

## ECUMENICAL AND INTERFAITH RELATIONS COMMITTEE

(A&P 2016, p. 292–97, 41)

### **COMMISSIONER'S OVERTURE RE PUBLIC PRAYER** (A&P 2015, p. 23)

The Commissioner's Overture re public prayer asks two things. It asks the committee to look into "the effects of the Supreme Court's decision as it impacts city councils, government at all levels and our own public prayers." Secondly, the overture asks that, "we enter into conversation with religious leaders of other faiths who share our belief that public prayer adds to civil society and the wellbeing of communities."

Firstly, the Ecumenical and Interfaith Relations Committee would like to point out an important distinction between the case of public prayer in worship and the place of public prayers in government meetings. The preamble to the overture can be read that they are one and the same. This is, perhaps understandable as there seems to be a growing anxiety among some groups of Christians that, as our Canadian culture becomes more secularized, older community traditions of which familiar Christian traditions are a part, are challenged and changed. As that changing reality grows, so may the anxiety of losing what we once held as an essential part of our cultural and religious identity. Where will it stop? Might public worship one day be outlawed?

The freedom of conscience and religion is protected under the Charter of Rights, a protection which extends to public worship. That raises the question of what happened in the City of Saguenay. The overture suggests that "prayers have been banned...", but a review of the case will show that the practice of reciting a particular prayer before the council meetings performed by elected officials with the intent of showing preference for one religion over another was ruled discriminatory and a breach of state neutrality. The practice surrounding the prayer had to stop but that does not enable us to jump to the conclusion that public prayer was banned everywhere in the City of Saguenay. Nor does it mean that non-discriminatory prayers that do not breach the state's neutrality are impossible.

Two issues stand out. The Supreme Court's decision is an attempt to apply and interpret the guarantee of the freedom of conscience and religion in our provincial and federal Charter. The issues of discrimination with respect to freedom of conscience and religion are important and have to be assessed within the context that the alleged discrimination occurred. Discrimination has to be proved.

The Quebec Human Rights Tribunal is a specialized administrative tribunal whose expertise relates mainly to cases involving discrimination. It is not a court but acts like one and it has been empowered with the legal right to rule on matters of discrimination. The issue of deference to a specialized Tribunal's ruling raises the question of which standard of review is appropriate to use. Should the Tribunal's powers and abilities be respected and the standard of reasonableness be used or should the standard of correctness be applied to the Tribunal's decision as if had the function of a lower court? The Supreme Court of Canada overruled the Quebec Court of Appeal on this question.

The decision of the Supreme Court along with the underlying issues need to be understood in order to explore the effect the judgement has on the prayers written and used by Presbyterians and other levels of government in Canada. One must not separate the process from the final decision. Indeed, the case against the City of Saguenay and its journey from the municipal chambers where it began to the Commission des droits de la personne et des droits de la jeunesse, to the Quebec Human Rights Tribunal through the Quebec Court of Appeal ending up at the Supreme Court of Canada may prove to be an important study and example for Presbyterian communities in Canada when they expect to hear public prayers recited by publically elected officials or others in public places outside of their own places of worship.

### **The Case**

The municipality of Saguenay resulted from an amalgamation of seven smaller communities in 2002. The current mayor had been mayor since that time. Prior to the amalgamation, not all the communities engaged in a prayer before a public meeting. The form and practice of prayer was introduced by its current mayor. From Facts cited in the Reasons for Judgement, it was recorded,

At the start of each meeting, the mayor and councillors would be standing. The mayor, using a microphone, would then recite a prayer after making the sign of the cross while saying [translation] "[i]n the name of the Father, the Son and the Holy Spirit". The prayer also ended with the sign of the cross and the same words. Other councillors and municipal officials would cross themselves at the beginning and end of the prayer as well. In the Chicoutimi council chamber,

there was a Sacred Heart statue fitted with a red electric votive light. In the council chamber in La Baie, there was a crucifix hanging on the wall.

From 2002 to 2008 there was no by-law governing the prayer. At the time, the prayer read as follows:

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.

In 2006, the mayor was approached by a resident of Saguenay who calls himself an atheist and who on account of his interest in municipal politics regularly attended the municipal council's public meetings. He felt uncomfortable with the display which he considered religious and asked the mayor to stop the practice. When the mayor refused the complaint process began. A complaint was filed with the Commission des droits de la personne et des droits de la jeunesse in 2007.

### **Judicial History**

In May 2008, the Commission said, "that it considered the evidence with respect to the prayer to be sufficient to submit it to the Tribunal."

In the submission to the Tribunal, the appellant, "asked the Tribunal to order the City and its mayor to cease the recitation of the prayer and to remove all religious symbols from the chambers in which the council's meetings were held." Later that year the city adopted a by-law that regulated the recitation of the prayer. It changed the wording of the prayer and the official opening of council meetings. It also provided for a two-minute delay between the end of the prayer and the official opening of the council meetings. From the Facts cited in the Reasons for Judgement, it was recorded,

WHEREAS there exists within the City of Saguenay a tradition to the effect that Council meetings are preceded by the recitation of a prayer, the text of which is reproduced below;  
WHEREAS the purpose of this tradition is to ensure decorum and highlight the importance of the work of the councilors;  
WHEREAS the members of Council, unanimously, want this tradition to continue and wish to pursue it on the basis of their individual rights and freedoms, in particular their rights to freedom of expression, conscience and religion;  
WHEREAS it is important to specify that the Council members and the public are in no way obligated to recite this prayer or attend its recitation;  
WHEREAS it is important to ensure that members of the Council and of the public who do not wish to attend the recitation of this prayer may nevertheless attend the Council session in its entirety;  
NOW THEREFORE, it is enacted as follows:

SECTION 2 – Bylaw VS-2002-39 is amended to add section 16.1 which provides the following:

SECTION 16.1 – Once the chairperson of the meeting enters the Council deliberation room, the Council members who wish to do so may rise to recite the traditional prayer, the text of which is reproduced below.

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 so that we may make wise decisions. Amen.

To allow Council members and the public who do not wish to attend the recitation of the prayer to take their places in the room, the chairperson of the meeting will declare the Council session open two minutes after the end of the recitation of the prayer.

After the by-law was adopted, the complainants amended their motion to ask the Tribunal to “declare that the By-law be inoperative....”

The Supreme Court summary of the Case History records that the Tribunal “stated that the case ultimately raises three questions (para 193):

- (1) Do the By-Law, the recitation of the prayer and the exhibiting of religious symbols interfere with the Appellant's right to full and equal recognition and exercise of his freedom of conscience and religion without discrimination based on religion, contrary to ss 3, 4, 10, 11, 15 of the *Quebec Charter*?
- (2) If so, did the City and its mayor establish a defense consistent with the *Quebec Charter*?
- (3) If there are unjustified discriminatory interference, what remedies are appropriate?

The Supreme Court summary noted that to answer these questions, the Tribunal “considered the right to equal exercise of freedom of conscience and religion, the purpose and scope of that freedom, and the state's duty of neutrality that flows from it.”

The Tribunal found that the prayer was “when considered in light of its context, religious in nature (para. 228) and that the respondents, by having it recited, were showing a preference for one religion to the detriment of others. Such a practice was therefore in breach of the state's duty of neutrality (para. 250).” The Tribunal declared the by-law “inoperative and invalid.” The respondents were ordered to cease the recitation of prayer and to remove all religious symbols from the rooms where the council meetings were held.

The Quebec Court of Appeal ruled against the Tribunal. “The standard of review of correctness” was applied in reaching its decision. The appeal commented on the witness, the central question concerning the neutrality of the state and the prayer. In consideration of the expert witness the Court of Appeal found that the Tribunal had made “a palpable and overriding error” in accepting the expert's opinion.

It endorsed the idea of “benevolent neutrality: to comply with this duty, the state must neither encourage nor discourage any belief or non-belief.” Further, “the concept of neutrality does not require the state to abstain from involvement in religious matters.” And, “the duty of neutrality must be complied with in a manner that is consistent with the society's heritage and traditions, and with the state's duty to preserve its history.” Finally, “protection of the diversity of beliefs must be reconciled with the cultural reality of society, which includes its religious heritage.”

Concerning the prayer, the Court of Appeal “found that the prayer expressed universal values and could not be identified with any particular religion.” And “the principle of the religious neutrality of the state is intended to promote tolerance and openness, not to exclude from a society all references to its religious history.” The Court ruled that the Appellant “had not been discriminated against on the ground of freedom of conscience and religion,” and that the irritants felt by him “did not amount to injuries that would be sufficient to offend the principle of substantive equality.”

The Court of Appeal was clear that on the issue of the religious symbols, neither it nor the Tribunal could comment on them because they were not part of the Commission's investigation. However, one opinion was expressed that “the Sacred Heart statue and the crucifix were works of art and were devoid of religious connotation and did not affect the state's neutrality.” Opposite that view was the insistence that the Court of Appeal not rule on the matter but, “noted that it would still be open to the parties to bring an action in the Superior Court in order to obtain remedies that the Tribunal could not grant them.”

### **The Supreme Court Issue**

The main question raised by the appeal, “is whether the prayer cited at the start of the City's public meeting and the by-law regulating its recitation constituted interference with Mr S.'s freedom of conscience and religion, contrary to sections 3 and 10 of the Quebec Charter.” To answer that question, the Supreme Court needed to “identify the standard of review applicable on an appeal from a final decision of the Tribunal and to determine whether the Tribunal had jurisdiction to rule on the issue of religious symbols.” Additionally, it needed to “define the scope of the state's duty of religious neutrality that flows from the freedom of conscience and religion protected by the Quebec Charter.”

Concerning the standard of review, the Supreme Court felt that the Court of Appeal erred using a “confusing conceptual hybrid” standard in reviewing the Tribunal’s case. The standards used in reviewing the Tribunal’s decision were not consistent with the statute set out for use by the Court of Appeal. Though it supported the use of the correctness standard with respect to the Court of Appeals preference of the more nuanced idea of “benevolent neutrality” to neutrality, the Supreme Court concluded that the Tribunal was “entitled to deference” in relation to the decision of discrimination. “The Court of Appeal was required to show deference and could not therefore substitute its own opinion on the facts.”

The Supreme Court agreed that it was not open for the Tribunal to consider the question of the religious symbols because the Tribunal’s jurisdiction is circumscribed by the work of the Commission. Further it felt that the Court of Appeal erred in speaking to the question of the religious symbols on account of the insistence of certain parties to do so. The contradiction in recognizing that the Tribunal lacked the jurisdiction and assuming that jurisdiction for the Court of appeal is, “difficult to justify.” However, the Tribunal could have admitted evidence that was useful and relevant to the determination of the case and the Supreme Court suggested that the presence of religious symbols formed part of that context.

In response to the appellant’s claim that the practice and the by-law interfered with Mr. S.’s freedom of conscience and religion under section 10 of the Quebec Charter, the respondents countered that “the authority for recitation of the prayer such as this at council meetings and for regulating it by means of the by-law lies in the right of the city’s officials to freedom of conscience and religion, and that Mr. S.’s right is therefore not impaired.” The Supreme Court ruled that the appellant’s claim must prevail. Some of the supporting reasons are summarized here.

State neutrality means “that the state must neither encourage nor discourage any form of religious conviction whatever. 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. If that religious expression also creates distinction, exclusion or preference that has the effect of nullifying or impairing the right to full and equal recognition and exercise of freedom of conscience and religion, there is discrimination.” The court also pointed out there is provision under the Quebec Charter for the state to breach its duty of neutrality. It requires “1) that the legislative objective is of sufficient importance in the sense that it relates to pressing and substantial concerns and 2) that the means chosen to achieve the objective are proportional.”

The position of each party was as follows. The appellants insisted that the words of the prayer and context in which the prayer was recited, the actions of the mayor and councillors, the religious symbols in the council chambers and the overall context contributed to the fact that the prayer was eminently religious. The respondents countered that the context should be dismissed because the appeal concerns only the prayer. They insisted that the prayer was non-denominational and could be identified with no particular religion, though they conceded that a non-denominational prayer is religious in nature. They also submitted “that to prevent the city from expressing its belief would be to give atheism and agnosticism precedence over religions.” They add that a religious prayer “is valid because the theism of the Canadian state is entrenched in the Constitution by the reference to the supremacy of God in the preamble of the Canadian Charter. They also point out that the prayer in the by-law is copied from the one recited by the Speaker of the House of Commons before the body commences its meetings.”

In considering the alleged discrimination, public statements from the mayor were quoted “revealing of the true function of the council’s practice: I am in this battle because I worship Christ. When I get to the hereafter, I’m going to be a little proud. I’ll be able to say to Him: ‘I fought for You; I even went to trial for You. There’s no better argument.’ And “I said those things. It’s true we place much emphasis on that because we have faith. And because we want to show it. The entire municipal council is behind me. Of course, it isn’t a strictly personal fight. It’s the whole council. I am mandated.” The court concluded:

These comments confirm that the recitation of the prayer at the council’s meetings was above all else a use by the council of public powers to manifest and profess one religion to the exclusion of all others. It was much more than the simple expression of a cultural tradition. It was a practice by which the state, actively, and with full knowledge of what it was doing, professed a theistic faith. What the respondents are defending is not a tradition, but the municipality’s right to manifest its own faith. A sure sign of this is the respondent’s statement in this Court that the appellants were attempting to prevent the municipality ‘from expressing its belief.’ In my opinion, nothing could

conflict more with the state's neutrality. Tradition cannot be used to justify such a use of public powers.

In considering the respondent's submission that the city's prayer is valid because it is similar to the one recited by the Speaker of the House of Commons, three things were noted. "First, there is no evidence before us on the purpose of the prayer of the House of Commons. Second, the circumstances of the recitation of the two prayers are different. Third, it is possible that the House's prayer is subject to parliamentary privilege, as certain courts have suggested." It was considered inappropriate for the Court to discuss the content of the prayer from the House of Commons without "detailed evidence" surrounding the details of its use, "or to use it for support that the city's prayer is valid."

In relation to the supremacy of God mentioned in the preamble to the Charter, the respondents claimed that it established the "moral source" of the values that the Charter protects. "A prayer that refers to that same source cannot, in itself, interfere with anyone's freedom of conscience and religion." However, the Court noted to view it in this way is to "truncate" and "limit" the scope of freedom of conscience and religion. Quoting from Professor L. Sossi from "The 'Supremacy of God', *Human Dignity and the Charter of Rights and Freedoms*" (2003):

The reference to the supremacy of God in the Charter should not be construed so as to suggest one religion is favoured over another in Canada, or that monotheism is more desirable than polytheism, nor that the God-fearing are entitled to greater rights and privileges than atheists or agnostics. Any of these interpretations would be at odds with the purpose and orientation of the Charter.

### **The Court's Conclusion**

"None of the arguments advanced by the respondents can refute the inescapable conclusion that, in the instant case, the By-Law and the City's practice with respect to the prayer are incompatible with the state's duty of neutrality. The Tribunal's findings of fact on the religious and discriminatory nature of the By-law and of the practice were not unreasonable; quite the contrary." The Court held up the Tribunal's decisions, that the by-law was declared inoperative and invalid and that the respondents be ordered to cease the recitation of the prayer in the chambers where the council meets. They were also ordered to pay compensatory and punitive damages to the appellant.

### **What we learned**

1. That members of The Presbyterian Church in Canada should understand more clearly the freedom of religion and conscience which is protected for everyone under the Charter of Rights. It ensures that we have the right to public places of worship where our religious practices are of our own design. Transferring those practices to the public sphere, however, like prayer at the beginning of a municipal meeting, have a different context and reality. In the public sphere where we may encounter people of other faiths or of no faith, the use of particular religious practices that could be viewed as preferential could be challenging. Awareness should lead to dialogue.
2. That this case is about a violation of an individual's right to "equal exercise of freedom of conscience and religion" and about the kind of discrimination that may arise when a group in power feels the scales of equality tip in their favour. It must be recognized how difficult it is to be objective about the provisions of, in this case, the Quebec Charter of Rights when issues of identity, like religious practices, are involved. The Canadian Charter of Rights, also, protects an individual's legal right to pray publicly. Under the Charter of Rights, Canadians have the freedom of conscience and religion. Under the right of freedom of religion falls the right to do things like assemble, worship, print and disseminate literature and to pray. Public prayer generally cannot and has not been outlawed.
3. On account of the fact that this case is about a violation of that freedom of conscience and religion, the content of the prayer is less of an issue than the context in which the prayer was used and/or imposed on those present. From the Reasons Concurring in Part One of the Justices noted that state neutrality is about what the role of the state is in protecting freedom of religion, part of the inquiry into freedom of religion necessarily engages the question of state neutrality." Moreover, "as the majority reasons themselves state, the duty of state religious neutrality 'flows from freedom of conscience and religion'. Like freedom of conscience and religion, its application depends on the context." The importance of context underlines the need for individuals and groups within communities to engage their councillors in dialogue about the place of public prayer if that is an issue for them.

4. That an elected public official should not be encouraged or expected to lead a prayer at public meetings. Perhaps that means the door is open for the wider faith community to dialogue concerning what appropriate interfaith support of the common good and civil well-being entails. Some of the members of the Ecumenical and Interfaith Relations Committee have been engaged in these conversations. The support for public displays of religious practice range from the total separation of church and state to the development and inclusion of some appropriate non-discriminatory practices.
5. That discernment and negotiation of what can and cannot be done in public meetings needs to happen in the communities where this is a concern. Those moved and passionate for the ways that prayer adds to civil society and the well-being of communities should join with other passionate citizens and religious leaders along with civic leaders in their community to talk about and discern practices that are not felt as an infringement of an individual's rights under the Charter and that are not discriminatory.

#### **The effects of the Supreme Court's decision on prayers in Presbyterian churches**

As noted at the beginning, the Supreme Court's decision against the City of Saguenay has no implication or effect on the prayers in public worship in The Presbyterian Church in Canada. It remains with the presbytery to ensure that the form of worship is decent and in order.

When it comes to public prayers in government meetings, care must be taken to ensure that rights protected under the Charter of Rights are not violated. It may mean that municipalities do not legislate the form and content of prayer or that there will be no prayer. It may mean that publicly elected officials are the wrong people to recite prayer whatever form it takes. It does mean that openness and dialogue are required which address the second request of the overture.

The Ecumenical and Interfaith Relations Committee would like to encourage the members and leaders of The Presbyterian Church in Canada to engage in ecumenical and interfaith dialogue with people of other faiths and of no faith in their communities.

#### **Recommendation No. 1** (adopted, p. 41)

That the prayer of the Commissioner's Overture be answered by the above response.