ABlawg.ca

2013 Award Winner Clawbies Canadian Law Blog Awards

2014 Finalist Clawbies Canadian Law Blog Awards

April 20, 2015

Keeping Faith Out of the Public Square: Is Calgary City Hall Offside?

By: Kathleen Mahoney

Case Commented On: *Mouvement laïque québécois v Saguenay (City),* 2015 SCC 16

> O God, author of all wisdom, knowledge and understanding. We ask Thy guidance in our consultations to the end that truth and justice may prevail, in all our judgments. Amen. (Prayer recited at Calgary City Council meetings)

What is wrong with this invocation? The Supreme Court of Canada would say nothing, as long as it is not invoked at City Hall to open meetings. In its recent decision in *Mouvement laïque québécois v Saguenay (City),* 2015 SCC 16 [*Saguenay*], the Court seems to have closed all the doors to future prospects of religious faith playing a role in the public square. Calgary's mayor Naheed Nenshi disagrees, saying that there is room in the public square for faith, and that Calgary City Hall will explore ways of getting around the ruling. (Calgary Herald, April 15, 2015). Will this be possible? Constitutionally speaking, it will be very difficult.

The *Saguenay* case arose when a citizen, Mr. Simoneau, who regularly attended the public meetings of the municipal council of the City of Saguenay objected to the way in which the mayor opened the meetings by reciting a Catholic prayer, starting and finishing with the sign of the cross. Simoneau, who considers himself an atheist, felt uncomfortable with this practice and asked the mayor to stop. When the mayor refused, he brought his complaint to the Québec Human Rights Commission, arguing that contrary to the *Quebec Charter,* his freedom of conscience and religion was being infringed by the mayor and City Hall and asked that the recitation of the prayer cease. City Hall then pre-emptively passed a by-law attempting to address the substance of the complaint and accommodate the non-believers. The by-law changed the wording of the prayer and provided for a two-minute delay between the end of the prayer and the official opening of council meetings so that non-believers could leave the Chamber while the prayer was being recited. Simoneau then challenged the legitimacy of the new by-law.

The Human Rights Commission struck down the by-law and ordered that the recitation of the prayer cease and awarded $30,000 in compensatory and punitive damages to the complainant. The Quebec Court of Appeal reversed the decision, saying that the prayer expressed universal values and could not be identified with any particular religion, and thus did not affect the state's neutrality. According to the Court of Appeal, Mr. Simoneau had not been discriminated against and any interference with his beliefs was trivial or insubstantial. The Supreme Court of Canada unanimously restored the decision of the Human Rights Commission (with a majority judgment

by Justice Gascon and a concurring judgment by Justice Abella, disagreeing only with respect to the majority's approach to the standard of review).

The core value of state neutrality is front and center in the Court's decision. This should come as no surprise to anyone familiar with the Supreme Court's jurisprudence on freedom of religion. The Court cited the *Big M Drug Mart* decision of 1985 (at para 68) where then Chief Justice Dickson, in striking down Sunday observance legislation, said:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms" (*R v Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 at 336-37).

Following this principle, the Court in this case emphasized that the constitutional guarantee of freedom of religion and conscience means that the freedom to be free from religion is just as important as the freedom to practice it (at paras 70, 74). Agnostics and atheists are entitled to express their beliefs just as much as believers. By having an opening prayer to begin the business of City Hall, the principle is violated because by officially invoking God's guidance, City Council is effectively practicing religion.

Expanding on the necessity for neutral public spaces, the Court says dignity, multiculturalism and diversity (at para 74) are also preserved. In a rare move, the Court invoked the multiculturalism section of the *Canadian Charter*, saying section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the *Charter*, but also with a view to promoting and enhancing diversity. Section 27 recognizes that Canada is not the purely Christian nation it once was. While the Christian faith may be part of Canada's or Quebec's culture and heritage, governments cannot hide behind history to promote religious views (at paras 78, 118).

The Court rejected the argument that by taking religion out of public spaces the Court favours non-believers. It pointed out that it would be equally offensive if municipal officials were to make a solemn declaration that its proceedings were based on a denial of God. The state neutrality principle would render such an invocation unconstitutional because it would exclude those who believe in a God (at para 133).

Finding that prayers in the public square violate equality rights of non-believers further bolstered the Supreme Court's ruling (at paras 116, 127). When government officials legitimize prayers as part of official functions, they discriminate against non-believers' fundamental rights to equally participate in the democratic process (at paras 75, 120, 127). Nenshi's argument that a non-denominational prayer would suffice, fails to address exclusion. Any kind of prayer amounts to making City Hall a preferential space for people with religious beliefs. By injecting prayer into official proceedings, the Council creates a favorable environment for believers' democratic participation. The non-believers who wish to participate pay the price of isolation, exclusion and stigmatization by doing so (at para 121). The Court found Saguenay's attempt at accommodation by giving those who preferred not to attend the recitation of the prayer time to leave and re-enter the council chamber had the effect of exacerbating the discrimination. When the prayer was being said non-believers had two choices: draw attention to themselves by publically announcing their beliefs inviting stigmatization and exclusion; or stay in place and participate in a practice

offensive to their atheistic beliefs. The Court found this to be an unacceptably discriminatory (at paras 121, 122).

It is clear that neither the preservation of a historical religious heritage nor the notion that a given faith is that of the majority should override the constitutional principles underlying the state neutrality principle. The Court acknowledged the historical roots of confederation with religion but explained the evolution of political theory in Western democracies toward religious neutrality, citing (at para 71) the explanation of Lebel J. in the case of *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 (CanLII), [2004] 2 SCR 650:

> …There were, of course, periods when there was a close union of ecclesiastical and secular authorities in Canada. European settlers introduced to Canada a political theory according to which the social order was based on an intimate alliance of the state and a single church, which the state was expected to promote within its borders. Throughout the history of New France, the Catholic Church enjoyed the status of sole state religion. After the Conquest and the Treaty of Paris, the Anglican Church became the official state religion, although social realities prompted governments to give official recognition to the status and role of the Catholic Church and various Protestant denominations. This sometimes official, sometimes tacit recognition, which reflected the make-up of and trends in the society of the period, often inspired legislative solutions and certain policy choices. Thus, at the time of Confederation in 1867, the concept of religious neutrality implied primarily respect for Christian denominations…

Consequently, the City of Saguenay's argument that their prayer was no different than the one recited by the Speaker in the House of Commons and should be accepted as a legitimate reflection of Canadian tradition was rejected (at para 142). Although the House of Commons prayer could possibly be protected by Parliamentary privilege, in light of the Supreme Court's ruling, it too, is likely unconstitutional. The Court avoided the discussion, stating that in the absence of evidence concerning the House of Commons prayer; it would be inappropriate to refer to it to support a finding on the validity of Saguenay's prayer (at para 143).

In a similar vein, Saguenay argued that the reference to the supremacy of God in the preamble to the *Canadian Charter* that states: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law," authorizes the state to profess a theistic faith. Rejecting this argument as well, the Court said the preamble to the *Charter* articulates the "political theory" underlying the 1867 constitution upon which the *Charter*'s protections are based (at para 147, citing *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 95.) Thus, the reference to God in the preamble could not be relied on to reduce the scope of the freedom of religion and conscience nor could it have the effect of granting a privileged status to theistic religious practices (at para 149).

On the other hand, something that may give some comfort to Mayor Nenshi is the Court's acknowledgment that their analysis does not apply to every reference to God in the public sphere. The Court's concern is when the reference amounts to the state's observance of a religious practice (at para 146):

> The moral source of that practice, whether divine or otherwise, is but one of the contextual factors that make it possible to identify the practice's purpose and its effect. It is that purpose and that effect that are determinative of the existence of discriminatory interference with freedom of conscience and religion and of a breach of the state's duty of neutrality.

This would give a municipality some leeway to allow prayer in the public domain by, for example, having a moment of silence for participants to invoke their own source of inspiration and guidance, religious or secular, before the meeting commences. In order for any religious references in the public square to amount to an infringement of fundamental freedoms the minimum threshold the Court must find is (1) that the complainant's belief is sincere, and (2) find that the complainant's ability to act in accordance with his or her beliefs has been interfered with in a manner that is more than trivial or insubstantial (at para 86). Thus, references such as "God keep our land glorious and free" in the national anthem would not offend neutrality principles.

A neutral public space, therefore, does not mean the homogenization of private players or an obliteration of religious diversity (at para 74). The principle that neutrality is required of institutions and the state, not individuals and groups, is an important distinction (at para 74, citing *R v N.S.*, 2012 SCC 72, [2012] 3 SCR 726, at paras 31 and 50-51).

Future directions in the law with respect to individual and group expressions of faith are foreshadowed in another Quebec case, *Loyola High School v Quebec* (Attorney General) 2015 SCC 12, that held "a secular state does not – and cannot – interfere with the beliefs and practices of a religious group unless they conflict with or harm over-riding public interests" (at para 43).

This indicates that while the Court cannot see its way clear to approve religious practices by the state, it also will not look kindly on any attempts by the state to impose religious beliefs on individuals such as secular dress codes on the public servants (such as was attempted in Quebec) or attempts to impose bans on face-covering niqabs at citizenship ceremonies (as the federal government wishes to do) unless they can demonstrate a compelling reason of public interest to do so.