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Mouvement laïque québécois v Saguenay (City)

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According to the Supreme Court of Canada, opening municipal council meetings with a prayer violates freedom of religion. *Mouvement Laique Quebecois v City of Saguenay,* 2015 SCC 16[1] decided in April of 2015, contributes to the jurisprudence in Canada on law and religion in a number of significant ways: first, it explicitly ties freedom of religion to a state duty to preserve neutrality as between religion and non-religion; second, it describes this duty of neutrality and its justificatory underpinnings; third it distinguishes between state neutrality and the goal of complete secularity; fourth, it touches on the relationship between constitutional protection for freedom of religion and the preamble of the *Canadian Charter of Rights and Freedoms,* which speaks of the supremacy of God as a founding principle; and finally, it acknowledges the potential tension between state neutrality and attempts to preserve culture and history.

In Canada freedom of religion is constitutionally protected against unjustified government interference, either under section 2(a) of the *Canadian Charter of Rights and Freedoms*[2] or, in Quebec (where *Saguenay* occurred), by the Quebec *Charter of*

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[1] 2015 SCC 16, 2015 CSC 16 (Supreme Court of Canada).
[2] *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. Section 2(a) states that everyone has certain fundamental freedoms, including "freedom of conscience and religion". In *Saguenay,* the Court noted that interpretive principles developed in relation to the *Canadian Charter* are also applicable to the Quebec *Charter*, and vice versa.

Human Rights and Freedoms.[3] The Quebec *Charter* declares that '[e]very person is the possessor of … freedom of conscience [and] freedom of religion', and that every person has the right to exercise his or her rights and freedoms, without 'distinction, exclusion or preference' based on various factors, including religion.[4]

It was the practice of the Saguenay municipal council to open its meetings with a prayer addressed to 'Almighty God' and with the sign of the cross accompanied by the words 'in the name of the Father, the Son and the Holy Spirit'.[5] A self-described atheist and an organization devoted to the complete secularization of society complained about both the prayer and sign of the cross, and about religious iconography located in council chambers. For procedural reasons, the Court declined to rule on the religious symbols, but was unanimous in its holding the city's practice amounted to sponsoring or favoring one religious tradition. [6] This discriminated against other traditions and created a 'disparate impact that is destructive of the religious freedom of the collectivity'.[7] The complainant – or anyone else who wished to attend public council meetings and did not share the religious tradition reflected in the prayer – was excluded on the basis of religion and thus prevented from fully exercising freedom of religion and conscience.[8] The fact that the prayer was claimed to be 'non-denominational'[9] was irrelevant; even non-denominational prayer is a religious practice.[10]

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[3] *Charter of Human Rights and Freedoms*, CQLR c C-12 (Quebec Charter).
[4] Quebec Charter sections 3 and 10.
[5] *Saguenay*, para 103.
[6] Justice Abella wrote a separate opinion, dissenting in part, although agreeing as to outcome. She parted company with the majority on the administrative law issue of what level deference to pay the initial decision of the human rights tribunal, to which Mr. Simoneau and the MLQ first brought their complaint.
[7] *Saguenay*, para 64.
[8] *Saguenay*, para 64.
[9] A claim that the Court seemed to treat with some skepticism. *Saguenay* (no. 1), para 136.
[10] *Saguenay*, para 137.

While neither the Canadian nor the Quebec *Charter* ‘expressly imposes a duty of religious neutrality on the state’,[11] the Supreme Court held in *Saguenay* that ‘[t]oday, the state’s duty of neutrality has become a necessary consequence of enshrining the freedom of conscience and religion in the *Canadian Charter* and the *Quebec Charter*’.[12] Even before freedom of religion was entrenched in the constitution, the Supreme Court had emphasized that there is no state religion in Canada,[13] and early *Charter* cases established that constitutional protection for freedom of religion prevents the state from favoring one religion over another.[14] More recently the Court noted that ‘[r]eligious neutrality is now seen by many Western states as a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights’ and referred to ‘a policy of neutrality’ adopted within Canada.[15] However, *Saguenay* marks the first time that the Court has explicitly stated that a state duty of neutrality on issues relating to religion flows from the entrenchment of freedom of religion and conscience in the constitution. This duty was found in the ‘evolving interpretation’ of the constitutional texts.[16] Since ‘freedom not to believe, to manifest one’s non-belief and to refuse to participate in religious observance is also protected’ by both the Canadian and the Quebec *Charters*,[17] in order to achieve ‘true neutrality’, ‘the state must neither encourage nor discourage any form of religious conviction whatsoever’.[18]

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[11] *Saguenay*, para 71.
[12] *Saguenay*, para 76.
[13] *Chaput v Romain*, [1955] SCR 834, [1955] SCJ No 61 (Supreme Court of Canada) 840.
[14] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, [1985] 3 WWR 481 (Supreme Court of Canada); *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, [1986] SCJ No 70 (Supreme Court of Canada).
[15] *SL v Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 SCR 235 (Supreme Court of Canada) paras10-11.
[16] *Saguenay*, para 70.
[17] *Saguenay*, para 70.
[18] *Saguenay*, para 78.

Saguenay did not simply declare the existence of a duty of neutrality – it also sought to justify this particular understanding of freedom of religion and conscience. Safeguarding a 'neutral public space' from state encroachment is depicted as a positive good, aimed at 'promoting diversity and multiculturalism'. This duty is 'based on [the] democratic imperative' of trying to create 'a free and democratic society'.[19] In the Court's view, such a society can only be realized if everyone feels welcome to participate in public life, and allowing a 'preferential public space that favours certain religious groups and is hostile to others' would stand in the way of such participation.[20] Neutrality as understood by the Supreme Court requires careful avoidance of state promotion of either belief or non-belief. The Court of Appeal in *Saguenay* had accepted the argument that prohibiting the prayer and sign of the cross 'would amount to giving atheism and agnosticism prevalence over religious beliefs'.[21] The Supreme Court of Canada disagreed, reasoning that abstaining from prayer does not by default show a preference for atheism. Had the city council opened with 'a solemn declar[ation] that the council's deliberations were based on a denial of God', this would favour atheism, and so would be unconstitutional.[22]

While *Saguenay* prohibits the state from making a profession of faith, the decision is also careful to acknowledge the importance of religion to individuals, describing religious conviction as 'integral to identity', and as 'the lens through which people perceive and explain the world'.[23] The requirement to maintain a position of neutrality

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[19] *Saguenay*, para 74.
[20] *Saguenay*, para 75.
[21] *Saguenay*, para 130.
[22] *Saguenay* ,para 133.
[23] *Saguenay,* para 73.

vis-à-vis religion falls on 'institutions and the state, not individuals'[24] and is not intended to 'homogenize' the involvement of individuals in public spaces.[25] Thus, the 'democratic imperative' described by the Court does not have as its goal the 'complete secularity' advocated by the Movement Laique, one of the complainants in this case.[26] In abjuring the 'secularization thesis'[27] which seeks to completely privatize religion, the Court has adhered to an understanding of secularity that leaves respectful room for individuals' religious expression, even in the public square. This aspect of *Saguenay* buttresses the Court's approach in a slightly earlier decision, *Loyola High School v Quebec (Attorney General)* 2015 SCC 12.[28] There, in the context of overturning a decision of the Quebec Minister of Education which would have required a private Catholic School to teach Catholicism from a purely secular viewpoint, the Supreme Court stated: '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'.[29]

Saguenay is also interesting for its attempt to reconcile the reference to God in the preamble to the *Canadian Charter* (according to the preamble, 'Canada is founded upon principles that recognize the supremacy of God and the rule of law') with the protection for freedom of religion and conscience. The preamble has largely been ignored, or even

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[24] The mayor and municipal council had tried to argue that prohibiting the prayer would infringe their individual right to freedom of religion. The Court in *Saguenay* distinguished between individuals acting in their public role, and thus required to fulfil the duty of neutrality, and the right of state officials to exercise their religious freedom "when they are not acting in an official capacity". *Saguenay*, para 119.

[25] *Saguenay*, para 74.

[26] *Saguenay*, para 78.

[27] V Bader, 'Religion and the Myths of Secularization and Separation' (2011) RELIGARE Working Paper No. 8/March 2011 <http://www.religareproject.eu/system/files/Religare%20WP%20No%208_Bader_0.pdf> accessed July 22 2015.

[28] 2015 SCC 12, 2015 CSC 12 (Supreme Court of Canada).

[29] *Loyola*, para 43. The dissenting judgment did not disagree on this point; in fact the dissent would also have allowed the Catholic school to teach about ethics from a religious perspective.

declared a 'dead letter' in one lower court case.[30] In *Saguenay*, the municipality argued that the preamble 'establishes the moral source of the values that [the] charter protects' and so a prayer referring to that source 'cannot, in itself, interfere with anyone's freedom of conscience and religion'.[31] In response, the Supreme Court distinguished between 'the state's observance of a moral practice' and the 'moral source of that practice'.[32] Thus, the preamble "articulates the 'political theory' on which the charter's protections are based",[33] but it cannot be used to 'reduce the scope of a guarantee that is expressly provided for in the charters'.[34] *Saguenay* is noteworthy for not simply dismissing the reference to God in the constitution; however, it remains to be seen whether the preamble will be given any greater weight in future cases or whether it will remain to all intents and purposes a dead letter.

Saguenay is also interesting for the comments, albeit brief, on possible tensions between the state's duty of neutrality and the claims of culture and history. The City of Saguenay was successful at the Court of Appeal in large part because the majority of that Court viewed the actions of the mayor and municipal council not as an endorsement of particular religious convictions, but as a reflection of Quebec's cultural history. The Supreme Court of Canada explicitly rejected this argument, warning: 'If the state adheres to a form of religious expression under the guise of cultural or historical reality or heritage, it breaches its duty of neutrality'.[35] The Supreme Court

[30] *R v Sharpe*, 1999 BCCA 416, [1999] BCJ No 1555 (British Columbia Court of Appeal), para 79.
[31] *Saguenay*, para 144.
[32] As part of this discussion, Justice Gascon also made the intriguing comment that "a single reference to God in the prayer" would not, by itself, be "determinative" as to whether or not the state duty of neutrality had been breached; however, the implications of this comment were not fleshed out. *Saguenay*, para 146.
[33] *Saguenay*, para 147.
[34] *Saguenay*, para 148.
[35] *Saguenay*, para 78.

acknowledged that 'the Canadian cultural landscape includes many traditional and heritage practices that are religious in nature… [and] it is clear that not all of these cultural expressions are in breach of the state's duty of neutrality'; however, 'the state may not consciously make a profession of faith or act so as to adopt or favour one religious view at the expense of others'.[36] Later, the Supreme Court 'concede[d] that the state's duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage'; but stated that this 'cannot justify the state engaging in a discriminatory practice for a religious purpose'.[37] Through its prayer, the municipal council was 'profess[ing] a theistic faith', and '[t]radition cannot be used to justify such a use of public powers'.[38] Future litigation may require the courts to define more fully the line between state celebration and preservation of religious history and unjustifiable state infringement of freedom of religion. This will not be an easy task.

Saguenay is likely to have a significant impact on the relationship between law and religion in Canada – both in practical terms (a significant number of municipalities across the country have been reviewing their practices for opening meetings, in light of the decision) and for its contribution to our understanding of what is required of the state in a secular, pluralistic society where freedom of religion is constitutionally entrenched.

[36] *Saguenay*, para 87.
[37] *Saguenay*, para 116.
[38] *Saguenay*, para 118.