

**SUPREME COURT OF CANADA**

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

**MOUVEMENT LAÏQUE QUÉBÉCOIS AND ALAIN SIMONEAU**

APPELLANTS  
(Respondents / Cross-Appellants)

- and -

**CITY OF SAGUENAY AND JEAN TREMBLAY**

RESPONDENTS  
(Appellants / Cross-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  
CANADIAN CIVIL LIBERTIES ASSOCIATION**

INTERVENERS

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**FACTUM OF THE INTERVENER  
CANADIAN CIVIL LIBERTIES ASSOCIATION  
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

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**FACTUM OF THE INTERVENER**  
**CANADIAN CIVIL LIBERTIES ASSOCIATION**

1. This appeal centres on whether the recital of a religious prayer at the outset of public city council meetings violates the *Charter of human rights and freedoms*<sup>1</sup> (“**Charter**”).
2. In reaching its decision, the Quebec Court of Appeal focused on the meaning of state neutrality in Quebec and the right of the state to promote religion. The Canadian Civil Liberties Association (“**CCLA**”) argues that the real question at issue in this appeal is whether there was a violation of fundamental rights and freedoms and whether any such violation could be justified.
3. The CCLA submits that the following principles, articulated by the Courts in interpreting section 2(a) of the *Canadian Charter of Rights and Freedoms*<sup>2</sup> (“**Canadian Charter**”), should be used as guidelines in determining whether there is discrimination under the Charter:
  - (a) freedom of religion and conscience includes the right to be free from any form of religious coercion by the state;
  - (b) freedom of religion and conscience includes the right not to believe in or subscribe to any religious faith; and
  - (c) the state and its agents must maintain a neutral orientation with respect to religion, and the failure to do so constitutes discrimination.
4. This appeal underlines the importance of a principled approach when analyzing freedom of religion and conscience in cases where religious practices and symbols are endorsed by the state, especially given the significant recent debate in Quebec and Canada surrounding freedom of religion.

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<sup>1</sup> C.Q.L.R., c. C-12, Appellants’ Book of Authorities (“R.S.A.”), vol. I, tab. 2.

<sup>2</sup> *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

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**PART I – OVERVIEW AND STATEMENT OF FACTS**

5. The CCLA takes no position with respect to the facts.

**PART II – QUESTIONS IN ISSUE**

6. Briefly stated, the CCLA’s arguments are the following:
- A. State-sponsored religious coercion violates freedom of religion and conscience. The recital of a religious prayer at public city council meetings constitutes such a violation.
  - B. This violation cannot be justified under the Charter. There can be no justification for state compulsion in matters of belief.

**PART III - ARGUMENT**

**A. State-Sponsored Religious Coercion Violates Freedom of Religion and Conscience**

7. This appeal raises two dimensions of freedom of religion. First, freedom of religion is an individual liberty, which includes the right not to be compelled to act contrary to one’s beliefs without a legitimate justification. The CCLA argues that, according to principles already well established by this Court, there is a violation of freedom of religion where the underlying objective of a statute is to attempt to compel a religious practice or belief.
8. Second, freedom of religion must be considered an equality right, namely the right to equal treatment of different belief systems by the state. The CCLA respectfully submits that there is a violation of freedom of religion where the state promotes or appears to endorse implicitly one religion over other belief systems.

**(1) State-Sponsored Coercion in Matters of Belief**

9. Freedom of religion is commonly referred to in its positive aspect, namely the right to believe or not believe what one chooses.

10. However, as pointed out by Justice LeBel in *Lafontaine*, freedom of religion also comprises a negative aspect, namely “*the right not to be compelled to belong to a particular religion or to act in a manner contrary to one’s religious beliefs*”<sup>3</sup>.
11. In *Big M Drug Mart*, Justice Dickson held that freedom is primarily characterized by the “*absence of coercion or constraint*”. As a result, he explains that there is a violation of freedom of religion where the state attempts to “*coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose*”:

“95. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. [...]

121. What unites enunciated freedoms in the American First Amendment, s. 2 (a) of the Charter and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation.”<sup>4</sup>

12. It is important to emphasize that “coercion” is not limited to overt or obvious forms of compulsion but, as stated by Justice Dickson, includes “*indirect forms of control which determine or limit alternative courses of conduct available to others*”<sup>5</sup>. As specified a year later by Justice Dickson in *Edwards Books*, “[i]t matters not [...] whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2 (a)”<sup>6</sup>.

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<sup>3</sup> *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, Respondents’ Book of Authorities (“R.S.I.”), vol. II, tab 26, para. 65 (“*Lafontaine*”).

<sup>4</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, R.S.I., vol. III, tab 45, para. 95 and 121 (“*Big M Drug Mart*”).

<sup>5</sup> *Ibid.*, para. 95.

<sup>6</sup> *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713, R.S.I., vol. III, tab. 50, para. 96.

13. The test applied in *Big M Drug Mart* to determine whether there is coercion was not limited to deciding whether the *effect* of the *Lord's Day Act* was in fact to coerce individuals to observe a religious practice, but rather to establish the underlying *purpose* of the legislation<sup>7</sup>. Indeed, even though the *Lord's Day Act* did not overtly have the effect of coercing individuals to observe the Christian Sabbath, Justice Dickson nevertheless found that it violated s. 2(a) of the Canadian Charter because its true purpose, as had been conceded by the Attorney General for Alberta, was to compel religious observance.
14. The Courts have found, on several occasions, that legislation whose purpose was to compel religious observance, even indirectly, violates freedom of religion. This includes cases where individuals are given opportunities to opt out of the religious exercise or practice at issue.
15. In *Zylberberg*, the majority of the Ontario Court of Appeal found that Regulations to Ontario's *Education Act* that forced pupils to engage in religious practices in schools were contrary to section 2(a) of the *Canadian Charter*, even though students could opt out of reciting the prayer<sup>8</sup>.
16. In *CCLA v. Ontario (Minister of Education)*, the Ontario Court of Appeal held that a regulation making religious education a compulsory part of the public school curriculum violated freedom of religion because the purpose and effect of the regulation were to provide for religious indoctrination<sup>9</sup>. This was the case even though students could obtain exemptions from participation.
17. In light of these principles, the CCLA submits that the Courts should favour a broad interpretation of coercion, including indirect forms of coercion, and be mindful of the underlying purpose of the legislation when analyzing whether there is a breach of an individual's right to freedom of religion and conscience.

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<sup>7</sup> *R. v. Big M Drug Mart Ltd.*, *supra*, note 4, para. 93.

<sup>8</sup> *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (ON CA), Book of Authorities of the Intervener CCLA ("CCLA Authorities"), tab. 4.

<sup>9</sup> *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (ON CA), CCLA Authorities, tab. 1.



**(2) Freedom of Religion as an Equality Right**

18. Freedom of religion should not only be seen as an individual liberty, but also as an equality right that “*requires the equal treatment by the state of different belief systems*”<sup>10</sup>.
19. Indeed in *Big M Drug Mart*, Justice Dickson held that, in proclaiming Christian standards, the *Lords Day Act* gave the appearance of discrimination against non-Christians and operated as a reminder to religious minorities of their alienation from the dominant culture:

*“97. To the extent that it binds all to a sectarian Christian ideal, the Lord’s Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.”<sup>11</sup>*

20. As a result, the state must treat different belief systems equally and cannot protect one religion over another:

*98. Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal. The arm of the state requires all to remember the Lord’s day of the Christians and to keep it holy. The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.”<sup>12</sup>*

21. More recently, Justice Deschamps explained in *SL* that “*state sponsorship of one religious tradition amounts to discrimination against others*”:

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<sup>10</sup> Richard Moon, “Government Support for Religion”, in *Freedom of Conscience and Religion*, 2014, Toronto, Irwin Law, CCLA Authorities, tab. 5, at p. 10.

<sup>11</sup> *R. v. Big M Drug Mart Ltd.*, *supra*, note 4, para. 97.

<sup>12</sup> *Ibid.*, para. 98.

*“17. The historical, political and social context of the late 20<sup>th</sup> century, the enactment of the Quebec and Canadian Charters, and the interpretation of freedom of religion by Canadian courts have played an important role in the Quebec government’s decision to remain neutral in religious matters. While it is true that the Canadian Charter, unlike the U.S. Constitution, does not explicitly limit the support the state can give to a religion, Canadian courts have held that state sponsorship of one religious tradition amounts to discrimination against others.”<sup>13</sup>*

22. The CCLA respectfully submits that, when determining if there is a violation of freedom of religion, the Courts should be mindful of the obligation of the state not to prefer one religion at the expense of those of another.

**(3) Application**

23. To determine if there is discrimination under s. 10 of the Charter, the Applicant must establish (1) the existence of a distinction, exclusion or preference; (2) that it is based on a ground enumerated in s. 10 of the Charter; and (3) that the distinction, exclusion or preference has the effect of nullifying or impairing the right to full and equal exercise of human rights and freedoms<sup>14</sup>.
24. The CCLA respectfully submits that a law or regulation which provides for the recital of a prayer at the outset of public city council meetings<sup>15</sup> violates the right to freedom of religion and conscience and constitutes discrimination under the Charter. The apparent purpose of such a law is to compel individuals to observe a specific religious practice.
25. The *Regulation* at issue here creates a preference for individuals of Christian denominations and excludes others. The question is not whether the prayer is Christian or non-denominational in nature, but whether the *Regulation* compels a religious practice and interferes with profoundly personal beliefs. Indeed, it could be argued that the reference to God excludes non-believers but also those who

<sup>13</sup> *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, R.S.I., vol. III, tab 56, para. 17 (“SL”).

<sup>14</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, CCLA Authorities, tab. 3.

<sup>15</sup> *Règlement sur la régie interne de la Ville de Saguenay*, VS-R-2008-40, Exhibit D-1, Appellants’ File (“D.A.”), vol. 14, p. 114-116 (“Regulation”).

- adhere to polytheistic and nontheistic religions<sup>16</sup>. Finally, the option given to citizens of leaving the chamber before the prayer is recited operates as a clear form of exclusion and isolation of any individuals who choose to do so.<sup>17</sup>
26. The preference and exclusion are based on religion, a ground enumerated in s. 10 of the Charter.
27. To the extent that the Regulation binds individuals and the city's deliberations and actions to a religious practice and that its underlying objective is to compel religious practice, it exercises a form of coercion inimical to the spirit of the Charter, in that:
- (a) it effectively compels individuals to declare publicly their religious beliefs or non-beliefs; and
  - (b) it may compel individuals to engage in a religious practice in order to avoid being isolated, stigmatized and identified as non-conformists or as non-believers.

**B. Absence of Justification**

28. It is important to reiterate the principles that have already been established by this Court in cases involving state compulsion on matters of belief and justification of religious practices based on historical and cultural practices.

**(1) Absence of Justification for State Compulsion in Matters of Belief**

29. The right to freedom of religion and conscience is not without limits. In *Big M Drug Mart*, Justice Dickson refers to limitations that “*are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*”<sup>18</sup>.
30. However, this Court has reiterated on numerous occasions that compelling religious observance is not a purpose that is pressing and substantial, such that the

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<sup>16</sup> R. Moon, “Government Support for Religion”, *supra*, note 10, at p. 37.

<sup>17</sup> See: *Freitag and Corporation of the Town of Penetanguishene*, [1999] O.J. No. 3524 (ON CA), CCLA Authorities, tab. 2.

<sup>18</sup> *R. v. Big M Drug Mart Ltd.*, *supra*, note 4, para. 95.

first stage of the *Oakes*<sup>19</sup> test to establish a justification under s. 1 of the Canadian Charter is not met and proportionality will not need to be considered.

31. In *Big M Drug Mart*, Justice Dickson wrote:

*“142. The characterization of the purpose of the Act as one which compels religious observance renders it unnecessary to decide the question of whether s. 1 could validate such legislation whose purpose was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced.”*<sup>20</sup>

32. Similarly, in *Hutterian Brethren*, the majority of this Court (per Chief Justice McLachlin) held that laws that compel religious belief or practice will fail at the first stage of *Oakes* considering the fundamental principle that the state cannot by law compel religious belief or practice:

*“[92] Canadian law reflects the fundamental proposition that the state cannot by law directly compel religious belief or practice. Thus, this Court has held that if the purpose of a law is to interfere with religious practices, the law cannot be upheld [...]. To compel religious practice by force of law deprives the individual of the fundamental right to choose his or her mode of religious experience, or lack thereof. Such laws will fail at the first stage of Oakes and proportionality will not need to be considered.”*<sup>21</sup>

**(2) Historical Context and Majority Culture Cannot Constitute Justification**

33. While historical considerations and majority culture might have been invoked to justify special treatment of certain religions in the past, this Court has stated that a new social philosophy, since the adoption of the Canadian Charter, “favours the recognition of minority rights”<sup>22</sup>. In light of the Charter, historical context and majority culture alone can no longer justify preferential treatment of certain religions.

<sup>19</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 (“*Oakes*”).

<sup>20</sup> *R. v. Big M Drug Mart Ltd.*, *supra*, note 4, para. 142.

<sup>21</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, R.S.A., vol. I, tab 10, para. 92 (“*Hutterian Brethren*”).

<sup>22</sup> *S.L. v. Commission scolaire des Chênes*, *supra*, note 13, para. 1.

34. Justice Dickson explicitly wrote in *Big M Drug Mart* that the enforcement of religious conformity is not a legitimate justification:

*“135. In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the Charter, it is no longer legitimate. With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise. [...]”*<sup>23</sup>

35. Similarly, in *SL*, Chief Justice McLachlin explains that Canadian courts have held that state sponsorship of one religious tradition amounts to discrimination against others<sup>24</sup>.

### **(3) Application**

36. A breach of freedom of religion and the right to equality cannot be qualified as negligent or insignificant<sup>25</sup> considering the principle that all limits “*that amount to state compulsion on matters of belief are always very serious*”<sup>26</sup>.
37. If the objective of a regulation is to compel religious observance, as was the Tribunal’s conclusion in the present case<sup>27</sup>, its purpose cannot be pressing and substantial and it must therefore fail the first part of the *Oakes* test.
38. To the extent that the Quebec Court of Appeal’s decision excuses state-sponsored religious coercion on the grounds of historical context and majority culture, this creates a dangerous precedent, inconsistent with the principle established by this Court in *Big M Drug Mart* and *SL* that religious conformity can no longer constitute a legitimate justification.

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<sup>23</sup> *R. v. Big M Drug Mart Ltd.*, *supra*, note 4, para 135.

<sup>24</sup> *S.L. v. Commission scolaire des Chênes*, *supra*, note 13, para. 17.

<sup>25</sup> *Saguenay (Ville de) v. Mouvement laïque québécois*, 2013 QCCA 936, para. 115.

<sup>26</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, *supra*, note 21, para. 91.

<sup>27</sup> *Simoneau v. Tremblay*, 2011 QCTDP 1, para. 228.

39. If the intended purpose of a prayer is to mark the solemnity of the beginning of a meeting, this can be achieved without invoking religion. This may be done in ways that would allow any individuals who so chooses to engage in a religious activity without it being state-sanctioned or endorsed, such as a moment of silence or quiet contemplation.
40. In addition, by concluding that the state has a right to adopt religious practices, the Court of Appeal appears to extend the state's representatives' individual right to freedom of religion to the state itself. The CCLA submits that the correct exercise in matters of state-sponsored religious coercion is not a balancing of one individual's right to freedom of religion against another's. Rather, the only real question is whether the violation of an individual's right to freedom of religion can be justified. The CCLA respectfully submits that it cannot.

**PARTS IV & V – COSTS SUBMISSIONS AND ORDER REQUESTED**

41. The CCLA does not seek costs and asks that no costs be awarded against it. The CCLA also respectfully requests permission to present oral argument at the hearing of the appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25<sup>th</sup> day of August, 2014.

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J. R. Kristian Brabander

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**PART VI – TABLE OF AUTHORITIES**

**Jurisprudence**

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B E T W E E N :

Mouvement laïque québécois  
and Alain Simoneau  
Appellants

-and-

City of Saguenay and Jean  
Tremblay  
Respondents

-and-

Human Rights Tribunal, et al.  
Interveners

Court File No. 35496

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL  
OF QUEBEC)**

**FACTUM OF THE INTERVENER  
CANADIAN CIVIL LIBERTIES ASSOCIATION  
(Pursuant to Rules 37 and 42  
of the *Rules of the Supreme Court of Canada*)**

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