood community, is to acknowledge the expressed obligation to tolerate abnormal annoyances, as opposed to the obligation to repair (or halt) abnormal annoyances.⁷⁹ Article 976 embodies the idea that

or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of *res ipsa loquitur* in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

Art. 668. Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [neighbor's] house, because this act occasions only an inconvenience, but not a real damage.

Art. 669. If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.

77. See CODE CIVIL [C. CIV.] [CIVIL CODE] art. 554 (Fr.); LA. CIV. CODE ANN. arts. 667–69 (2016); see also *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 82 So. 206, 207 (La. 1919) (quoting ROBERT JOSEPH POTHIER, 3 TREATISE: CONTRACT OF PARTNERSHIP; WITH THE CIVIL CODE AND CODE OF COMMERCE RELATING TO THAT SUBJECT, IN THE SAME ORDER 549 (Paris ed. 1835) (describing neighborhood relations as quasi-contracts that import reciprocal obligations between neighbors)).

78. Adrian Popovici, *La Poule et l'Homme: Sur l'Article 976 CcQ*, 99 REVUE DU NOTARIAT [REV. NOTARIAT.] 214, 226 (1997) (Can.).

79. *Id.* at n.35. Here, Popovici refers to the formula used by Jean Carbonnier in analyzing article 976. See 3 DROIT CIVIL: LES BIENS 264 n.59 (12th ed. 1988) (“Le

what might be considered unacceptable or illicit behavior to a third party becomes acceptable—or at least tolerable—when framed within the context of the neighborhood.⁸⁰ In other words, as Popovici further suggests, article 976 creates a certain level of “acceptable” or “tolerable” damages or harm that can be inflicted within the context of a neighbor and neighborhood that would not be acceptable to inflict on another third party.⁸¹

This notion of an altered threshold then crystallizes into an obligation of “good neighborliness” and tolerance that speaks to what is needed for the survival of neighborhood mosaics of diverging lifeworlds and distinct cultures in the urban cores of our cities as they are increasingly packed into close-quarter condo developments premised on an *ideal* of “diversity” and “balance” sought through developing mixed-income and mixed-use housing.⁸² The high consideration that is accorded to tolerance and codified within article 976 reads as a fundamental premise of humanity, and carries with it a quintessentially human essence applicable beyond Quebec’s civil code, and even beyond civil law. Echoing Popovici’s assertion, article 976 espouses the fundamentals of an ideal relationship between two neighbors—a minimum level of mutual tolerance of annoyances and differences.⁸³

C. OWNERSHIP, THE TENANT, AND CCQ ARTICLE 976

Another unique element of article 976 is that it allows for claims by both owners and tenants, without favoring the property rights embodied in ownership versus rental. Significantly, because article 976 never mentions ownership, it may be especially suited to dealing with the mixed context of condo developments that use the purchase of condo units to offset the cost of social housing for tenants. The primacy of ownership is displaced by the desire for harmonious relations between neighbors, where “any holder of a real right of usage, or of a personal right of lease, can bring an action in nuisance if her enjoyment of property is infringed abnormally.”⁸⁴ As Adrian

principe n'est point l'obligation de réparer les inconvénients anormaux, mais bien l'obligation de supporter les inconvénients normaux. Là est l'idée maîtresse de la communauté de voisinage.”

80. Popovici, *supra* note 78, at 235 n.57.

81. *Id.* at 226 n.37.

82. *Id.* at 226; see Van Praagh, *supra* note 9, at 24–26.

83. Popovici, *supra* note 78, at 253.

84. Needham, *supra* note 68; but see CODE CIVIL [C. CIV.] [CIVIL CODE] art. 554

Popovici explains, article 976 reaches beyond the owner and ownership in order to include renters, tenants, and lessees.⁸⁵

VI. SUBALTERN COSMOPOLITANISM AND THE APPLICATION OF CCQ ARTICLE 976

Drawing our discussion back to Santos's call for an equality of differences within the contact zones characterized by subaltern cosmopolitan legal struggles for equality and recognition in the face of dominant groups; tolerance within these contact zones is especially important if they are to function as spaces for intercultural translation, and pave the way for an equality of differences.⁸⁶ Intercultural translation within these zones can begin to mitigate differences by questioning "the reified dichotomies among alternative knowledges," the unequal valuation, and abstract status assignment received by different knowledges in order to "enable[] us to cope with diversity and conflict."⁸⁷ To complement this intercultural translation within the contact zones generated by spaces like mixed-community developments, a more concerted effort to incorporate the principles of tolerance into municipal legislation could possibly provide viable options for displacing the primacy of dominant groups, individual entities, or property interests within mixed-community redevelopment projects.⁸⁸ While the identity of article 976 as a hegemonic legal tool is due to its presence within the framework of dominant state and private law that structure law in the city, the article's incorporation of a duty to tolerate makes it ripe with potential for counter-hegemonic application.

(Fr.); LA. CIV. CODE ANN. arts. 667–69 (2016). It is, however, also important to note that article 976 does not protect a real right in immovable property. The SCC clarified this point by holding that an action pursuant to article 976 (*troubles de voisinage*) is linked to personal rights, rather than a real right in immovable property. See *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392, paras. 81–84; Needham, *supra* note 68, at 216.

85. Popovici, *supra* note 78, at 241–42.

86. See SANTOS, *supra* note 13; SANTOS, *supra* note 14, at 472 ("Contact zones are therefore zones in which rival normative ideas, knowledges, power forms, symbolic universes and agencies meet in unequal conditions and resist, reject, assimilate, imitate, subvert each other, giving rise to hybrid legal and political constellations in which the inequality of exchanges are traceable.").

87. See SANTOS, *supra* note 13, at 212–13; see also *id.* at 213–35 (exploring the dynamics and potential of intercultural translation within the contact zone).

88. See Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum on Subaltern Cosmopolitan Politics and Legality*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 29, 29–30 (Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito eds., 2005).

As mixed community developments proliferate, the relatively underdeveloped use of article 976 should be further explored as an option. Current struggles for rights and freedoms in relation to particular practices, behaviors, and life choices within the city space that predominantly seek alternative political frameworks should also be analyzed,⁸⁹ including those framed within rights-based legal frameworks drawing on constitutional law and the Canadian Charter of Rights and Freedoms.⁹⁰ One can also look to extralegal city-based human-rights charters that draw on the right to the city framework like the Montreal Charter of Rights and Responsibilities.⁹¹ But the compelling language of article 976 in particular provides the opportunity for an alternative approach that more effectively captures the neighborly give-and-take and tolerance necessary for equitable, respectful, and sustainable life within the close quarters of the urban core, especially in the intertwining of lifeworlds of mixed-community zones. Within these contact zones, the acceptance and tolerance of difference is a two-way street that requires the participation of all involved parties. While the by-products of one's practices and preferences must not exceed tolerable levels, there must also exist a tolerance of these by-products up to the contextual neighborhood threshold, which speaks to Young's call for a "realization of a politics of

89. This Article does not canvas the different possible options and focuses on the notion of tolerance and a duty to tolerate that is housed within article 976. *But see*, e.g., YOUNG, *supra* note 54 (suggesting an alternative political framework).

90. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1892, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). Additionally, these claims may also be framed with reference to the Quebec Charter of Human Rights and Freedoms, CQLR c C-12. *See*, e.g., *Syndicat Northcrest v. Anselem*, [2004] 2 S.C.R. 55, paras. 2–3, 5, 9. There, a claim was made under the Quebec Charter of Human Rights and Freedoms alleging an infringement of freedom of religion and the associated practices that led the Orthodox Jewish claimant to construct a *succah* on his balcony. Drawing on by-laws protecting balcony decorations, the condo complex within which he had constructed his *succah*, along with other Orthodox Jewish residents, demanded that he remove the *succah*. *See* Van Praagh, *supra* note 9, at 26. Van Praagh assesses this case through the lens of *troubles de voisinage* and article 976 in order to examine the negotiation and renegotiation of conditions surrounding cohabitation and the use of property in the particular neighborhood context of a mixed or "hybridized" neighborhood in Montreal. *See id.*

91. City of Montreal, *Montréal Charter of Rights and Responsibilities* (Jan. 1, 2006), <http://ville.montreal.qc.ca>. This charter is the first of its kind in North America. *But see* *Global Charter-Agenda for Human Rights in the City*, UCLG COMMITTEE ON SOCIAL INCLUSION, PARTICIPATORY DEMOCRACY AND HUMAN RIGHTS (2013), <http://www.uclg-cisd.org/en/right-to-the-city/world-charter-agenda>; *European City Charter*, *supra* note 4. The aforementioned sources list other city-based charter initiatives upon which the Montreal Charter of Rights and Responsibilities was based. Certainly, the relative newness of article 976 also contributes to its limited application.

difference,”⁹² and Santos’s “transcultural or intercultural equality of differences.”⁹³

Where Santos has identified eight general theses that comprise the conditions for, or the ingredients of, cosmopolitan legality, he has laid out a research agenda for subaltern cosmopolitan legal theory and practice that examines particular sites of cosmopolitan legality.⁹⁴ The second of these theses, “A non-hegemonic use of hegemonic legal tools,” speaks to a form of legislated tolerance in the neighborhood context that can be identified within article 976 and the greater legal framework of *troubles de voisinage* and nuisance law in Quebec and Canada.⁹⁵ Santos suggests that “one way of showing defiance for law and rights is to struggle for increasingly inclusive laws and rights,” and that this may be accomplished by a non-hegemonic use of hegemonic legal tools.⁹⁶

Santos favors this counter-hegemonic application of existing legal tools and frameworks, regardless of their hegemonic coding, as an alternative to completely altering existing frameworks through which knowledges, cultures, and cultural practices must be negotiated. Santos’s approach strives for a recalibration of these frameworks in order to establish a tolerance for the plurality of legal knowledges and diversity that can level out inequitable treatment and injustice.⁹⁷

92. YOUNG, *supra* note 54.

93. SANTOS, *supra* note 14, at 473.

94. *Id.* at 465 (“Accordingly, an inquiry into the place of law in subaltern cosmopolitanism and the nascent practices that may embody a subaltern cosmopolitan legality must be done in a rather prospective and prescriptive spirit. This is the spirit that animates the remainder of this chapter, which aims at laying out—rather than fully fleshing out—a research agenda on subaltern cosmopolitan legal theory and practice and at mapping some of the key sites in which such theory and practice are currently being tried out.”).

95. *See id.* at 467 (“Contrary to the critical legal studies movement, cosmopolitan legality subscribes to a non-essentialist view of state law and rights. What makes the latter hegemonic is the specific use that the dominant classes or groups make of them. Used as autonomous exclusive instruments of social action they are indeed part of top-down politics. They are unstable, contingent, manipulable and confirm the structures of power they are supposed to change. In sum, conceived and utilized in this way they are of no use to cosmopolitan legality.”).

96. *Id.* (“Manipulability, contingency and instability from below is the most efficient way of confronting manipulability, contingency and instability from above. A strong politics of rights is a dual politics based on the dual management of legal and political tools under the aegis of the latter.”).

97. *See* SANTOS, *supra* note 13, at 42 (“[I]t is imperative to start an intercultural dialogue and translation among different critical knowledges and practices”); *see also* Gudynas, *Today’s Tomorrow*, *supra* note 73 (“Buen Vivir can be considered as a

Finally, deploying a legislated tolerance, such as that found in article 976, provides a way to address the inequalities that exist within mixed-income developments, especially the imbalance in influence that property owners have in protecting their interests over the interests of non-owners/tenants.⁹⁸

VII. CONCLUSION

Change can occur on many fronts by recalibrating relationally dominant and non-dominant voices in both urban governance and city-nuisance frameworks. There are certainly alternatives to using a private-law instrument like the CCQ, such as alternative political frameworks, and so on,⁹⁹ but article 976's language of tolerance is compelling as city redevelopment projects in the urban cores of Canada's cities become increasingly shaped by the tenets of city redevelopment into mixed-community zones, and as the close-quarters of condo life increasingly favored by those seeking to purchase property draws out the inevitabilities of neighborhood discord. This concern is especially pronounced within mixed-income housing that leverages private-market condo unit purchases in order to provide rent-geared-to-income units within the same development. As we have seen, property ownership tends to carry with it the ability to trump the interests of non-property owners within the same space.

Here, article 976 of the CCQ provides an example of the kind of legislatively mandated tolerance that will be key to cultural sustainability within the close-quarters and mixed context of these developments. Not only does article 976 disable the overvaluation of the property owner's interests over tenant interests, but it importantly addresses a duty—the duty to tolerate that which may be different. The kind of tolerance mandated in article 976 moves beyond simply an *image* of tolerance¹⁰⁰—the sort that is at play in the much-hyped creative-city dialogues currently favored in city planning and rejuvenation

platform where critical views of development are shared. All positions consider alternatives not as an instrumental fixing of current strategies, but as a replacement of the very idea of development.”).

98. See August & Walks, *supra* note 17, at 280, 289; BLOMLEY, *supra* note 15, at 89 (“Embedded in these claims, I think, are some important ethical conceptions of property. Real property has long had a special significance in governmental discourse, given its supposed value in the formation of desirable social and political identities.”); see also August, *supra* note 2, at 91; Lees et al., *supra* note 5, at 6.

99. See YOUNG, *supra* note 54.

100. See August, *supra* note 2, at 91; see also Rose, *supra* note 2, at 281.

efforts. Instead, article 976 encourages a meaningful engagement with intercultural difference in the effort towards more equal and culturally sustainable cities of subaltern cosmopolitan legality.¹⁰¹

101. See SANTOS, *supra* note 14; YOUNG, *supra* note 54.