

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

**MOUVEMENT LAÏQUE QUÉBÉCOIS and
ALAIN SIMONEAU**

APPELLANTS
(RESPONDENTS/INCIDENTAL APPELLANTS)

AND:

CITY OF SAGUENAY and JEAN TREMBLAY

RESPONDENTS
(APPELLANTS/INCIDENTAL RESPONDENTS)

AND:

**HUMAN RIGHTS TRIBUNAL, EVANGELICAL FELLOWSHIP
OF CANADA, CATHOLIC CIVIL RIGHTS LEAGUE,
FAITH AND FREEDOM ALLIANCE, ASSOCIATION DES PARENTS
CATHOLIQUES DU QUÉBEC, CANADIAN SECULAR ALLIANCE and the
CANADIAN CIVIL LIBERTIES ASSOCIATION**

INTERVENERS

**FACTUM OF THE INTERVENER,
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(Rule 42 of the Supreme Court Rules)

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TABLE OF CONTENTS

PART I – STATEMENT OF FACTS1

PART II – ISSUES ON APPEAL.....1

PART III – ARGUMENT2

 A. The Duty of State Neutrality2

 (1) State neutrality only requires neutrality from state officials
 in respect of official conduct.....4

 (2) The focus must be on the law or state action, not on the
 individual plaintiff4

 (3) State neutrality requires equal treatment for religious and
 non-religious systems of belief6

 (4) No contradiction exists between state neutrality and the
 preservation of historic heritage.....7

 B. The Test for Whether State Neutrality Has Been Breached8

 C. Saguenay Violated its Duty of Neutrality9

PART IV – ORDER SOUGHT CONCERNING COSTS.....10

PART V – ORDER SOUGHT10

PART VI – TABLE OF AUTHORITIES.....11

PART I – STATEMENT OF FACTS

1. This Court has held that freedom of religion embraces a principle of state neutrality with respect to religious matters.¹ This case offers an opportunity for this Court to further define what the principle of state neutrality really means.

2. The Canadian Secular Alliance (the “Alliance”) submits that the principle prohibits the state from taking actions that impliedly endorse a position or viewpoint on religious matters. The requirement of state neutrality recognizes that individuals’ freedom of religion can only be properly protected by a state that has no views on such questions. Freedom of religion does not just prevent the state from coercing individuals with respect to religious belief and practice; the principle of state neutrality requires the state to refrain entirely from taking positions on religious questions or engaging in religious practice.

3. The Court of Appeal adopted a weak and fundamentally flawed version of the principle of state neutrality. Rather than viewing the principle as requiring the state’s withdrawal from the religious sphere, the Court of Appeal looked to whether the bylaw passed and carried out by the Ville de Saguenay (“Saguenay”) had a coercive effect on Mr. Simoneau as a particular individual. Further, the Court of Appeal took a tortuous interpretation of the prayer and the religious objects, concluding that they were “mere references to religious heritage”.² Respectfully, it is plain and obvious that opening council meetings with a religious prayer, in chambers bearing religious objects, implies endorsement by the state of a theistic viewpoint. It is just such state action that the principle of state neutrality precludes.

4. The Alliance accepts the facts as outlined in the Appellant’s factum.

PART II -- ISSUES ON APPEAL

5. The question in this case that the Alliance will address is whether Saguenay violated the principle of state neutrality, and hence the guarantee of freedom of religion, by adopting the

¹ *S. L. c. Commission Scolaire Des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235.

² *Simoneau c. Tremblay*, 2013 QCCA 936 at para. 107, 363 D.L.R. (4th) 62.

bylaw at issue in this case. The Alliance will submit that it did, as the prayer plainly implies endorsement by Saguenay of a theistic perspective.

6. The Alliance will not address the question of whether the Human Rights Tribunal had jurisdiction to make orders with respect to the religious objects. The Alliance will, however, submit that, at the very least, it is appropriate to consider the religious objects as part of the context by which the prayer is interpreted.

PART III – ARGUMENT

A. The Duty of State Neutrality

7. In *S.L. c. Des Chênes (Commission scolaire)*, Deschamps J., for the majority, made clear that freedom of religion requires the state to remain neutral in matters of religion and that state sponsorship of one religious tradition amounts to discrimination against others.³ Since the government may not treat one religious belief more favourably than any other, state neutrality limits the role of the government in spiritual affairs “to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship, which is a fundamental, collective aspect of freedom of religion, and to organize their churches or communities.”⁴ Essentially, the role of the state is to set up a free space in which citizens of various beliefs can exercise their individual rights.⁵

8. The government is therefore prohibited from enacting private legislation that favours one religion over another.⁶ While religious values play an important role in our liberal democracy, it is not open to the government to express an opinion on purely spiritual matters, including matters involving the worshipping, honouring, or recognition of God. The state is a civic institution, not a religious one, and it cannot be used to advance a primarily spiritual agenda.

³ *S.L., supra*, at para. 17.

⁴ *Témoins de Jéhovah v. La Fontaine (Village)*, 2004 SCC 48 at para. 68, [2004] 2 S.C.R. 650, *per* Lebel J., dissenting.

⁵ *S.L., supra*, at para. 10.

⁶ *S.L., supra*, at para. 54, *per* Lebel J., concurring.

9. That being said, the state will often need to take a position on matters that involve a moral or ethical dimension. The state must advance the key values that make a liberal democracy possible, such as human dignity, basic human rights, and popular sovereignty. Since these values are constituent parts of liberal democracy itself, by promoting these constitutional values the state does not violate state neutrality.⁷ It is only those values and beliefs that are primarily spiritual that may not be advanced by government.

10. Some commentators suggest that by removing explicitly religious elements from the public sphere, state neutrality creates a kind of government-sanctioned anti-spirituality. These commentators argue that “[w]hat for some is the neutral ground on which freedom of religion and conscience depends is for others a partisan anti-spiritual perspective”.⁸

11. But state neutrality does not require government to ignore religious and other deeply held conscientious beliefs. Instead, the state must accommodate these beliefs in a way that accords equal respect to all. The state can support the expression of religion and conscientious belief “so long as it does so in a manner that respects the principle of neutrality or even-handedness between religions”.⁹ It is only when a government sponsors or endorses a particular religious or non-religious conscientious belief that it violates state neutrality because it no longer treats other beliefs with equal respect.

12. Religious members of society may also legitimately be influenced by their religious values when engaged in public debate.¹⁰ As long as the governmental expression of these values addresses civic matters – the rights or welfare of others in the community – those values may legitimately be recognized by the state.¹¹ Thus an individual who believes he or she has a religious duty to feed the poor may advocate for programs that aim at reducing poverty, but may not seek to have the state recognize the metaphysical truth of his or her religious belief.

⁷ B. Berger, “Religious Diversity, Education, and the ‘Crisis’ in State Neutrality” (2014) 29 C.J.L.S. 103 at 121.

⁸ R. Moon, “Government Support for Religious Practice” in R. Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver, B.C.: UBC Press, 2008) 217 at 231 [Moon (2008)].

⁹ B. Ryder, “State Neutrality and Freedom of Conscience and Religion” (2005), 29 S.C.L.R. (2d) 169 at 174-175.

¹⁰ *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at para. 19, [2002] 4 S.C.R. 710

¹¹ R. Moon, “Freedom of religion under the *Charter of Rights*: the limits of state neutrality” (2012) 45 U.B.C. L. Rev. 49 at 508-509 [Moon (2012)].

13. In brief, the state may not endorse any primarily spiritual or religious belief or position. While the state may recognize and accommodate religious believers and while state action may be informed by values that are also religious, the state cannot take a position on matters of a spiritual nature. The state may not venture into questions of the proper form of worship or the individual's relationship to the divine; that is the domain of religion and conscience.

14. With that overview, it is worth turning to consider certain more particular issues concerning the duty of state neutrality.

(1) State neutrality only requires neutrality from state officials in respect of official conduct

15. It is important to be clear at the outset that the duty of state neutrality does not require the removal of religion from the public sphere; it rather requires the withdrawal by the *state* from the *religious* sphere. More pointedly, state neutrality does not preclude religious belief or practice on the part of individuals, acting as such, who are also state officials. Rather, the principle is aimed solely at the endorsement by the *state* of positions on religious matters.¹² The duty of state neutrality is not breached by a municipal councillor engaging in private prayer prior to the opening of a council meeting, nor by a councillor disclosing his or her religious affiliation as an individual, such as by wearing a turban, head scarf or kippah.

16. It will at times be difficult to determine when a state official is acting as an individual, and when as an official. As always, the issue must be approached with sensitivity to the context. In the case at bar, however, the issue is straightforward, as the prayer is set out in a bylaw and is recited by participating councillors at the commencement of their public meetings.

(2) The focus must be on the law or state action, not on the individual plaintiff

17. While the Court of Appeal acknowledged that freedom of religion encompasses a duty of state neutrality, Gagnon J.A. focused his inquiry on whether the prayer had a coercive effect on Mr. Simoneau. As part of that analysis, Gagnon J.A. concluded that Mr. Simoneau is not "particularly vulnerable" to religious or moral coercion,¹³ that he never felt any pressure to take

¹² See, for example, *Freitag v. Penetanguishene (Town)*, 1999 CarswellOnt 2911 at para. 12, 47 O.R. (3d) 301 (C.A.).

¹³ *Simoneau, supra*, at para. 112.

part in the prayer,¹⁴ and that he alleged “only mere discomfort” at the sight of the religious objects.¹⁵

18. Respectfully, the Court of Appeal’s focus on the effects of the prayer and religious objects on Mr. Simoneau is wholly misplaced. When state neutrality is breached, there is no need for individual plaintiffs to show that the impact prejudices them or causes them any particular harm. As Dickson J., as he then was, held in *Big M*: “[a] law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation.”¹⁶ When a law has a religious purpose, there is no need to further consider its effects, since the law is necessarily invalid. As Dickson J. put it, “[e]ven if such effects were found inoffensive ... this could not save legislation whose purpose has been found to violate the *Charter*’s guarantees.”¹⁷

19. There is no need to show coercion because state endorsement of religion inevitably signals to non-believers that they are not full members of the political community.¹⁸ In proclaiming the standards of a particular belief, state-endorsed religion creates a climate hostile to non-believers, as well as the appearance of discrimination. The theological content of the endorsing legislation is a constant reminder to non-believers that they are different and “other” from the dominant religious culture.¹⁹ Spiritual or religious beliefs or points of view often lie at the core of individuals’ identities. So when the state treats certain spiritual practices or beliefs as less important or less true than others, the state is not simply rejecting the individual’s views and values but is also denying the individual’s equal worth.²⁰

20. When government deliberately takes a position on a matter of religious controversy and thus purposefully violates state neutrality, there is no need for the court to consider the extent of the infringement on any particular plaintiff. Accordingly, Canadian courts have found that laws that advance a particular religious agenda are invalid, whether or not the legislation prejudices

¹⁴ *Ibid.* at para. 114.

¹⁵ *Ibid.* at para. 127.

¹⁶ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 314, [1985] 3 W.W.R. 481.

¹⁷ *Ibid.* at 333.

¹⁸ Moon (2008), *supra*, at 229.

¹⁹ *Big M*, *supra*, at 337.

²⁰ Moon (2012), *supra*, at 505.

any individual plaintiff and without any need to consider whether the legislation can otherwise be justified.²¹

21. Mr. Justice Gagnon therefore erred by looking to the impact of the prayer on Mr. Simoneau. Since the purpose of the legislation was to enshrine into law an openly religious prayer that professed the existence of God, there was no need for Gagnon J.A. to consider Mr. Simoneau's particular circumstances or religious convictions.

(3) State neutrality requires equal treatment for religious and non-religious systems of belief

22. The Court of Appeal appears to have taken comfort in its view that the prayer “cannot be identified with any particular religion”, but rather is simply consistent with “modern theistic doctrine”.²² The implication is that a prayer at “such a high level of generality as to encompass all faiths”²³ cannot reasonably be offensive to anyone's freedom of religion.

23. The duty of state neutrality, however, does not simply preclude the state from weighing into classic sectarian divisions, such as those between Catholics and Protestants or Sunnis and Shias. The religious sphere from which the state must withdraw is defined more generally, and includes – perhaps at its broadest – the question of the existence of a god or gods. The state must take no position on that issue. The state is neither theist, nor atheist, nor even agnostic; it is truly secular.

24. Following similar pronouncements in *Big M*²⁴ and *Morgentaler*,²⁵ Justice Deschamps confirmed in *S.L.* that state neutrality requires respect for both religious and non-religious systems of belief:

[F]ollowing a realistic and non-absolutist approach, state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having

²¹ *Big M*, *supra*, at 353; *Freitag*, *supra*, at para. 25; *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*, 1990 CarswellOnt 1078 at paras. 57 and 61, 71 O.R. (2d) 341 (C.A.) [CCLA]; *Zylberberg v. Sudbury (Bd. of Education)*, 1988 CarswellOnt 1093 at para. 41, 65 O.R. (2d) 641 (C.A.).

²² *Simoneau*, *supra*, at para. 88.

²³ In words quoted by Gagnon J.A. in *Simoneau* at para. 91.

²⁴ *Big M*, *supra*, at 347.

²⁵ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 179, 63 O.R. (2d) 281, *per* Wilson J., concurring in the result.

no religious beliefs whatsoever, while taking into account the competing constitutional rights of the affected individuals affected.²⁶

25. Accordingly, the existence or non-existence of a god or gods is a question of a religious nature on which government is precluded from taking a position.

(4) No contradiction exists between state neutrality and the preservation of historic heritage

26. In his reasons, Gagnon J.A. characterized state neutrality and the preservation of historic heritage as conflicting state duties that must be *balanced*²⁷ and *reconciled*,²⁸ stating that “the claim that the State should practise abstention in religious matters seems to contradict its duty to preserve its history, characterized here by an interconfessional heritage.”²⁹

27. In fact, the state is not presented with any such dilemma. To the contrary, the only duty on the state is to maintain neutrality by not endorsing any position on religious matters. The state may choose, as a matter of its own policy, to preserve elements of its heritage that are “merely passive witnesses to history”, in Gagnon J.A.’s words,³⁰ but its freedom to do so ends where passive witnessing of history crosses into active, implied endorsement of a religious position. That is, the state may permissibly support historic heritage that has a religious basis when doing so does not reasonably imply an endorsement of a religious viewpoint.

28. That a religious practice has historical roots is not a justification for its continuation. Freedom of religion is intended at least in part to protect religious minorities from traditional majoritarian religious viewpoints. If these same majoritarian traditions can in fact justify infringing state conduct, freedom of religion will be of little assistance to the very persons it is intended to help. Indeed, if historical tradition justifies state endorsement of religion, there is no reason why even overtly sectarian prayers should be considered unconstitutional. If anything, an overtly sectarian religious prayer would be more closely tied with history than a supposedly non-denominational prayer that has been denuded of its historical particulars.

²⁶ *S.L., supra*, at para. 32, emphasis added.

²⁷ *Simoneau, supra*, at para. 63.

²⁸ *Ibid.* at para. 72.

²⁹ *Ibid.* at para. 69.

³⁰ *Ibid.* at para. 70.

29. Mr. Justice Gagnon put considerable weight on the preamble to the *Canadian Charter of Rights and Freedoms*, which refers to the “Supremacy of God”.³¹ But far from justifying breaches of state neutrality, to the extent that the “Supremacy of God” clause has any legal force at all – which is a matter of serious debate³² – it is in recognizing that all government action must be subordinate to the basic human rights protected by the *Charter*.³³ The “Supremacy of God” clause cannot be used to undercut those same human rights by permitting the government to endorse particular religious viewpoints.

B. The Test for Whether State Neutrality Has Been Breached

30. When an complainant asserts a violation of state neutrality on the grounds that the state has endorsed a position on a religious matter, the court must consider three questions:

- (a) Is the action complained of action of the state or private action of a government official?
- (b) Does that action imply endorsement or support of a particular position on a religious matter?
- (c) Is the *purpose* of the state action to endorse or support a particular position on a religious matter?

31. If the answer to each of the first two questions is yes, then the state action breaches the state’s duty of neutrality and, therefore, freedom of religion. If the answer to the third question is also affirmative, then the state action cannot be justified as a reasonable limit and cannot be permitted.³⁴

32. The third question requires the court to consider the full factual nexus of the impugned state action, including the language used; the history and context of the action; and whether the state action’s putative civic purpose (if any) could be achieved without touching on questions of primarily spiritual importance.

³¹ *Ibid.* at para. 100.

³² J. Penney and R. Danay, “The Embarrassing Preamble? Understanding the ‘Supremacy of God’ and the Charter” (2006) 39 U.B.C. L. Rev. 287 at 288 [Penney].

³³ See Penney, *supra*, generally.

³⁴ See, for instance, *Big M*, *supra*, at 333-4.

33. In some cases, language used in legislation readily demonstrates an overtly religious purpose, as Dickson J. found in *Big M* with respect to Sunday observance statutes.³⁵ The history and context of a state action also provides important indicia of its purpose. So where a particular state action has a clear religious history, that history will ordinarily indicate that the state action continues to operate as an endorsement of religion.³⁶

34. The court must also consider the broader context of the state act. Where the act is accompanied by other religious indicia – like, as in this case, the making of the sign of the cross by religious officials during a supposedly non-denominational prayer – the court may infer that the state act is intended to endorse a particular religious viewpoint.³⁷

35. A final consideration is whether the state act could be stripped of its religious content while still accomplishing its putative civic objectives. If the government’s civic purpose could be accomplished as readily without touching on a matter of religious controversy, the court should infer that the purpose of the act or legislation is to endorse a particular religious point of view.

C. Saguenay Violated its Duty of Neutrality

36. As the prayer is prescribed by bylaw and recited at the commencement of public municipal council meetings, it is plainly and obviously state action. The more serious questions are whether the effects and purpose of the prayer are religious in nature.

37. The Alliance submits that they are. The prayer invokes a god in the role of a benefactor through the references to “Almighty God” who grants favours, wisdom, knowledge and understanding, and through the closing words “Amen”.³⁸ The history and context of the prayer and bylaw also indicate their religious purpose: until the Appellant served its initial motion, the mayor performed an openly sectarian prayer in which he made reference to “the name of the Father, the Son and the Holy Spirit”; the mayor performed the sign of the cross before and after reciting the prayer; some of the rooms in which the meetings were held and the prayers

³⁵ *Big M, supra*, at 318.

³⁶ *Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Laval (Ville)*, 2006 QCTDP 17 at paras. 166-167, 2006 CarswellQue 8871 [*Laval*]; *CCLA, supra*, at paras. 46-56; *Big M, supra*, at 336.

³⁷ *Laval, supra*, at para. 165.

³⁸ *Simoneau, supra*, at para. 22.

performed contained overtly sectarian symbols, including a sacred heart and crucifix; and the mayor overtly proclaimed the prayer's religious purpose.³⁹

38. Further, it must be said that if the bylaw had the secular purpose of aiming to solemnize council proceedings, such could be accomplished by way of a secular dedication or moment of silence. Indeed, the bylaw was amended once in order to remove some of its most overtly Catholic content; the only plausible purpose for the remaining references to a god is a continuing desire on the part of Saguenay to invoke a Christian, theistic conception.

39. For these reasons, the Alliance submits that the bylaw violates the duty of state neutrality and hence freedom of religion, and cannot be justified as a reasonable limit.

PART IV – ORDER SOUGHT CONCERNING COSTS

40. The Alliance does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

41. The Alliance seeks leave to make up to 10 minutes of oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: August 26, 2014



Tim Dickson



Alexander Boland

³⁹ *Ibid.* at paras. 16-17 and 150-151.

PART VI --- TABLE OF AUTHORITIES

CASES

<i>Canadian Civil Liberties Assn. v. Ontario (Minister of Education)</i> , 1990 CarswellOnt 1078, 71 O.R. (2d) 341 (C.A.).....	6, 9
<i>Chamberlain v. Surrey School District No. 36</i> , 2002 SCC 86, [2002] 4 S.C.R. 710	3
<i>Freitag v. Penetanguishene (Town)</i> , 1999 CarswellOnt 2911, 47 O.R. (3d) 301 (C.A.)	4, 6
<i>S. L. c. Commission Scolaire Des Chênes</i> , 2012 SCC 7.....	1, 2, 7
<i>Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Laval (Ville)</i> , 2006 QCTDP 17, 2006 CarswellQue 8871	9
<i>R. v. Morgentaler</i> , [1988] 1 S.C.R. 30 179, 63 O.R. (2d).....	7
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295 at 314, [1985] 3 W.W.R. 481.....	5, 6, 7, 9
<i>Simoneau c. Tremblay</i> , 2013 QCCA 936, 363 D.L.R. (4th) 62.....	1, 2, 5, 6, 7, 10
<i>Témoins de Jéhovah v. La Fontaine (Village)</i> , 2004 SCC 48; [2004] 2 S.C.R. 650	2
<i>Zylberberg v. Sudbury (Bd. of Education)</i> , 1988 CarswellOnt 1093, 65 O.R. (2d) 641 (C.A.)	6

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