Prayer for Relief: Saguenay and State Neutrality toward Religion in Canada

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1. Introduction

TO WHAT EXTENT can the state, in carrying out its functions, profess or favour one religious tradition over another? This question was at the heart of the decision of the Supreme Court of Canada in *Mouvement laïque québécois v Saguenay (City)*.[3] The Court decided that the Canadian state bears a duty of neutrality in matters of religion, which means it cannot profess or favour one religious tradition over another. This Article discusses the consequences of how the Court articulated the duty of neutrality in Canada, and, in particular, how it pertains to deriving a meaning for a 'secular state'.

2. Freedom of Religion in Canadian Constitutional Law

To begin, we will briefly summarise how freedom of religion has developed in Canadian constitutional law since the advent of the *Canadian Charter of Rights and Freedoms* in 1982, under which the freedom is guaranteed.[4] In 1985, the Supreme Court of Canada described the 'essence' of this freedom as 'the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly

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[3] *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3.

[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(a) (*Canadian Charter*). It is important to note that s 2(a) of the *Canadian Charter* guarantees 'freedom of *conscience and religion*' (emphasis added).

and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.'[5] In the same decision, the Court also confirmed that freedom of religion 'equally' protects 'expressions and manifestations of religious non-belief and refusals to participate in religious practice.'[6]

In 2004, the Court defined 'religion' for the purposes of 'freedom of religion' and clarified the test for determining whether the state has infringed this freedom. On the definition of 'religion', the majority of the Court said this:

> Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[7]

As for the legal test for whether freedom of religion is breached, the complainant's (1) belief must be sincere and (2) ability to act in accordance with the belief must have been interfered with in a manner that is more than trivial or insubstantial.[8]

In *Saguenay*, the Court noted that neither the *Canadian Charter* nor the Quebec *Charter of human rights and freedoms*,[9] both of which guarantee freedom of religion, 'expressly imposes a duty of religious neutrality on the state'; the Court concluded, however, that this duty 'results from an evolving interpretation of freedom of conscience and religion.'[10] The Court found evidence of this evolution in a

[5] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 18 DLR (4th) 321, 336.

[6] ibid 347.

[7] *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [39].

[8] ibid [56], [59].

[9] *Charter of Human Rights and Freedoms*, CQLR c C-12, s 3 (*Quebec Charter*). The *Quebec Charter*, like the *Canadian Charter*, protects 'freedom of religion'. Section 3 of the *Quebec Charter* also protects freedom of 'conscience', 'opinion', 'expression', 'peaceful assembly', and 'association'.

[10] *Saguenay* (n 3) [71]. The *Canadian Charter* forms part of the Canadian Constitution, which is the supreme law of Canada. The *Quebec Charter* is a provincial statute enacted by the National Assembly of Quebec. It must, like all non-constitutional laws enacted in Canada, conform to the Constitution. Notably, the *Quebec Charter* goes far beyond the content of other provincial human rights legislation in Canada in a number of ways. The most relevant distinction, for the purposes of this comment, is that the *Quebec Charter* guarantees fundamental freedoms such as freedom of religion (in section 3) whereas almost all other provincial human rights legislation in Canada does not.

dissenting opinion within a 2004 decision.[11] The Court concluded in *Saguenay* that the duty of neutrality means that the state can 'neither favour nor hinder any particular belief, and the same holds true for non-belief'.[12]

With these principles in mind, we now turn to the facts and judicial history of *Saguenay*.

3. *Saguenay*—Facts and Judicial History

In *Saguenay*, the Supreme Court of Canada held that freedom of conscience and religion, protected by both the *Canadian Charter* and the *Quebec Charter*, prohibited a municipal council of the City of Saguenay (the 'City') from reciting a Christian prayer at the beginning of its council meetings. Alain Simoneau was a resident of the City, which is in the Canadian province of Quebec. Mr Simoneau, who considered himself an atheist, regularly attended municipal council meetings.

From 2002 to November 2008, the mayor of the City, Jean Tremblay, would commence the City's council meetings by reciting the following prayer:

> O God, eternal and almighty, from Whom all power and wisdom flow, we are assembled here in Your presence to ensure the good of our city and its prosperity.
> We beseech You to grant us the enlightenment and energy necessary for our deliberations to promote the honour and glory of Your holy name and the spiritual and material [well-being] of our city.
> Amen.[13]

Prior to, and after reciting the prayer, the mayor would make the sign of the cross and state: '[i]n the name of the Father, the Son and the Holy Spirit'.[14] Other councillors and municipal officials would cross themselves at the beginning and end of the prayer as well.[15]

Mr Simoneau objected to the prayer, as well as the display of religious symbols—such as a crucifix and a sacred statue—in certain meeting halls. With the support of Mouvement laïque québécois ('MLQ'), a non-profit organisation of which he is a member and which wishes the province to be void of public religious

[11] *Saguenay* (n 3) [71]. See *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650 [66]–[67] (LeBel J). Curiously, the Court did not cite *Chaput v Romain* [1955] SCR 834, 1 DLR (2d) 241. *Chaput* predates the *Canadian Charter* but stands for the principle that in Canada there is no state religion, no person must adhere to any religious belief, and all religions are on an equal footing.

[12] *Saguenay* (n 3) [72].

[13] ibid [7].

[14] ibid [6].

[15] ibid.

expression or identity, Mr Simoneau first filed a complaint to the Commission des droits de la personne et des droits de la jeunesse (the 'Commission'), a Quebec government agency which investigates human rights complaints. The Commission informed Mr Simoneau there was adequate evidence for him to bring forth a human rights claim with respect to the prayer. With the continued support of the MLQ, he subsequently filed a complaint to the Quebec Human Rights Tribunal (the 'Tribunal'), including his objections to both the prayer and religious symbols in his complaint. In response, on November 3, 2008, the City adopted By-law VS-R-2008-40 (the 'By-law'), which regulated the prayer's recitation. Specifically, the By-law provided for a two minute delay between the end of the prayer and the official opening of council meetings in order to allow individuals to recuse themselves from the council chamber during the recitation of the prayer.[16] The By-law also provided for a revised prayer, which read as follows:

> *Almighty God, we thank You for the great blessings that You have given to Saguenay and its citizens, including freedom, opportunities for development and peace. Guide us in our deliberations as City Council members and help us to be aware of our duties and responsibilities. Grant us the wisdom, knowledge and understanding to allow us to preserve the benefits enjoyed by our City for all to enjoy and so that we may make wise decisions.*
> *Amen.*[17]

Although the prayer was revised, the mayor and City councillors continued to act in the same way as beforehand (e.g., making the sign of the cross). Consequently, Mr Simoneau and MLQ amended their motion to ask the Tribunal to declare the By-law to be inoperative and of no force or effect in relation to Mr Simoneau.[18]

A. The Tribunal

The Tribunal held that the By-law breached, *inter alia,* section 3 of the *Quebec Charter*, and therefore declared it to be inoperative and of no force or effect.[19] Notably, the Tribunal held that the council had breached its legislative duty to remain neutral between all religions. It stated:

> As the Tribunal explained earlier, when the state and public authorities are involved, they have a duty of neutrality so that the religious equality of everyone is preserved. Considering the conclusions to which the analysis of the religious nature of the

[16] ibid [12].
[17] ibid (emphasis in original).
[18] ibid [13].
[19] *Simoneau c Tremblay*, 2011 QCTDP 1, [2011] RJQ 507.

> prayer and symbols lead, the Tribunal believes that the use of public power to display, in fact convey, a particular faith imposes religious values, beliefs and practices on people who do not share them. In doing so, Ville de Saguenay and the mayor favour one religion to the detriment of another, whereas, pursuant to its duty of neutrality, the state must refrain from intervening to exercise a preference.[20]

Based on the City's failure to abide by its duty of neutrality, the Tribunal concluded that Mr Simoneau could not exercise his rights as an atheist, which section 3 of the *Quebec Charter* also protects.[21]

B. Quebec Court of Appeal

The Quebec Court of Appeal reversed the decision of the Tribunal, holding the Tribunal did not have jurisdiction to adjudicate on the religious symbols and that the prayer did not violate section 3 of the *Quebec Charter*.[22] The Court of Appeal's conclusion on jurisdiction stemmed from the explicit decision of the Commission to restrict its investigation to the prayer. Despite the Commission's decision, the Tribunal concluded that it had jurisdiction to adjudicate both the religious symbols and the prayer.[23]

With respect to the state's duty of neutrality, Gagnon JA, for the majority (and whose reasons were substantially agreed with by Hilton JA), stated:

> I am inclined, for the purposes of this appeal, to adopt the concept of 'benevolent neutrality' used by the author José Woehrling to attempt to better define the parameters of the State's duty of religious neutrality. According to this author, benevolent neutrality is expressed by the respect of all religions, placed on equal footing, without either encouraging or discouraging any form of religious or moral conviction relating directly or indirectly to atheism or agnosticism.[24]

Applying this understanding of neutrality, Gagnon JA noted the historical context of religious symbols and expressions in political institutions throughout Canada, Quebec, and in the City. He concluded: 'A reasonable, well-informed person, aware of the implicit values that underlie this concept could not, in this case, accept the

[20] ibid [250].
[21] ibid [257], [270].
[22] *Saguenay (Ville de) c Mouvement laïque québécois*, 2013 QCCA 936, [2013] RJQ 897.
[23] *Saguenay* (n 3) [10], [14].
[24] *Saguenay* (n 22) [76].

notion that the City's political activities were, because of this prayer, under any particular religious influence.'[25]

C. Supreme Court of Canada

The Supreme Court agreed with the Court of Appeal's jurisdictional conclusion with respect to the religious symbols but restored the Tribunal's decision with respect to the prayer. Gascon J, for the Court, held that the By-law interfered in a discriminatory manner with Mr Simoneau's freedom of conscience and religion protected under the *Quebec Charter*, and that the City's recitation of the prayer contravened the state's duty of neutrality by endorsing one religious tradition. The substance of the duty of neutrality, according to Gascon J, entails that 'the state may not profess, adopt or favour one belief to the exclusion of all others.'[26] Regarding the By-law, he held:

> In a case such as this, the practice of reciting the prayer and the By-law that regulates it result in the exclusion of Mr. Simoneau on the basis of a listed ground, namely religion. That exclusion impairs his right to full and equal exercise of his freedom of conscience and religion. The discrimination of which he complains relates directly to the determination of whether, on the one hand, the prayer is religious in nature and whether, on the other hand, the City is entitled to have it recited as it did.[27]

The Supreme Court agreed with the Tribunal's conclusions that freedom of conscience and religion under the *Quebec Charter* protected the 'freedom not to believe, to manifest one's non-belief and to refuse to participate in observance' and that the prayers recited at the City's meetings had a religious purpose.[28] Accordingly, the Court held that the City breached its 'duty of neutrality', which 'requires that the state neither favour nor hinder any religion, and that it abstain from taking any position on this subject.'[29]

[25] ibid [107].
[26] *Saguenay* (n 3) [84].
[27] ibid [64].
[28] ibid [70], [114].
[29] ibid [137].

4. Implications of *Saguenay*

Saguenay directs that the Canadian state cannot favour one religion over others—it must be neutral on the matter of religion in carrying out its functions. This does not mean that the state is allowed to explicitly favour unbelief to belief. Yet, as Gascon J admitted in *Saguenay*, the difference between doing so and not doing so is 'subtle'.[30] Among these subtleties, we believe the Court's interpretation of the duty of neutrality gives rise to three interesting issues.

A. What is the Distinction between Absolute Neutrality and True Neutrality?

Saguenay raises the issue of what distinguishes 'absolute' and 'true' neutrality. The respondents—the City and its mayor, Jean Tremblay—argued that barring the council's prayer amounted to the state preferring atheism and agnosticism to theistic religious belief.[31] While Gascon J readily accepted the difficulty in achieving religious neutrality in the public square, he rejected the respondents' argument:

> [A]bstaining does not amount to taking a stand in favour of atheism or agnosticism. The difference, which, although subtle, is important, can be illustrated easily. A practice according to which a municipality's officials, rather than reciting a prayer, solemnly declared that the council's deliberations were based on a denial of God would be just as unacceptable. The state's duty of neutrality would preclude such a position, the effect of which would be to exclude all those who believe in the existence of a deity.
>
> In short, there is a distinction between unbelief and true neutrality. True neutrality presupposes abstention, but it does not amount to a stand favouring one view over another. No such inference can be drawn from the state's silence.[32]

Gascon J is correct that a council meeting featuring an express denial of God would infringe the state's duty of neutrality. Yet even if the City attempted to respect all religious traditions to which its population adheres (for example, by rotating through prayers and spiritual readings from these traditions), this would still infringe the religious freedom of the atheist or agnostic. Indeed, Gascon J

[30] ibid [133].
[31] ibid [130].
[32] ibid [133]–[134].

confirmed that even a non-denominational prayer would violate the duty of neutrality because it still excludes non-believers.[33]

It is unclear in *Saguenay* whether the Court views atheism as a religion or religious belief. If it does, then cases like *Saguenay* could be viewed as cases of competing religions (i.e. atheism vs Christianity). If this is the case, it is arguable that prohibiting the state from showing traditional religious symbols or reciting prayers is not a matter of enforcing a 'duty of neutrality' but rather amounts to the state favouring one religion over another.

If the only way for the state to fulfil the duty of neutrality is by not professing any religious view at any moment (and assuming atheism and agnosticism are not religions), then it follows that the duty favours atheism and agnosticism in the public square. The example given by Gascon J seems to be a distinction in degree rather than in kind. This is to say that allowance for the state to deny God's existence is simply a greater (or more obvious) state preference for atheism and agnosticism than the duty of neutrality as defined in *Saguenay*. It is difficult to identify the distinction between the duty of neutrality as defined in *Saguenay* and a duty of irreligion on the part of the state. Regardless of its purpose, the unavoidable effect of the duty of neutrality is to favour atheism or agnosticism over theistic religion in the public square.

B. Are there Exceptions to the Duty of Neutrality?

After *Saguenay*, must there be no prayers recited at any municipal council meeting in Canada? The Court did not answer this question explicitly, but the decision appears to favour prayer-free meetings. But what if all of the attendees at a council meeting consent to the recitation of a prayer? And what if all of the attendees adhere to the same religion and a prayer from that religious tradition is recited? *Saguenay* does not opine on these scenarios. If a council meeting begins with a prayer in one of these scenarios, this would certainly violate the state's duty of neutrality because the state, by allowing the prayer, has preferred one religion to another.

The question here is whether there are exceptions to the duty of neutrality. In our view the duty of neutrality is intended to protect the rights of citizens vis-à-vis the state. The trigger for the *Saguenay* litigation was Mr Simoneau's individual right under the *Quebec Charter* to not adhere to any religion. Had Mr Simoneau been undisturbed by the prayer's recitation and not challenged this state practice, there would appear to be no legal bar to the recitation of the prayer.

Saguenay also does not squarely engage with the religious freedom of the individual who is a state official (e.g., the mayor of Saguenay, Jean Tremblay). The Court focused on the religious freedom of Mr Simoneau. Must a person who is a state official leave their religious identity at the door of their workplace as they

[33] ibid [137].

do their coat? Going forward, can Mr Tremblay silently pray while seated in the council chamber, make the sign of the cross, and start the meeting? This may also cause some discomfort for Mr Simoneau, but it would seem heavy-handed to deny state officials the right to express their religious identity in this way—especially where the intent of the expression is to seek assistance in the performance of their duties. It would be peculiar, indeed, to refuse Mr Tremblay the right to silently pray that he be effective and competent in his service of the citizens of Saguenay, Mr Simoneau included.

Before turning to the relationship between the duty of neutrality and secularism, we note that *Saguenay* may identify an exception to the duty of neutrality. At one point in the decision, Gascon J referred vaguely to the 'many traditional and heritage practices' in Canada 'that are religious in nature.'[34] Without providing specific examples, Gascon J held that 'it is clear that not all of these cultural expressions are in breach of the state's duty of neutrality'.[35]

In our view it is difficult to identify 'traditional and heritage practices' that are religious that do not breach the state's duty of neutrality. Indeed the category appears quite narrow, as Gascon J stated that if the traditional or heritage practice reveals 'an intention to profess, adopt or favour one belief to the exclusion of all others, and if the practice at issue interferes with the freedom of conscience and religion of one or more individuals, it must be concluded that the state has breached its duty of religious neutrality.'[36]

We cannot presently think of a religiously inspired traditional or heritage state practice in Canada that would respect the duty of neutrality in light of this test. Indeed, while *obiter dicta*, Gagnon JA of the Quebec Court of Appeal viewed the council's display of religious symbols, which could be construed as professing, adopting or favouring one belief to the exclusion of all others, as referencing Quebec's 'cultural and historical heritage.'[37] Yet the result in *Saguenay* appears to challenge this conclusion. On this front the Court seems to be trying to put some of the toothpaste back in the tube after letting it out.

C. What about Secularism?

Saguenay does not explicitly discuss the relationship between the duty of neutrality and secularism. Secularism and related words like 'secularity' scarcely appear in the decision. Yet Canada's identity as a secular state rests just beneath the surface in *Saguenay*. The duty of neutrality discussed in *Saguenay* is concerned with how

[34] ibid [87].
[35] ibid.
[36] ibid [88].
[37] *Saguenay* (n 22) [156].

secularism in Canada is to be achieved, but there is no direct discussion of the *kind* of secularism that Canada is pursuing.

In *Secularism and Freedom of Conscience*, Jocelyn Maclure and Charles Taylor argue that secularism rests on two principles (equality of respect and freedom of conscience) and on two 'operative modes' that make it possible to achieve these principles (separation of church and state and state neutrality toward religions).[38] The two principles are the *ends* of secularism; the operative modes are the *means*. How these principles and operative modes are interpreted and applied leads to differing versions of secularism that are more or less restrictive on *individual*—in addition to *state*—expression of religion. Maclure and Taylor describe two dominant versions of secularism: the (1) 'republican' model which 'allows greater restriction on the free exercise of religion, in the name of a certain understanding of the state's neutrality and of the separation of political and religious powers' and the (2) 'liberal-pluralist' model 'centered on the protection of freedom of conscience and of religion, as well as a more flexible concept of separation and neutrality.'[39] The republican view demands neutrality from individuals in public (to varying degrees) while the liberal-pluralist view requires neutrality of institutions but not individuals.[40]

In our view, *Saguenay* supports the liberal-pluralist version of secularism. For example, Gascon J stated:

> By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. *I note that a neutral public space does not mean the homogenisation of private players in that space. Neutrality is required of institutions and the state, not individuals* (…) . On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. (…).
>
> I would add that, in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the *Quebec Charter* and the *Canadian Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs (…) . The state may not

[38] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Jane Marie Todd tr, Harvard University Press 2011) ch 2.

[39] Maclure and Taylor (n 38) 27.

[40] ibid 39.

> act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. *It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.*[41]

Gascon J also held in *Saguenay* that 'what is in issue here is not complete secularity, but true neutrality on the state's part and the discrimination that results from a violation of that neutrality.'[42] It appears from *Saguenay* that the Canadian Constitution does not envision a Canada in which religious expression must be absent from the public square with respect to *individual* expression—even where the individual is working as a state official.

This sentiment was buttressed by another Supreme Court of Canada case concerning freedom of religion decided one month prior to *Saguenay*, where the majority of the Court held:

> Part of secularism, however, is respect for religious differences. A secular state does not—and cannot—interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. Nor can a secular state support or prefer the practices of one group over those of another: (…). The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them. Through this form of neutrality, the state affirms and recognises the religious freedom of individuals and their communities.[43]

These sentiments emphasise that, in Canada, religion is not to be totally void in the public sphere. There is a material difference between allowing a Christian government employee to say grace before eating lunch at the workplace and having the Christian prayer recited at the beginning of the lunch hour over the public announcement system for all employees to hear. It is important that the holding in *Saguenay*, which concerns the state's duty of neutrality regarding religion and irreligion, not be construed as pertaining to individual religious or irreligious expression in public.

[41] *Saguenay* (n 3) [74]–[75] (emphasis added).
[42] ibid [78].
[43] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613, [43]–[44].

5. Conclusion

The primary contribution of *Saguenay* is the principle that the Canadian state bears a duty of neutrality with respect to religion (and irreligion)—a duty that 'results from an evolving interpretation of freedom of conscience and religion' in Canadian constitutional law.[44] As we have explored, the imposition of this duty raises difficult issues and leaves important questions unanswered for the time being. These issues and questions include the distinction between absolute and true neutrality, whether true neutrality favours unbelief to belief in the public square, and determining which Canadian 'traditional and heritage practices' connected to religion can continue (if any). With respect to these matters, only time—and further litigation—will bring answers.

At the same time, *Saguenay* provides guidance with respect to the version of secularism that the Canadian Constitution envisions, namely a version that does not render the public square a 'religion-free' zone with respect to individual expression. It is ironic that *Saguenay* originated in Quebec because, in 2013, the government of that province proposed a law—the so-called 'Secular Charter of Values'—which would have prohibited public servants from wearing certain types of religious apparel at work. It was expected that the Secular Charter would apply to articles such as the Sikh turban, Jewish kippah, and Muslim hijab, among others.[45] The proposed law—which died on the Order paper by virtue of a provincial election—caused great controversy throughout Canada and sparked heated debate on the version of secularism that Canada should pursue. *Saguenay*, despite barely mentioning secularism, hints rather strongly that this proposed law subscribes to a version of secularism that is incompatible with the 'free and democratic society' that the *Canadian Charter* envisions for Canada.[46] In this respect, *Saguenay* may feature 'more than meets the eye' in terms of the impact it will have on Canadian constitutional law—and Canada itself.

[44] *Saguenay* (n 3) [71].

[45] Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Quebec, 2013. Section 5 of Bill 60 prohibited public servants in Quebec from wearing 'objects such as headgear, clothing, jewelry, or other adornments which, by their conspicuous nature, overtly indicate a religious affiliation.'

[46] *Canadian Charter* (n 4) s 1.