



**SUPREME COURT OF CANADA**

**CITATION:** Mouvement laïque québécois v. Saguenay (City), 2015  
SCC 16

**DATE:** 20150415  
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**BETWEEN:**

**Mouvement laïque québécois and Alain Simoneau**

Appellants

and

**City of Saguenay and Jean Tremblay**

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

**OFFICIAL ENGLISH TRANSLATION:** Reasons of Gascon J.

**CORAM:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver,  
Karakatsanis, Wagner and Gascon JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 164)

Gascon J. (McLachlin C.J. and LeBel, Rothstein, Cromwell,  
Moldaver, Karakatsanis and Wagner JJ. concurring)

**REASONS CONCURRING IN PART:** Abella J.  
(paras. 165 to 173)

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MOUVEMENT LAÏQUE QUÉBÉCOIS v. SAGUENAY (CITY)

**Mouvement laïque québécois and  
Alain Simoneau**

*Appellants*

v.

**City of Saguenay and  
Jean Tremblay**

*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*

**Indexed as: Mouvement laïque québécois v. Saguenay (City)**

**2015 SCC 16**

File No.: 35496.

2014: October 14; 2015: April 15.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver,  
Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Human rights — Freedom of conscience and religion — Right to equality — Discriminatory practices — Principle of religious neutrality of state — Whether practice of members of municipal council that is regulated by by-law and that consists of reciting prayer at start of each meeting of council is in breach of principle of religious neutrality of state and results in discriminatory interference with freedom of conscience and religion — If so, whether remedies granted by Human Rights Tribunal appropriate — Charter of human rights and freedoms, CQLR, c. C-12, ss. 3, 10.*

*Administrative law — Appeals — Standard of review — Specialized administrative tribunal — Applicable standard of review on statutory appeal from final decision of Quebec Human Rights Tribunal — Whether decision subject to standards of review applicable to judicial review proceeding, or to appellate standards — Whether Court of Appeal erred in applying correctness standard to all Tribunal's conclusions, except for one with respect to expert evidence, for which it referred to palpable and overriding error — Charter of human rights and freedoms, CQLR, c. C-12, ss. 132, 133.*

S regularly attended the public meetings of the municipal council of the City of Saguenay. At the start of each meeting, the mayor would recite a prayer after making the sign of the cross while saying [TRANSLATION] “in 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 City officials would cross themselves at the beginning and end of the prayer as well. In one of the council chambers, there was a Sacred Heart statue fitted with a red electric votive light. In another, there was a crucifix hanging on the wall. S, who considers himself an atheist, felt uncomfortable with this display, which he considered religious, and asked the mayor to stop the practice. When the mayor refused, S complained to the Commission des droits de la personne et des droits de la jeunesse. He argued that his freedom of conscience and religion was being infringed, contrary to ss. 3 and 10 of the *Quebec Charter*, and asked that the recitation of the prayer cease and that all religious symbols be removed from council chambers.

The Commission limited its investigation to the question whether the prayer was discriminatory. It considered the evidence to be sufficient to submit the dispute to the Human Rights Tribunal, but it did not do so itself, because the Tribunal had recently decided a similar case and because it considered S to be in a position to defend his individual rights by himself. S then pursued his remedy, with the support of the Mouvement laïque québécois (“MLQ”), by means of an application to the Tribunal. The City then adopted a by-law whose purpose was to regulate the recitation of the prayer, and that also 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. The mayor and the councillors continued to act in the same way as described above, however, and S and the MLQ amended their motion to ask the

Tribunal to declare the by-law to be inoperative and of no force or effect in relation to S.

The Tribunal granted the application, finding that the prayer was, when considered in light of its context, religious in nature and that the City and its mayor, by having it recited, were showing a preference for one religion to the detriment of others, which constituted a breach of the state's duty of neutrality. The Tribunal also concluded that the prayer and the exhibiting of religious symbols resulted in an interference with S's freedom of conscience and religion that was more than trivial or insubstantial, and that the interference was discriminatory. It declared the by-law inoperative and invalid, ordered the City and the mayor to cease the recitation of the prayer and to remove all religious symbols from the rooms where the council's meetings were held, and awarded \$30,000 in compensatory and punitive damages to S. It refused to award the reimbursement of extrajudicial fees, however, because, in its view, the City and the mayor were not guilty of an improper use of procedure.

The Court of Appeal allowed the appeal. In its opinion, the question of the religious neutrality of the state was a matter of importance to the legal system that required the application of the standard of review of correctness. It held that the prayer at issue expressed universal values and could not be identified with any particular religion, and that the religious symbols were works of art that were devoid of religious connotation and did not affect the state's neutrality. According to the

Court of Appeal, S had not been discriminated against on the ground of freedom of conscience and religion. The interference, if any, was trivial or insubstantial.

*Held:* The appeal should be allowed.

*Per* McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and **Gascon JJ.:** Where a statute provides for an appeal from a decision of a specialized administrative tribunal such as the Tribunal, the appropriate standards of review are the ones that apply on judicial review, not on an appeal. The Tribunal is not a court to which the *Courts of Justice Act* applies. Its jurisdiction is based on the mechanism for receiving and processing complaints that is provided for in the *Quebec Charter* and implemented by the Commission, and is protected by the *Charter* by means of a privative clause and a supporting clause. The Tribunal's procedure reflects its nature as a specialized administrative tribunal, and the existence of a right to appeal with leave does not change that nature. Nor is the fact that the Tribunal does not have exclusive jurisdiction in discrimination cases and that a complainant can also turn to the ordinary courts determinative. The scope of a right to appeal and the absence of exclusive jurisdiction may sometimes affect the deference to be shown to decisions of a specialized administrative tribunal, but they do not mean that the standards of review with respect to judicial review cease to apply. The choice of the applicable standard depends primarily on the nature of the questions that have been raised. Deference should normally be shown where the Tribunal acts within its specialized area of expertise, interprets the *Quebec Charter* and applies that

charter's provisions to the facts to determine whether a complainant has been discriminated against. However, the presumption of deference can sometimes be rebutted if a contextual analysis reveals that the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters; the existence of concurrent and non-exclusive jurisdiction on a given point of law is an important factor in this regard. The presumption can also be rebutted where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal's area of expertise.

In this case, the Court of Appeal erred in applying the standard of correctness to all the Tribunal's conclusions while assessing the expert evidence on the basis of the palpable and overriding error criterion. Although the correctness standard applied to the question of law relating to the scope of the state's duty of religious neutrality that flows from freedom of conscience and religion, that of reasonableness applied on the question whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom, the determination of whether it was discriminatory, the qualification of the experts and the assessment of the probative value of their testimony. Where the religious symbols were concerned, on the other hand, the Court of Appeal was right to find that, because the Commission had not conducted an investigation into this question, it was not open to the Tribunal to consider it.

The state's duty of religious neutrality results from an evolving interpretation of freedom of conscience and religion. The evolution of Canadian society has given rise to a concept of this neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard, which means that it must neither favour nor hinder any particular belief, and the same holds true for non-belief. The pursuit of the ideal of a free and democratic society requires the state to encourage everyone to participate freely in public life regardless of their beliefs. A neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity, and it helps preserve and promote the multicultural nature of Canadian society. The state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. 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. The Tribunal was therefore correct in holding that the state's duty of neutrality means that a state authority cannot make use of its powers to promote or impose a religious belief. Contrary to what the Court of Appeal suggested, the state's duty to remain neutral on questions relating to religion cannot be reconciled with a benevolence that would allow it to adhere to a religious belief.

A provision of a statute, of regulations or of a by-law will be inoperative if its purpose is religious and therefore cannot be reconciled with the state's duty of

neutrality. Where the purpose of an impugned provision is to regulate a practice engaged in by state officials that is itself being challenged, the analysis of the provision must take account of the practice it regulates. In a case in which a complaint of discrimination based on religion concerns a state practice, the alleged breach of the duty of neutrality must be established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others and that the exclusion has resulted in interference with the complainant's freedom of conscience and religion. To conclude that an infringement has occurred, the Tribunal must be satisfied that the complainant's belief is sincere, and must 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. Where the impugned practice is regulated by a legislative provision, the state can invoke s. 9.1 of the *Quebec Charter* to show that this provision that, in its effect, infringes freedom of conscience and religion constitutes a reasonable and justified limit in a free and democratic society.

The Tribunal's finding in this case that there had been discriminatory interference with S's freedom of conscience and religion for the purposes of ss. 3 and 10 of the *Quebec Charter* was reasonable. 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. On the evidence in the record, it was reasonable for the Tribunal to conclude that the City's prayer is in fact a practice of a religious nature. Its decision on this point was supported by reasons that were both extensive and intelligible, and the background facts, which were reviewed in

detail, support its conclusion. Likewise, the Tribunal's conclusions on the issues of qualifying the expert of S and the MLQ and of the probative value of his opinion were not unreasonable. A relationship between an expert and a party does not automatically disqualify the expert. Even though the Tribunal did not discuss the expert's independence and impartiality in detail, it was very aware of his relationship with the MLQ and of his views with respect to secularism; it was only after discussing all the evidence, including the substance of the testimony of all the experts, that it decided to accept his testimony.

The prayer recited by the municipal council in breach of the state's duty of neutrality resulted in a distinction, exclusion and preference based on religion — that is, based on S's sincere atheism — which, in combination with the circumstances in which the prayer was recited, turned the meetings into a preferential space for people with theistic beliefs. The latter could participate in municipal democracy in an environment favourable to the expression of their beliefs. Although non-believers could also participate, the price for doing so was isolation, exclusion and stigmatization. This impaired S's right to exercise his freedom of conscience and religion. The attempt at accommodation provided for in the by-law, namely giving those who preferred not to attend the recitation of the prayer the time they needed to re-enter the council chamber, had the effect of exacerbating the discrimination. The Tribunal's findings to the effect that the interference with S's freedom of conscience and religion was more than trivial or insubstantial were supported by solid evidence,

and deference is owed to the Tribunal's assessment of the effect of the prayer on S's freedom of conscience and religion.

Barring the municipal council from reciting the prayer would not amount to giving atheism and agnosticism prevalence over religious beliefs. There is a distinction between unbelief and true neutrality. True neutrality presupposes abstention, but it does not amount to a stand favouring one view over another. Moreover, it has not been established in this case that the prayer is non-denominational. The Tribunal's findings of fact instead tend toward the opposite result. Be that as it may, the respondents themselves conceded at the hearing that the prayer is nonetheless a religious practice. Even if it is said to be inclusive, it may nevertheless exclude non-believers. As for the proposed analogy to the prayer recited by the Speaker of the House of Commons, in the absence of evidence concerning that prayer, it would be inappropriate to use it to support a finding that the City's prayer is valid. Finally, the reference to the supremacy of God in the preamble to the *Canadian Charter* cannot lead to an interpretation of freedom of conscience and religion that authorizes the state to consciously profess a theistic faith. The preamble articulates the political theory on which the *Charter's* protections are based. The express provisions of the *Canadian Charter* and of the *Quebec Charter*, such as those regarding freedom of conscience and religion, must be given a generous and expansive interpretation. This is necessary to ensure that those to whom these charters apply enjoy the full benefit of the rights and freedoms, and that the purpose of the charters is attained.

Insofar as the by-law infringed the *Quebec Charter*, the Tribunal could declare it to be inoperative in relation to S, but it could not declare it to be “inoperative and invalid” without further clarification, as that would amount to a general declaration of invalidity, which the Tribunal does not have the jurisdiction to make. The Tribunal could make any necessary orders to put an end to the identified interference in relation to the prayer. Even though it should not have taken certain factors into account in awarding compensatory damages, its decision on this subject, viewed as a whole, satisfied the reasonableness test. As for the Tribunal’s decision on the issue of punitive damages, reasons that are intelligible were given for it, and the Tribunal is entitled to deference. Finally, the Tribunal’s conclusion that no improper use of procedure had occurred and its refusal to award S and the MLQ the reimbursement of their extrajudicial fees were reasonable.

*Per Abella J.:* There is agreement with the majority that the appeal should be allowed. However, using different standards of review for each different aspect of a decision is a departure from the Court’s jurisprudence that risks undermining the framework for how decisions of specialized tribunals are generally reviewed. The reasons of a specialized tribunal must be read as a whole to determine whether the result is reasonable.

Questions of general importance to the legal system attract the correctness standard only if they are outside the tribunal’s expertise. Since 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 religious neutrality. It is not a transcendent legal question meriting its own stricter standard, it is an inextricable part of deciding whether discrimination based on freedom of religion has taken place. This is the Tribunal's daily fare. To extricate state neutrality from the discrimination analysis as being of singular significance to the legal system, elevates it from its contextual status into a defining one.

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*Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304; *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265; *Genex Communications inc. v. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, [2009] R.J.Q. 2743; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *de*

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Tribunal, 2011 QCTDP 1, [2011] R.J.Q. 507, [2011] AZ-50722559, [2011] Q.H.R.T.J. No. 1 (QL), 2011 CarswellQue 7400 (WL Can.). Appeal allowed.

*Luc Alarie*, for the appellants.

*Richard Bergeron, Arnaud Gosselin-Brisson and Laurence Dubois*, for the respondents.

*Louise Cadieux*, for the intervener the Human Rights Tribunal.

*Albertos Polizogopoulos and Stefan Cyr*, for the intervener the Evangelical Fellowship of Canada.

*Ranjan K. Agarwal, Robert W. Staley, Jack R. Maslen and Philip H. Horgan*, for the interveners the Catholic Civil Rights League, the Faith and Freedom Alliance and Association des parents catholiques du Québec.

*Tim Dickson and Alexander Boland*, for the intervener the Canadian Secular Alliance.

*Kristian Brabander and Elisa Clavier*, for the intervener the Canadian Civil Liberties Association.

English version of the judgment of McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ delivered by

GASCON J. —

## I. INTRODUCTION

[1] The state is required to act in a manner that is respectful of every person’s freedom of conscience and religion. This is a fundamental right that is protected by the Quebec *Charter of human rights and freedoms*, CQLR, c. C-12 (“*Quebec Charter*”), and the *Canadian Charter of Rights and Freedoms* (“*Canadian Charter*”). Its corollary is that the state must remain neutral in matters involving this freedom. The interplay between freedom of conscience and religion, on the one hand, and this duty of neutrality, on the other, is sometimes a delicate one.

[2] The respondents, the City of Saguenay and its mayor, would like to continue the recitation of a prayer at the start of the municipal council’s public meetings. In their view, the issue is one of respect for their freedom of conscience and religion. The appellants, the Mouvement laïque québécois (“MLQ”) and Alain Simoneau, are asking that the respondents cease this practice, which, they submit, interferes in a discriminatory manner with Mr. Simoneau’s freedom of conscience and religion. They demand that the City and its official comply with the state’s duty of neutrality.

[3] The Quebec Human Rights Tribunal (“Tribunal”) concluded that the recitation of the prayer was in breach of the state’s duty of neutrality and that it interfered in a discriminatory manner with Mr. Simoneau’s freedom of conscience and religion. The Court of Appeal reversed that decision on the basis that the prayer was non-denominational and fundamentally inclusive. According to the Court of Appeal, such a prayer could not interfere with Mr. Simoneau’s rights.

[4] I would allow the appeal. Through the recitation of the prayer at issue during the municipal council’s public meetings, the respondents are consciously adhering to certain religious beliefs to the exclusion of all others. In so doing, they are breaching the state’s duty of neutrality. The resulting discriminatory interference with Mr. Simoneau’s freedom is supported by the evidence the Tribunal accepted.

## II. FACTS

[5] The City of Saguenay is a product of the amalgamation in 2002 of seven municipalities, including Chicoutimi, Jonquière and La Baie. Mr. Tremblay has been the mayor of Saguenay since it was founded. At the relevant time, Mr. Simoneau resided in Saguenay. He considers himself an atheist.

[6] Mr. Simoneau, who is interested in municipal politics, regularly attended the municipal council’s public meetings, which were held at the borough hall of either Chicoutimi, Jonquière or La Baie. 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.

[7] Between 2002 and November 2008, there was no by-law governing the prayer. At the time, the prayer read as follows:

[TRANSLATION] 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.

[8] When Mr. Simoneau attended the council meetings, he felt uncomfortable with this display, which he considered religious. At the meeting on December 4, 2006, he therefore asked the mayor to stop the practice. When the mayor refused, Mr. Simoneau complained to the Commission des droits de la personne et des droits de la jeunesse (“Commission”) in a letter dated March 22, 2007.

[9] The MLQ formally filed a complaint on Mr. Simoneau’s behalf on March 28, 2007, as it is authorized to do by s. 74 para. 3 of the *Quebec Charter*. The

MLQ is a non-profit organization of which Mr. Simoneau is a member. It advocates the complete secularization of the state in Quebec. The complaint referred to the wording of the prayer and the context in which the prayer was recited. Mr. Simoneau argued that his freedom of conscience and religion was being infringed. He asked that the recitation of the prayer cease and that all religious symbols, including the statue and the crucifix, be removed from council chambers.

[10] The Commission gave the parties its statement of facts in February 2008. It indicated that its investigation would deal only with the question whether the prayer was discriminatory and that it would not be investigating the religious symbols. In May, after the Commission had completed its investigation, it informed Mr. Simoneau that it considered the evidence with respect to the prayer to be sufficient to submit the dispute to the Tribunal. However, it advised him that it had decided not to do so itself, because the Tribunal had recently decided a similar case (*Commission des droits de la personne et des droits de la jeunesse v. Laval (Ville de)*, [2006] R.J.Q. 2529) and because it considered the complainant to be in a position to defend his individual rights by himself.

[11] Mr. Simoneau then decided, with the MLQ's support, to pursue his remedy by means of an application to the Tribunal. Section 84 para. 2 of the *Quebec Charter* authorized them to do so in such a case. They served their motion to institute proceedings on the respondents on July 22, 2008. They alleged that the recitation of the prayer amounted to discriminatory interference with Mr. Simoneau's freedom of

conscience and religion, contrary to ss. 3 and 10 of the *Quebec Charter*. They also submitted that the prayer interfered in a discriminatory manner with his right to dignity and his right to information, contrary to ss. 4, 10, 11, 15, 44 and 82 of the *Quebec Charter*. They 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. They claimed \$50,000 in compensatory and punitive damages.

[12] Four months later, on November 3, 2008, the City adopted By-law VS-R-2008-40 ("By-law"). The purpose of this by-law was to regulate the recitation of the prayer from then on, and it also 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. It read in part as follows:

[TRANSLATION] 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 councillors;

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 and 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.

[13] After the By-law was adopted, although the wording of the prayer had changed, the mayor and the councillors continued to act in the same way as described above. In response, the appellants amended their motion to ask the Tribunal to further declare the By-law to be inoperative and of no force or effect in relation to Mr. Simoneau.

### III. JUDICIAL HISTORY

#### A. *Human Rights Tribunal (2011 QCTDP 1)*

[14] Although the Commission had told the parties that its investigation would not include the religious symbols, the Tribunal began by finding that it had jurisdiction to deal with that issue in addition to that of the prayer (para. 26). It 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 Mr. Simoneau'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 and 15 of the *Quebec Charter*? (2) If so, did the City and its mayor establish a defence consistent with the *Quebec Charter*? (3) If there is unjustified discriminatory interference, what remedies are appropriate?

[15] 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 (paras. 194-211). In analyzing the religious nature of the prayer, it reviewed the evidence, including the testimony of numerous witnesses and the opinions of three experts, in detail. 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 noted that Mr. Simoneau was sincere in his atheism (para. 261) and assessed the effects of the prayer on his freedom of conscience and religion. It observed that Mr. Simoneau felt isolated, uncomfortable and excluded. This led it to conclude that the prayer and the

exhibiting of religious symbols resulted in an interference with his freedom of conscience and religion that was more than trivial or insubstantial (para. 262). And that interference was discriminatory (para. 270).

[16] The Tribunal then considered the By-law and found that the prayer it provided for had a religious purpose that was incompatible with the state's duty of neutrality. Since such a purpose could not be valid, the Tribunal was of the opinion that the By-law could not be justified under s. 9.1 of the *Quebec Charter* (para. 283). It found that it was unnecessary to consider the proportionality test (paras. 284-85). Finally, it rejected the respondents' arguments that the prayer was justified on the basis of respect for tradition and of their attempt at reasonable accommodation (paras. 289-307).

[17] As a remedy, the Tribunal declared the By-law [TRANSLATION] "inoperative and invalid" (para. 355) and ordered the respondents to cease the recitation of the prayer (para. 356) and to remove "all religious symbols" from the rooms where the council's meetings were held (para. 357). It also awarded \$30,000 in compensatory and punitive damages to Mr. Simoneau (paras. 358-59), because, *inter alia*, of the intentional nature of the unlawful interference (para. 333). Finally, although the Tribunal had jurisdiction to award the reimbursement of extrajudicial fees (para. 344), it decided not to do so, because the respondents' defence did not constitute an improper use of procedure (para. 349).

B. *Quebec Court of Appeal (2013 QCCA 936, 363 D.L.R. (4th) 62)*

[18] The main reasons of the Court of Appeal were written by Gagnon J.A., who began by considering the standard of review applicable on an appeal from a decision of the Tribunal, which he characterized as a [TRANSLATION] “specialized tribunal” (para. 35). He stated that the appeal was ultimately about the religious neutrality of the state. In his opinion, this was a matter of importance to the legal system over which the Tribunal did not have exclusive jurisdiction. He therefore chose to apply “the standard of review of correctness” to the appeal (para. 37).

[19] Gagnon J.A. then discussed the expert evidence the Tribunal had considered, finding that the Tribunal had made [TRANSLATION] “a palpable and overriding error” (para. 49) in qualifying the expert proposed by the appellants and in ruling on the probative value of his testimony. In Gagnon J.A.’s view, the Tribunal had erred in accepting the expert’s opinion despite the fact that he lacked objectivity and impartiality (paras. 45 and 49-50).

[20] Gagnon J.A. next considered the central question, that of the state’s religious neutrality. To define the scope of the state’s duty in this regard, he endorsed the concept of [TRANSLATION] “benevolent neutrality”: to comply with this duty, the state must neither encourage nor discourage any belief or non-belief (para. 76). He expressed the opinion that the concept of neutrality does not require the state to abstain from involvement in religious matters. In his view, the duty of neutrality must be complied with in a manner that is consistent with society’s heritage and traditions, and with the state’s duty to preserve its history (para. 69). Protection of the diversity

of beliefs must be reconciled with the cultural reality of society, which includes its religious heritage (para. 72).

[21] Having made these observations, Gagnon J.A. turned to the prayer set out in the By-law. He found that the prayer expressed universal values and could not be identified with any particular religion (para. 88). He concluded that the principle of the religious neutrality of the state is intended to promote tolerance and openness, not to exclude from a society's reality all references to its religious history (para. 106). On the issue of the religious symbols, Gagnon J.A. stated that the Tribunal had lacked jurisdiction to deal with it, because that portion of the complaint had not been investigated by the Commission. Nevertheless, given the appellants' insistence on this point, he considered it necessary to discuss it (para. 116). He expressed the view that the Sacred Heart statue and the crucifix were works of art that were devoid of religious connotation and did not affect the state's neutrality (para. 125). In the circumstances, he found that the interference with Mr. Simoneau's freedom, if any, was trivial or insubstantial in the case of both the prayer and the symbols (paras. 115 and 127).

[22] At the conclusion of his analysis, Gagnon J.A. found that Mr. Simoneau had not been discriminated against on the ground of freedom of conscience and religion. In his opinion, the irritants alleged by Mr. Simoneau did not amount to injuries that would be sufficient to offend the principle of substantive equality (para. 130). He decided to allow the appeal and dismiss the action. In concurring

reasons, Hilton J.A. agreed with his colleague, but argued that it was not appropriate for the Court of Appeal to rule on the issue of the religious symbols. Since the Tribunal had lacked jurisdiction to rule on those symbols in the absence of an investigation by the Commission, he was of the opinion that the Court of Appeal should also refrain from doing so (para. 163). He 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 (para. 165). In his view, the interests of justice did not require the Court of Appeal to exercise its discretion and rule on this issue (para. 176).

#### IV. ISSUES

[23] The main question raised by this appeal is whether the prayer recited at the start of the City's public meetings and the by-law regulating its recitation constituted discriminatory interference with Mr. Simoneau's freedom of conscience and religion, contrary to ss. 3 and 10 of the *Quebec Charter*. To answer this question, it will be necessary, *inter alia*, 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*. Before I turn to this, however, it will be necessary 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 the religious symbols.

#### V. ANALYSIS

A. *Standard of Review*

[24] When the Tribunal makes a final decision, as in the instant case, ss. 132 and 133 of the *Quebec Charter* provide for a right to appeal, with leave, directly to the Court of Appeal:

**132.** Any final decision of the Tribunal may be appealed from to the Court of Appeal with leave from one of the judges thereof.

**133.** Subject to section 85, the rules relating to appeals set out in the Code of Civil Procedure (chapter C-25), with the necessary modifications, apply to any appeal under this Chapter.

[25] In its decisions, the Court of Appeal has been inconsistent as regards the framework for intervention that applies in such cases. As this appeal illustrates, this inconsistency appears to be a source of difficulty. After noting that this was an appeal from a decision of a specialized tribunal, Gagnon J.A. adopted (at para. 36) the reasoning of *Association des pompiers de Laval v. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 2041, [2011] R.J.D.T. 1025 (“*Association des pompiers*”), leave to appeal refused, [2012] 2 S.C.R. vi, in which Bich J.A. had, on the basis of two precedents to the effect that the Tribunal is subject to the appellate standard, advocated a [TRANSLATION] “standard of review similar to that applicable to appeals from the judiciary” (para. 33). However, she had qualified this by referring to the principles applicable to judicial review (paras. 31-33).

[26] After quoting a lengthy passage from that case, Gagnon J.A. concluded that the issue of the religious neutrality of the state is [TRANSLATION] “a matter of importance to the legal system over which the Tribunal does not have exclusive jurisdiction” (para. 37). As a result, he stated that it is [TRANSLATION] “according to the standard of review of correctness that this appeal must be decided” (para. 37). However, he made an exception for the qualification of the appellants’ expert and the assessment of that expert’s testimony. On this point, he instead intervened on the basis of the appellate standard of “palpable and overriding” error (para. 49).

[27] In this Court, the parties rely on the principles of administrative law and judicial review, but disagree on the applicable standard. The appellants submit that the Court of Appeal erred in characterizing the issue as a question of importance to the legal system. In their view, this is a simple case of discrimination. Given that the application of provisions of the *Quebec Charter* related to discrimination falls squarely within the Tribunal’s area of expertise, the reasonableness standard must be applied to all the Tribunal’s conclusions. As for the respondents, they support the choice made by the Court of Appeal.

[28] In my opinion, the Court of Appeal’s judgment contains two errors in respect of the standard of review.

[29] First, Gagnon J.A. applied both administrative law principles related to judicial review (the correctness standard) and tests applicable to appeals (palpable and overriding error). With respect, the result is a confusing conceptual hybrid. Given

the current state of the Court of Appeal's case law on this point, it seems to be hard for litigants to understand the rules. Clarification is needed to ensure greater consistency and some predictability. Where, as in this case, a statute provides for an appeal from a decision of a specialized administrative tribunal, the appropriate standards of review are, in light of the principles laid down by this Court, the ones that apply on judicial review, not on an appeal.

[30] Second, because of the approach he took, Gagnon J.A. erroneously applied the correctness standard to all the Tribunal's conclusions, except for the one with respect to the expert evidence, for which he referred to the palpable and overriding error criterion.

(1) The Tribunal's Decision Is Subject to the Standards Applicable on Judicial Review, Not on an Appeal

[31] There are currently two conflicting approaches in the Court of Appeal's case law as regards the standards of review applicable on an appeal from a final decision of the Tribunal. The first approach is to apply appellate standards as if the decision were that of a trial court. The second is to rely on administrative law principles related to judicial review to determine the appropriate standard of review.

[32] In *Association des pompiers*, on which Gagnon J.A. relied, the Court of Appeal referred to the first approach: *Gaz Métropolitain inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201, [2011] R.J.Q.

1253, at paras. 32-34; *Commission scolaire des Phares v. Commission des droits de la personne et des droits de la jeunesse*, 2006 QCCA 82, [2006] R.J.Q. 378 (“*des Phares*”), at paras. 29-35. Since that decision, it has reached the same conclusion in three other cases (*Commission des droits de la personne et des droits de la jeunesse v. 9185-2152 Québec inc. (Radio Lounge Brossard)*, 2015 QCCA 577, at paras. 40-41; *Bertrand v. Commission des droits de la personne et des droits de la jeunesse*, 2014 QCCA 2199, at para. 10; *Commission scolaire des Phares v. Commission des droits de la personne et des droits de la jeunesse*, 2012 QCCA 988, [2012] R.J.Q. 1022, at para. 8), in which it stated summarily that the appellate standards of review apply to the Tribunal’s final decisions. In a recent case that is now pending in this Court, *Bombardier inc. (Bombardier Aerospace Training Center) v. Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 1650, [2013] R.J.Q. 1541, leave to appeal granted, [2014] 1 S.C.R. vii, the Court of Appeal decided an appeal from a decision of the Tribunal in relation to discrimination without speaking to the applicable standard of review. However, it is clear from the court’s reasons that it was relying on the appellate standard, namely palpable and overriding error, in that case as well (paras. 85, 100 and 145).

[33] In those cases, the Court of Appeal intervened on the basis of the principles applicable to appeals that were developed in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Where an appeal concerns a question of law, intervention is required if the decision is incorrect. Where an appeal concerns a

question of fact or a question of mixed fact and law, intervention is warranted if there is a palpable and overriding error.

[34] Most of the cases in this line refer to the decision in the 2006 *des Phares* case, in which the Court of Appeal gave three reasons why the appellate standard should apply. First, the Tribunal does not have exclusive jurisdiction over the implementation of the *Quebec Charter*; a complainant can choose to apply either to the Tribunal or to the ordinary courts (para. 31). Second, the Tribunal's recognized expertise in relation to the facts [TRANSLATION] "does not extend to general questions of law" (para. 33). Third, the appeal provided for in s. 132 of the *Quebec Charter* is a statutory appeal and not a judicial review proceeding (para. 32). In support of this, the Court of Appeal cited *Coutu v. Tribunal des droits de la personne*, [1993] R.J.Q. 2793 (C.A.), in which Gendreau J.A. had stated in *obiter* that such an appeal makes it possible to reconsider the decision [TRANSLATION] "on the basis of criteria that are different from and broader than the ones that apply on judicial review" (p. 2801).

[35] I believe that this Court's recent decisions with respect to judicial review cast doubt on the approach based on Gendreau J.A.'s comments. What is more, the Court of Appeal's other approach to this question is based on those decisions.

[36] The leading authority for this second approach is *Commission scolaire Marguerite-Bourgeois v. Gallardo*, 2012 QCCA 908, [2012] R.J.Q. 1001, at paras. 47-51, a decision that was rendered after *Association des pompiers* but before the decision in the instant case. It reflects what tends to be a minority view (*Québec*

*(Commission des droits de la personne et des droits de la jeunesse) v. Dhawan*, 2000 CanLII 11031 (Que. C.A.), at paras. 11-12; *Compagnie minière Québec Cartier v. Québec (Commission des droits de la personne)*, 1998 CanLII 12609 (Que. C.A.), at p. 5 of the reasons of Otis J.A.). According to this approach, the Court of Appeal must apply administrative law principles related to judicial review to final decisions of the Tribunal and refer to the factors adopted by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. A choice must therefore be made between two standards of review: correctness and reasonableness. The choice depends above all on the nature of the question being considered.

[37] In *Gallardo*, Dalphond J.A. discussed the characteristics that make the Tribunal a specialized administrative tribunal rather than a court (paras. 36-46). Relying on authorities from this Court, he stated that, in such a case, the principles of administrative law apply [TRANSLATION] “both to a review by a superior court by way of an application for judicial review and to one by way of an appeal to a court of law with broader jurisdiction” (para. 47).

[38] In my view, Dalphond J.A. was right: this approach must prevail. Where a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal (*Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195, at

paras. 13 and 18-21; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 17, 21, 27 and 36; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 2 and 21; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at para. 27).

[39] It is true that the Tribunal is similar to a court both in the questions it must decide and in the adversarial nature of the proceedings before it. However, these similarities do not change its nature. It is a specialized administrative tribunal. As in the reasons of Dalphond J.A. in *Gallardo* and Gagnon J.A. in the instant case, the Court of Appeal has characterized the Tribunal as such in several other cases (*Conférence des juges de paix magistrats du Québec v. Québec (Procureur général)*, 2014 QCCA 1654, at para. 60; *For-Net Montréal inc. v. Chergui*, 2014 QCCA 1508, at para. 69; *Association des juges administratifs de la Commission des lésions professionnelles v. Québec (Procureur général)*, 2013 QCCA 1690, [2013] R.J.Q. 1593, at para. 25, note 17; *Imperial Tobacco Canada Ltd. v. Létourneau*, 2013 QCCA 1139, at para. 23, note 4; *Commission de la santé et de la sécurité du travail v. Fontaine*, 2005 QCCA 775, [2005] R.J.Q. 2203, at para. 35; *Québec (Procureure générale) v. Tribunal des droits de la personne*, [2002] R.J.Q. 628 (Que. C.A.), at para. 67). There are a number of factors that support this characterization.

[40] First of all, the Tribunal is not a court to which the *Courts of Justice Act*, CQLR, c. T-16, applies. It is a body created under the *Quebec Charter* whose

expertise relates mainly to cases involving discrimination (ss. 71, 111 and 111.1 of the *Quebec Charter*). Its jurisdiction in this regard is based on the mechanism for receiving and processing complaints that is provided for in the *Quebec Charter* and implemented by the Commission. For such complaints, the Tribunal is intended to be an extension, as an adjudicative body, of the Commission's preliminary investigation mechanism (*Gallardo*, at para. 39). Some of its members are appointed from among the judges of the Court of Québec having experience, expertise and an interest in human rights (s. 101). The others are assessors, who have experience, expertise and an interest in the same area and who assist those judges (ss. 62, 101 and 104). The members are appointed for five-year terms, which are renewable (s. 101).

[41] The Tribunal's procedure also reflects its nature. The rules governing the Tribunal are set out in ss. 110, 113 and 114 to 124 of the *Quebec Charter*. They provide *inter alia*, that the Tribunal is not strictly bound by the usual rules of the *Code of Civil Procedure*, CQLR, c. C-25 ("C.C.P."). The powers conferred on the Tribunal give it the flexibility it needs to carry out its mandate. The process is meant to be quick and efficient in order to improve access to justice (*Gallardo*, at paras. 42-43; *For-Net*, at paras. 36-37).

[42] Finally, the *Quebec Charter* protects the Tribunal's jurisdiction by means not only of a privative clause (s. 109 para. 1), but also of a supporting clause (s. 109 para. 2).

[43] Contrary to what the first of the Court of Appeal's approaches suggests, the existence of a right to appeal with leave does not mean that the Tribunal's specialized administrative nature can be disregarded. Nor is the fact that the Tribunal does not have exclusive jurisdiction in discrimination cases and that a complainant can also turn to the ordinary courts determinative. Although the scope of a right to appeal and the absence of exclusive jurisdiction may sometimes affect the deference to be shown to decisions of a specialized administrative tribunal, this does not justify replacing the standards of review applicable to judicial review with the appellate standards (*Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, at paras. 35-39; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paras. 23-24; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at paras. 14-15; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("Mowat"), at para. 23).

[44] There is nothing novel about applying judicial review standards to a specialized administrative tribunal like the Tribunal. As this Court stated in *Mowat* (at para. 19), this is true with respect to many bodies that are required to rule on human rights complaints.

(2) Standards of Review Applicable in the Instant Case

[45] This being said, the choice of the applicable standard depends primarily on the nature of the questions that have been raised, which is why it is important to

identify those questions correctly (*Mowat*, at para. 16; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4). For the purposes of this appeal, it will suffice to mention the following in this regard.

[46] Deference is in order where the Tribunal acts within its specialized area of expertise, interprets the *Quebec Charter* and applies that charter's provisions to the facts to determine whether a complainant has been discriminated against (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 ("NGC"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54). In such situations, deference should normally be shown, although this presumption can sometimes be rebutted. One case in which it can be rebutted is where a contextual analysis reveals that the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters; the existence of concurrent and non-exclusive jurisdiction on a given point of law is

an important factor in this regard (*Tervita*, at paras. 35-36 and 38-39; *McLean*, at para. 22; *Rogers*, at para. 15).

[47] Another such case is where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal's area of expertise (*Dunsmuir*, at paras. 55 and 60). Moldaver J. noted the following on this point in *McLean* (at para. 27):

The logic underlying the “general question” exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, “[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers” (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions “safeguard[s] a basic consistency in the fundamental legal order of our country” (para. 22).

[48] As LeBel and Cromwell JJ. pointed out in *Mowat* (at para. 23), however, it is important to resist the temptation to apply the correctness standard to all questions of law of general interest that are brought before the Tribunal:

There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise.

[49] In the instant case, an important question concerns the scope of the state's duty of religious neutrality that flows from the freedom of conscience and religion protected by the *Quebec Charter*. The Tribunal and the Court of Appeal each dealt with this question of law, but they disagreed on how it should be answered. Whereas the Tribunal found that the state has an [TRANSLATION] "obligation to maintain neutrality" (paras. 209-11), the Court of Appeal preferred the more nuanced concept of [TRANSLATION] "benevolent neutrality" (paras. 76-79). Although I agree with the Tribunal on this point, I am of the opinion that, in this case, the Court of Appeal properly applied the correctness standard on this question.

[50] However, it was not open to the Court of Appeal to apply that standard to the entire appeal and to disregard those of the Tribunal's determinations that require deference and are therefore subject to the reasonableness standard. For example, the question whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom and the determination of whether it was discriminatory fall squarely within the Tribunal's area of expertise. The same is true of the qualification of the experts and the assessment of the probative value of their testimony, which concerned the assessment of the evidence that had been submitted (*NGC*, at para. 30; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 74; *Khosa*, at paras. 59 and 65-67). The Tribunal is entitled to deference on such matters. The only requirement is that its reasoning be transparent and intelligible. Its decision must be considered reasonable if its conclusions fall within a "range of

possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47).

[51] In her concurring reasons, Abella J. disagrees with this approach to the applicable standards of review in the instant case. In my opinion, in the context of this appeal, this Court’s decisions, more specifically *Dunsmuir*, *Mowat* and *Rogers*, to which I have referred, support a separate application of the standard of correctness to the question of law concerning the scope of the state’s duty of neutrality that flows from freedom of conscience and religion. I find that the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner are undeniable. Moreover, the jurisdiction the legislature conferred on the Tribunal in this regard in the *Quebec Charter* was intended to be non-exclusive; the Tribunal’s jurisdiction is exercised concurrently with that of the ordinary courts. I am therefore of the view that the presumption of deference has been rebutted for this question. This Court confirmed in a recent case (*Tervita*, at paras. 24 and 34-40) that the applicable standards on judicial review of the conclusions of a specialized administrative tribunal can sometimes vary depending on whether the questions being analyzed are of law, of fact, or of mixed fact and law.

[52] Having made these clarifications concerning the applicable standards, I will deal briefly with the religious symbols before turning to the main question in the appeal.

#### B. *The Religious Symbols*

[53] The Court of Appeal found that, because the Commission had not conducted an investigation into the question of the religious symbols, namely the Sacred Heart statue in Chicoutimi and the crucifix in La Baie, it was not open to the Tribunal to consider it. I agree.

[54] The Tribunal was created under ss. 100 et seq. of the *Quebec Charter*. In discrimination cases, its jurisdiction is dependent on the work done beforehand by the Commission (ss. 111 and 80 to 82). The *Quebec Charter* provides for a comprehensive mechanism by virtue of which the Commission is responsible for receiving, processing and screening the complaints submitted to it (ss. 74 et seq.).

[55] People who believe they have been discriminated against can either file a complaint with the Commission or bring an action directly in a court of law. Those who choose to file a complaint with the Commission commit themselves to an administrative process whose various stages reflect the screening role conferred on the Commission. At the stage of receipt of a complaint, the Commission may refuse to act on one of the grounds set out in s. 77, where, for example, it considers the complaint to be frivolous, vexatious or made in bad faith. If there are no grounds for refusing to act at that stage, the Commission begins investigating and tries to collect any relevant evidence (s. 78). Upon completing this investigation, the Commission may cease to act if it believes that the evidence it has collected is insufficient. Where it refuses or ceases to act in such a case, the complainant may not then submit his or

her own application to the Tribunal to pursue a remedy, but must instead turn to the Superior Court or the Court of Québec.

[56] If, on the other hand, the Commission considers the evidence sufficient, it may decide to submit an application to the Tribunal to pursue a remedy (ss. 78 and 80). However, it is not required to do so. Even if it considers the complaint justified, s. 84 gives it the discretion not to submit such an application, in which case the complainant may, on an exceptional basis and at his or her own expense, submit an application to the Tribunal to pursue the remedy that could have been pursued by the Commission. For this purpose, the complainant is substituted by operation of law for the Commission (s. 84 para. 2).

[57] LeBel J.A., as he then was, described this mechanism in detail in *Ménard v. Rivet*, [1997] R.J.Q. 2108 (C.A.). It has two important characteristics for our purposes. First, in discrimination cases, not every person who believes that his or her fundamental rights have been violated may apply to the Tribunal. As a general rule, aside from a case of substitution under s. 84 para. 2, only the Commission is authorized to submit an application to the Tribunal (ss. 80 to 82). Second, where a complainant has a right to submit his or her own application to the Tribunal, the scope of the remedy is limited by the work done beforehand by the Commission. The Tribunal's jurisdiction is circumscribed by that work. In a discrimination case, the application to the Tribunal is intended to be an extension of the investigation conducted by the Commission in response to a complaint.

[58] In his complaint, Mr. Simoneau requested both that the recitation of the prayer be stopped and that all religious symbols be removed from council chambers. However, the Commission decided to limit its investigation to the question whether the prayer was discriminatory in nature under ss. 3 and 10 of the *Quebec Charter*. In its statement of facts, the Commission clearly indicated that it would not be investigating the religious symbols.

[59] Nevertheless, although the Tribunal acknowledged (at para. 18) that the principles established in *Ménard* did not allow it to consider the question of the religious symbols, it noted that the Commission had, contrary to s. 77 of the *Quebec Charter*, failed to state the reasons for its decision not to investigate that aspect of the complaint. The Tribunal concluded from this that the Commission had not properly “refused to act” with respect to the symbols within the meaning of that provision. It referred to the imperatives of access to justice and proportionality to justify its decision to consider the question (para. 22), even though nothing in its enabling statute authorized it to rely on those imperatives to extend its jurisdiction.

[60] The Commission limited its investigation to determining whether the prayer was discriminatory in nature. That being the case, the Tribunal could not extend its jurisdiction to questions related to the discriminatory nature of the religious symbols under s. 11 or to the other questions raised by the appellants before the Tribunal, such as interference with the right to the safeguard of one’s dignity or the right to information that are guaranteed by, respectively, s. 4 and s. 44. To conclude

otherwise would be to unduly curtail the Commission's function of managing and screening complaints (*Ménard*, at p. 2120). The Tribunal's jurisdiction in discrimination cases is dependent on the Commission's having first conducted an investigation. There was quite simply no such investigation into the religious symbols contested by Mr. Simoneau.

[61] Although the majority of the Court of Appeal expressed the opinion that it had not been open to the Tribunal to rule on the religious symbols, they nonetheless considered it necessary to speak to the question themselves in light of the insistence of certain parties (para. 116). In my opinion, they erred in doing so. I agree with Hilton J.A. on this point. It was not open to the majority, after noting that the Tribunal had lacked jurisdiction, to turn around and assume jurisdiction for the Court of Appeal on the same question. There is a contradiction here that is difficult to justify. In his concurring reasons, Hilton J.A. rightly observed that it was not necessary to rule on this point to decide the appeal. As he stated, the appellants still had the right, if need be, to bring an action in the Superior Court or the Court of Québec in order to obtain the remedies that fell outside the Tribunal's jurisdiction.

[62] However, it is important to draw a distinction between the Tribunal's jurisdiction on the one hand and, on the other, its authority to hear and consider the evidence in examining the question that was properly before it. Because the Tribunal had jurisdiction to determine whether the prayer was discriminatory, it could admit "any evidence useful and relevant" to that determination (s. 123 of the *Quebec*

*Charter*). The Tribunal did not have to limit itself to the evidence collected by the Commission in its investigation. It could also consider the evidence showing the context in which the prayer was recited. The actions of the mayor and the municipal councillors, as well as the presence of religious symbols in two council chambers, formed part of that context. This evidence was relevant to the determination of whether the prayer was religious or discriminatory. I will come back to this in my analysis of the main question in the appeal, to which I will now turn.

### C. *The Prayer*

[63] The prayer recited at the municipal council's public meetings is at the heart of the dispute between the parties. The recitation of the prayer is regulated by a legislative measure, namely the By-law. The appellants argue that, in view of their religious nature, the practice and the By-law interfere in a discriminatory manner with Mr. Simoneau's freedom of conscience and religion, contrary to ss. 3 and 10 of the *Quebec Charter*. The discrimination is allegedly based on his religious views, that is, on his atheism. In the appellant's opinion, there is in this case proof of discrimination, that is, (1) a distinction, exclusion or preference flowing from that practice and that By-law that (2) is based on a ground listed in s. 10 and (3) has the effect of nullifying or impairing Mr. Simoneau's right to the full and equal exercise of his human rights and freedoms (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 ("Boisbriand"), at para. 85; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R.

525, at p. 538; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, at p. 98).

The respondents counter that the authority for the recitation of a prayer such as this at council meetings and for regulating it by means of a by-law lies in the right of the City's officials to freedom of conscience and religion, and that Mr. Simoneau's right is therefore not impaired.

[64] In my opinion, the appellants' position must prevail. Sponsorship of one religious tradition by the state in breach of its duty of neutrality amounts to discrimination against all other such traditions (*S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 17). If the state favours one religion at the expense of others, it imports a disparate impact that is destructive of the religious freedom of the collectivity (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 337). In a case such as this, the practice of reciting the prayer and the By-law that regulates it result in the exclusion of Mr. Simoneau on the basis of a listed ground, namely religion. That exclusion impairs his right to full and equal exercise of his freedom of conscience and religion. The discrimination of which he complains relates directly to the determination of whether, on the one hand, the prayer is religious in nature and whether, on the other hand, the City is entitled to have it recited as it did. In my opinion, I must therefore begin the discussion by establishing the scope of the state's duty of neutrality in the context of freedom of conscience and religion. I will then consider the rules that make it possible to determine whether the state has breached its duty of neutrality in adopting a statute,

regulations or a practice. Finally, I will apply these rules to the facts in evidence before the Tribunal.

(1) Neutrality of the State As Regards Freedom of Conscience and Religion

[65] Section 3 of the *Quebec Charter* protects the freedom of conscience and religion of every person:

**3.** Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

[66] Section 10 supplements s. 3 and prohibits discrimination based on various grounds, including religion:

**10.** Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on . . . religion . . . .

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

[67] Section 2(a) of the *Canadian Charter* is the constitutional counterpart of s. 3:

**2.** Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

[68] Because of the similarity between s. 3 of the *Quebec Charter* and s. 2 of the *Canadian Charter*, it is well established that s. 3 should be interpreted in light of the principles that have been developed in relation to the application of the *Canadian Charter* (*Boisbriand*, at para. 42). In *Big M*, the Court considered the freedom of conscience and religion guaranteed by the *Canadian Charter*, and Dickson J. defined this freedom as follows:

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 and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. . . .

. . .

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of “the tyranny of the majority”. [Emphasis added; pp. 336-37.]

[69] This passage shows that freedom of conscience and religion protects the right to entertain beliefs, to declare them openly and to manifest them, while at the same time guaranteeing that no person can be compelled to adhere directly or indirectly to a particular religion or to act in a manner contrary to his or her beliefs (J. Woehrling, “L’obligation d’accommodement raisonnable et l’adaptation de la société à la diversité religieuse” (1998), 43 *McGill L.J.* 325, at p. 371; see also the

comments of LeBel J. in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 65, although dissenting, he was not contradicted by the majority on this point).

[70] These protections are not limited to religious beliefs. The freedom not to believe, to manifest one's non-belief and to refuse to participate in religious observance is also protected:

Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. [Emphasis added.]

(*Big M*, at pp. 346-47)

In *S.L.*, at para. 32, Deschamps J. pointed out that freedom of religion includes the freedom to have no religious beliefs whatsoever. For the purposes of the protections afforded by the charters, the concepts of "belief" and "religion" encompass non-belief, atheism and agnosticism.

[71] Neither the *Quebec Charter* nor the *Canadian Charter* expressly imposes a duty of religious neutrality on the state. This duty results from an evolving interpretation of freedom of conscience and religion. I will reproduce the following comments made by LeBel J. in *Lafontaine* in which he described the evolution of the concept of religious neutrality (although he was dissenting, the majority did not contradict him on this point either):

The duty of neutrality appeared at the end of a long evolutionary process that is part of the history of many countries that now share Western democratic traditions. Canada's history provides one example of this experience, which made it possible for the ties between church and state to be loosened, if not dissolved. 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. One illustration of this can be seen in the constitutional rules relating to educational rights originally found, *inter alia*, in s. 93 of the *Constitution Act, 1867*.

Since then, the appearance and growing influence of new philosophical, political and legal theories on the organization and bases of civil society have gradually led to a dissociation of the functions of church and state; Canada's demographic evolution has also had an impact on this process, as have the urbanization and industrialization of the country. Although it has not excluded religions and churches from the realm of public debate, this evolution has led us to consider the practice of religion and the choices it implies to relate more to individuals' private lives or to voluntary associations (M. H. Ogilvie, *Religious Institutions and the Law in Canada* (2nd ed. 2003), at pp. 27 and 56). These societal changes have tended to create a clear distinction between churches and public authorities, placing the state under a duty of neutrality. Our Court has recognized this aspect of freedom of religion in its decisions, although it has in so doing not disregarded the various sources of our country's historical heritage. The concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society. [Emphasis added; paras. 66-67.]

[72] As LeBel J. noted, the evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief (*S.L.*, at para. 32). It requires that the state abstain from taking any position and thus avoid adhering to a particular belief.

[73] In ‘Freedom of Religion Under the *Charter of Rights: The Limits of State Neutrality*’ (2012), 45 *U.B.C. L. Rev.* 497, at p. 507, Professor R. Moon points out that a religious belief is more than an opinion. It is the lens through which people perceive and explain the world in which they live. It defines the moral framework that guides their conduct. Religion is an integral part of each person’s identity. When the state adheres to a belief, it is not merely expressing an opinion on the subject. It is creating a hierarchy of beliefs and casting doubt on the value of those it does not share. It is also ranking the individuals who hold such beliefs:

If religion is an aspect of the individual’s identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual’s views and values, it is denying her or his equal worth. [Emphasis added; p. 507.]

[74] By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I

note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 31 and 50-51). On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 of the *Canadian Charter*. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the *Canadian Charter*, but also with a view to promoting and enhancing diversity (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 95; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 757; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 758; *Big M*, at pp. 337-38; see also J. E. Magnet, "Multiculturalism and Collective Rights", in G.-A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms* (4th ed. 2005), 1259, at p. 1265).

[75] I would add that, in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the *Quebec Charter* and the *Canadian Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136; *Big M*, at p. 346; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at

para. 27; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at pp. 179 and 181-82; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 326). The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice-versa.

[76] When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. It is prohibited from adhering to one religion to the exclusion of all others. Section 3 of the *Quebec Charter* imposes a duty on the state to remain neutral in this regard. Today, 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*.

[77] The Tribunal was therefore correct in holding that the state's duty of neutrality means that a state authority cannot make use of its powers to promote or impose a religious belief (paras. 209-11). As for Gagnon J.A., although he was aware of these principles, to which he referred, he found that absolute state neutrality is not possible from a constitutional point of view (para. 68). In his opinion, absolute neutrality is contrary to the state's duty to preserve its history, including its multireligious heritage (para. 69). A society's cultural reality precludes an excessively

radical conception of state neutrality (paras. 70 and 74). He considered the concept of [TRANSLATION] “benevolent neutrality” to be more appropriate to define the state’s duty of religious neutrality (para. 76). It follows that the state’s duty of neutrality does not go so far as to require complete secularity (para. 79).

[78] With respect, what is in issue here is not complete secularity, but true neutrality on the state’s part and the discrimination that results from a violation of that neutrality. In this regard, contrary to what the Court of Appeal suggested, I do not think that the state’s duty to remain neutral on questions relating to religion can be reconciled with a benevolence that would allow it to adhere to a religious belief. State neutrality means — and the Court of Appeal in fact agreed with this (at paras. 76 and 78) — that the state must neither encourage nor discourage any form of religious conviction whatsoever. 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 a 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.

[79] In my opinion, this is where the problem lies. I will return to this after discussing how the state might breach this duty of neutrality and interfere in a discriminatory manner with freedom of conscience and religion.

(2) Interference by the State with Freedom of Conscience and Religion

[80] The state might interfere with freedom of conscience and religion by, for example, adopting a statute, regulations or a by-law, or it might do so where its officials, in performing their functions, engage in a practice that is in breach of its duty of neutrality. Both of these possibilities apply in the case of the violations of ss. 3 and 10 of the *Quebec Charter* alleged by the appellants.

[81] A provision of a statute, of regulations or of a by-law will be inoperative if its purpose is religious and therefore cannot be reconciled with the state's duty of neutrality. The legislation, including its preamble, its structure and its evolution, as well as its context and the legislative debate, are all indicators that can be used to delineate the provision's purpose (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 274-87). The legislative objective cannot be to impose or favour, or to express or profess, one belief to the exclusion of all others. A typical example of a legislative breach of the duty of neutrality would be a situation in which the state enacted legislation whose purpose was to make the observance of a religious practice mandatory (see *Big M*).

[82] Although the rules for determining whether a provision of a statute, of regulations or of a by-law infringes freedom of conscience and religion are well established, this appeal does not relate strictly to a legislative provision. The respondents adopted the By-law to regulate the recitation of the prayer, but the complaint filed with the Commission was not limited to this. Moreover, the By-law was adopted after the complaint had been filed. The complaint also concerned a

practice engaged in by the mayor and municipal councillors, namely the recitation of a prayer. Where the purpose of an impugned provision is to regulate a practice engaged in by state officials that is itself being challenged, the analysis of the provision must also take account of the practice it regulates.

[83] In a case like this one in which a complaint of discrimination based on religion concerns a state practice, the alleged breach of the duty of neutrality must be established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others (*S.L.*, at para. 32) and that the exclusion has resulted in interference with the complainant's freedom of conscience and religion (see *Boisbriand*, at para. 85; *Bergevin*, at p. 538; *Forget*, at p. 98).

[84] First, because of the duty of religious neutrality with which it is required to comply, the state may not profess, adopt or favour one belief to the exclusion of all others. Obviously, the state itself cannot engage in a religious practice, so the practice would be one engaged in by one or more state officials, who would have to be acting in the performance of their functions. Where state officials, in the performance of their functions, profess, adopt or favour one belief to the exclusion of all others, the first two criteria for discrimination mentioned above, namely that there be an exclusion, distinction or preference and that it be based on religion, are met.

[85] Second, the state practice must have the effect of interfering with the individual's freedom of conscience and religion, that is, impeding the individual's ability to act in accordance with his or her beliefs. On the other hand, it is not the case

that every burden on an individual's freedom, even the most insignificant, constitutes discriminatory interference:

This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion. It means only that indirect or unintentional burdens will not be held to be outside the scope of *Charter* protection on that account alone. Section 2(a) does not require the legislatures to eliminate every miniscule state-imposed cost associated with the practice of religion. . . . The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial . . . . [Emphasis added.]

(*Edwards Books*, at p. 759)

[86] In *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 56-59, the Court developed a test for determining whether freedom of conscience and religion has been infringed. To conclude that an infringement has occurred, the court or tribunal must (1) be satisfied 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 (see also *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 32; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 67; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 34). Such an infringement, where it arises from a distinction based on religion, impairs the right to full and equal exercise of freedom of conscience and religion (*Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at

pp. 786-87; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at pp. 817-19). The result is discrimination that is contrary to that freedom and to the state's duty of religious neutrality that flows from it.

[87] This being said, it must be recognized that the Canadian cultural landscape includes many traditional and heritage practices that are religious in nature. Although it is clear that not all of these cultural expressions are in breach of the state's duty of neutrality, there is also no doubt that 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 all others. In this regard, I note with interest a passage from the report of the Consultation Commission on Accommodation Practices Related to Cultural Differences entitled *Building the Future: A Time for Reconciliation* (2008). The Quebec government had given this commission a mandate to study the question of religious accommodation in the Quebec context in 2007. In its report, the Commission urged that the following distinction be made:

However, we must avoid maintaining practices that in point of fact identify the State with a religion, usually that of the majority, simply because they now seem to have only heritage value. [p. 152]

[88] Thus, it is essential to review the circumstances carefully. If they reveal an intention to profess, adopt or favour one belief to the exclusion of all others, and if the practice at issue interferes with the freedom of conscience and religion of one or more individuals, it must be concluded that the state has breached its duty of religious neutrality. This is true regardless of whether the practice has a traditional character.

[89] Where, as in the instant case, the impugned practice is regulated by a legislative provision, however, it might be possible for the state to justify its discriminatory effect. Thus, where a provision of a statute, of regulations or of a by-law is in breach of the state's duty of neutrality in its effect, the state can invoke s. 9.1 of the *Quebec Charter*:

**9.1.** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

[90] This section gives the state the possibility of showing that a provision that, in its effect, infringes an individual's freedom of conscience and religion constitutes a reasonable and justified limit on that freedom in a free and democratic society. This means that the criteria developed by the Court in interpreting s. 1 of the *Canadian Charter* apply to the interpretation of s. 9.1 (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 980; *Ford*, at pp. 769-71). The impugned provision must therefore satisfy the justification test enunciated in *Oakes*, which requires the state to prove on a balance of probabilities (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. This second requirement has three components: (i) the means chosen must be rationally connected to the objective; (ii) they must impair the right in question as little as possible; and (iii) they must not so severely trench on individual

or group rights that the objective is outweighed by the seriousness of the intrusion (*Edwards Books*, at pp. 768-69).

[91] The foregoing comments will serve as a basis for determining whether the City and its mayor, by the recitation of the prayer and the adoption of the By-law, violated ss. 3 and 10 of the *Quebec Charter*.

(3) Application to the Facts

(a) *Positions of the Parties*

[92] The appellants submit that the Tribunal was right to find that the prayer at issue was a religious practice associated with Catholicism (paras. 229-38 and 244). In light of the wording of the prayer, of the preamble to the by-law in which it is set out, of the actions of the mayor and the councillors while it was recited, of the fact that there were religious symbols in the council chambers, and of the overall context, the appellants maintain, as did the Tribunal, that the prayer was eminently religious (paras. 239-44). They counter the respondents' expert evidence suggesting that the prayer had no religious significance by pointing to the Tribunal's conclusion that the evidence as a whole shows the opposite to be true. They add that a prayer, even a non-denominational one, is a religious practice that excludes atheists and agnostics.

[93] Moreover, the Tribunal noted the sincerity of Mr. Simoneau's atheism, as well as the discomfort and unpleasantness he felt and "the severe exclusionary and

isolating impact” the respondents’ practice had on him (para. 265). It also found that the prayer and the exhibiting of religious symbols constituted discriminatory interference with his freedom of conscience and religion (paras. 263-65 and 270). To the appellants, all these factors show that the Tribunal’s decision with respect to the findings of fact that are central to the case and fall squarely within its area of expertise was reasonable.

[94] The respondents counter that the context must be disregarded, given that the appeal concerns only the prayer. In their opinion, the Court of Appeal was right to dissociate the prayer from the mayor’s gestures and comments. The respondents state, relying on the Court of Appeal’s findings on this point, that the prayer was non-denominational, could be identified with no particular religion and favoured none. The Court of Appeal preferred the opinion of the respondents’ experts, finding that “the values expressed by the prayer at issue are universal and cannot be identified with any particular religion” (para. 88). It rejected the argument that a prayer excludes atheists and agnostics even if it is non-denominational (paras. 97 et seq.). In the court’s view, it could not be concluded that “the City’s [state] activities were, because of this prayer, under any particular religious influence” (para. 107).

[95] At the hearing in this Court, on the other hand, the respondents conceded that even a non-denominational prayer is religious in nature. They nevertheless submit 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 to 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 that body commences its meetings. The respondents argue that, given that the City's prayer can in no way be said have to coerced Mr. Simoneau to do anything, any interference was at most trivial and insubstantial. That is what the Court of Appeal held (para. 115). Given that there was no appreciable interference, there was no discrimination, and at any rate, the alleged injury was non-existent (paras. 129, 132 and 136).

(b) *Analysis of the Relevant Evidence*

[96] On the evidence in the record, I find that it was reasonable for the Tribunal to conclude that the City's prayer is in fact a practice of a religious nature. Once the Tribunal had established the scope of the state's duty of neutrality in relation to freedom of conscience and religion, whether the practice and the By-law were religious in nature was a question of fact that fell squarely within its jurisdiction. Its decision on this point was supported by reasons that were both extensive and intelligible. The Court of Appeal was required to show deference and could not therefore substitute its own opinion on the facts for that of the expert decision-maker.

(i) Context

[97] The background facts, which the Tribunal reviewed in detail, support the conclusion that the practice challenged by the appellants is religious in nature. I cannot accept the respondents' argument that the circumstances must be disregarded. In fact, the prayer has no meaning in this case unless it is recited by state officials. The actions of the mayor and the councillors and the context of the recitation of the prayer are at the heart of the appeal. I will consider four determinative aspects of this context that the Tribunal stressed in its decision.

[98] First, the City was created in 2002 by amalgamating seven municipalities. Before the amalgamation, it was only in some of these municipalities that a prayer was recited before municipal council meetings. And in the City itself, the practice was implemented only in 2002. Thus, the "tradition" on which it is supposedly based is a fairly recent one and is not as significant as the Court of Appeal suggests.

[99] Second, no by-law governed the prayer between 2002 and November 2008. The practice is one established by the municipal council and its mayor. The words of the original prayer were clearly identified with religion and with Catholicism. That prayer began [TRANSLATION] "O God, eternal and Almighty" and acknowledged the presence of the divine being at the meeting. Those who recited it beseeched God to grant them the "enlightenment and energy necessary" to ensure that their deliberations would "promote the honour and the glory" of God. They attributed the "prosperity" as well as the "spiritual and material happiness of [the] city" to God. The prayer concluded with the word "[a]men".

[100] Third, although the wording was modified somewhat by the By-law as of 2008, the new wording changed neither the nature nor the substance of the prayer. Both wordings constituted an invocation to God, attributing benefits enjoyed by the City and its citizens to him, and asking him to guide the council's deliberations. Although the preamble to the By-law indicates that the By-law's purpose is to [TRANSLATION] "ensure decorum and highlight the importance of the work of the councillors", it stresses above all the objective of continuing the tradition of reciting the prayer in accordance with the wish of the council's members "to pursue it on the basis of their individual rights and freedoms, in particular their rights to freedom of expression, conscience and religion". These recitals from the preamble show that the prayer was intended as support by the City for the religion professed by individual councillors.

[101] It is true that, unlike the practice from before the By-law was adopted, the one provided for in the By-law included a period of two minutes between the end of the prayer and the official opening of the meeting. This time would enable citizens who did not want to attend the recitation of the prayer to leave the chamber and to re-enter it only after the prayer had been completed. This solution adopted by the council of inviting citizens to physically leave the chamber for the duration of the prayer highlights the exclusive effect of the practice. Rather than limiting the religious nature of the By-law, the possibility so afforded accentuated it.

[102] Fourth, and lastly, the recitation of the prayer involved a ritual that reveals its true nature. At the start of every public meeting of the municipal council, its members entered the chamber one at a time as their names were called. The mayor and councillors then stood for the recitation of the prayer. The mayor and several councillors made the sign of the cross while the mayor said, speaking into the microphone, [TRANSLATION] “[i]n the name of the Father, the Son and the Holy Spirit”. He then recited the prayer, which ended with the same words, plus the word “[a]men”. This was done before the adoption of the By-law and continued to be done in the same way after it was adopted.

(ii) Expert Evidence

[103] In addition to this evidence regarding the context, on which the principal players, Mr. Simoneau and the mayor, testified at length, the Tribunal heard three experts — Solange Lefebvre and Gilles Bibeau for the respondents, and Daniel Baril for the appellants — on the religious significance and nature of the prayer. The Tribunal ultimately found that Mr. Baril’s testimony was most consistent with the evidence as a whole as regards the [TRANSLATION] “religious [significance] of the prayer” (para. 240).

[104] In the Court of Appeal’s view, the Tribunal had erred in choosing [TRANSLATION] “to purely and simply adhere to [Mr. Baril’s] opinion” (para. 45). Gagnon J.A. stated that the Tribunal had failed to assess this expert’s credibility although there were a number of reasons why his independence and impartiality

might be open to question, including the fact that he was an advocate for secularization of the state. Gagnon J.A. also noted Mr. Baril's ties with the MLQ, of which he was a co-founder and a member. Because of this relationship with a party and of the stands Mr. Baril had taken in the past, Gagnon J.A. found that he "does not meet the requirements of objectivity and impartiality that are indispensable to the status of expert" (para. 50). Gagnon J.A. criticized the Tribunal for having failed to undertake "a review of the grounds for disqualification of the witness Baril" (para. 54), whom he considered, ultimately, "not qualified" to testify (para. 52). In his view, "[a] well-informed person, aware of the duty of impartiality that must animate any expert called to appear before a court, would easily agree that the witness Baril lacked the necessary [distance] to act in this case" (para. 51). In sum, the Tribunal had erred in qualifying Mr. Baril as an expert (para. 54). In the Court of Appeal's view, it must intervene if a palpable and overriding error has been made in assessing the probative value of the expert's opinion (paras. 49, 50 and 54).

[105] In my opinion, the Court of Appeal should not have intervened in this regard. The qualification of an expert and the assessment of the probative value of his or her testimony or opinion are evidentiary issues that require deference, especially given that s. 123 of the *Quebec Charter* confers considerable flexibility on the Tribunal in such matters. It is not open to a reviewing court to carry out its own assessment of the probative value of an expert's testimony or opinions simply because it disagrees with the Tribunal's assessment.

[106] I agree that the independence and impartiality of an expert are very important factors. It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchar, with J. Béchar, *L'Expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.-M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590-91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565, at pp. 598-99). A challenge to a trial judge's decision to qualify an expert witness, like a challenge to a finding that the expert is independent and impartial, requires consideration of, *inter alia*, the substance of the expert's opinion.

[107] In the instant case, even though the Tribunal did not discuss Mr. Baril's independence and impartiality in detail, it was very aware of his relationship with the

MLQ and of his views with respect to secularism, as can be seen from the following comments:

[TRANSLATION] Mr. Baril is one of the founders of the Mouvement laïque québécois, of which he was president. At the time of the trial, he was its vice-president. He described himself as[, among other things,] an activist for secularism, which he defined on the basis of two principles: freedom of conscience and the separation of church and state. [para. 178]

I cannot therefore conclude that the Tribunal disregarded either this relationship between the expert and the party or the expert's general views with respect to secularism. It knew about them. I should add that a relationship between an expert and a party does not automatically disqualify the expert in every case.

[108] Furthermore, the assertion that the Tribunal adhered “purely and simply” to Mr. Baril's opinion is inaccurate. On the contrary, the Tribunal discussed the substance of the testimony of the three experts at length. It was only after doing so that it decided to accept Mr. Baril's testimony. It made this choice having regard in particular to the totality of the context I described above, about which the respondents' experts had little to say. As for the Court of Appeal, it referred only briefly to the substance of Mr. Baril's opinion in discussing the exact nature of the prayer. It described his vision of state secularism as “absolutism” (at paras. 81-82), then rejected his testimony and adopted the position of the respondents' experts. Their testimony, which he described as a significant contribution to the debate, led the court to conclude that the values expressed in the prayer at issue are universal and belong to no religion in particular (paras. 83 and 88).

[109] With respect, I find, in light of this analysis and of the evidence as a whole, that the Tribunal's conclusions on the issues of qualifying Mr. Baril as an expert and of the probative value of his opinion were not unreasonable. It was not open to the Court of Appeal to reverse them as it did.

[110] I wish to add two comments. First, on the disqualification issue, Gagnon J.A. referred to arts. 234 and 417 *C.C.P.* Those articles apply only to judges and to court-appointed experts, respectively. The grounds for recusation set out in them do not apply to experts proposed by the parties (Ducharme and Panaccio, at Nos. 1304 and 1334). The criteria applied where bias or the appearance of bias on the part of a judge is at issue differ from those applicable to actual bias on the part of a party's expert. The rigour that is in order in the former case does not apply in the latter.

[111] Second, the entire discussion on Mr. Baril's opinion with respect to state secularism, which the Court of Appeal stressed in its reasons, actually missed the point. The expert evidence of Mr. Baril and of the respondents' witnesses was relevant only to the determination of whether the prayer at issue was religious in nature. And that is exactly what the Tribunal used it for. Mr. Baril's opinion regarding the role of the state in religious matters goes to the definition of the state's duty of neutrality. That is a question of law that is within the jurisdiction of the courts. It is distinct from the expert's views on the religious nature and discriminatory effect of the prayer.

(iii) The Alleged Discrimination

[112] In light of the context and the evidence discussed above, the Tribunal concluded that there had been discriminatory interference with Mr. Simoneau's freedom of conscience and religion for the purposes of ss. 3 and 10 of the *Quebec Charter*. But the Court of Appeal found that Mr. Simoneau had not been treated unfairly in relation to other citizens who attended the council meetings (para. 131). Gagnon J.A. wrote [TRANSLATION] "that it has not been shown that Simoneau was the subject of a distinction in violation of the principles of substantive equality" (para. 130). He added that, "[i]n any event, the demonstration of harm is non-existent here" (para. 130).

1. *Exclusion Based on Religion*

[113] The Court of Appeal could not disregard the Tribunal's findings of fact regarding the existence of an exclusion based on religion unless they could be held to be unreasonable. The evidence does not support such a result. The deference the court owed precluded it from intervening rashly in this regard. In my opinion, it was open to the Tribunal to conclude that the municipality's practice, given its religious nature, was in breach of the state's duty of neutrality and resulted in an exclusion based on religion. The evidence shows that state officials, while performing their functions, engaged in a practice according to which the state professed, adopted or favoured one belief to the exclusion of all others. In *S.L.*, this Court wrote that a neutral state must show respect for all beliefs and that this includes the right to have no beliefs. The

adoption of a practice and of a by-law by which the state professes, and thereby favours, a particular religion cannot be reconciled with that principle.

[114] The prayer was recited by the mayor and by municipal councillors at public meetings of the municipal council. There is no question that they were performing their functions at the time. The evidence also shows that the practice had a religious purpose. This was the finding of fact made by the Tribunal, which held that, given the religious nature of the practice, the City was displaying, conveying and favouring one belief to the exclusion of all others (para. 250). The Court of Appeal's assertion (at para. 128) that the City was not under the influence of a religion or that it was not trying to impose its faith was in direct conflict with this finding, which, however, was far from unreasonable.

[115] On this point, I note that the Court of Appeal stressed that the state's duty of neutrality does not require the elimination of every allusion to [TRANSLATION] "a society's historical points of reference" (para. 98). It held that neutrality does not preclude "historical manifestations of the religious dimension of Quebec society, which, when viewed with proper perspective, cannot have the effect of undermining the neutrality of the various branches of the State" (para. 104). It considered the prayer to be one of a number of "mere references to religious heritage" (para. 107).

[116] I concede that the state's duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage. But that cannot justify the state engaging in a discriminatory practice for religious purposes, which is what happened

in the case of the City's prayer. The mayor's public declarations are revealing of the true function of the council's practice:

[TRANSLATION] I'm in this battle because I worship Christ.

When I get to the hereafter, I'm going to be able 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. It's extraordinary.

I'm in this fight because I worship Christ. I want to go to heaven and it is the most noble fight of my entire life.

(Tribunal's reasons, at para. 88 (Tribunal's emphasis deleted).)

[117] At the Tribunal's hearing, the mayor went back to these comments and added the following:

[TRANSLATION] 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 municipal council. I am mandated. Because I have faith and, in my opinion, that's the most important value of all those I can have. [Emphasis added; para. 90.]

[118] 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 respondents' statement in this Court that the

appellants were attempting to prevent the municipality [TRANSLATION] “from expressing its belief” (R.F., at para. 116). In my opinion, nothing could conflict more with the state’s duty of neutrality. Tradition cannot be used to justify such a use of public powers.

[119] I repeat that what is at issue here is the state’s adherence, through its officials acting in the performance of their functions, to a religious belief. The state, I should point out, does not have a freedom to believe or to manifest a belief; compliance with its duty of neutrality does not entail a reconciliation of rights. On the other hand, it goes without saying that the same restrictions do not apply to the exercise by state officials of their own freedom of conscience and religion when they are not acting in an official capacity. Although they are not entitled to use public powers to profess their beliefs, this does not affect their right to exercise this freedom on a personal basis.

## 2. *The Impairment of Mr. Simoneau’s Rights*

[120] The prayer recited by the municipal council in breach of the state’s duty of neutrality resulted in a distinction, exclusion and preference based on religion — that is, based on Mr. Simoneau’s atheism — which, in combination with the circumstances in which the prayer was recited, turned the meetings into a preferential space for people with theistic beliefs. The latter could participate in municipal democracy in an environment favourable to the expression of their beliefs. Although non-believers could also participate, the price for doing so was isolation, exclusion

and stigmatization. This impaired Mr. Simoneau's right to exercise his freedom of conscience and religion.

[121] In this regard, the evidence accepted by the Tribunal shows that when Mr. Simoneau went to meetings of the municipal council, he had to choose between remaining in the chamber and conforming to the City's religious practice, excluding himself from the practice by refusing to participate in it, and physically excluding himself from the chamber for the duration of the prayer. If he chose to conform to the council's practice, he would be acting in direct contradiction with his atheistic beliefs. If he chose to exclude himself from the prayer either by refusing to participate in it or by leaving the chamber, he would be forced to reveal that he is a non-believer (para. 266). According to the Tribunal's findings, Mr. Simoneau had experienced a strong feeling of isolation and exclusion (paras. 265-66). This led the Tribunal to conclude that the interference caused by this situation was more than trivial or insubstantial (para. 262). Such interference constitutes an infringement of the complainant's freedom of conscience and religion.

[122] At the risk of repeating myself, the attempt at accommodation provided for by the City in the By-law, namely giving those who preferred not to attend the recitation of the prayer the time they needed to re-enter the council chamber, far from tempering the discrimination, exacerbated it.

[123] Here again, the Court of Appeal contradicted the Tribunal's findings of fact, holding that the interference with Mr. Simoneau's freedom was at most trivial or

insubstantial (paras. 109-15). Its intervention on this point was based on the standard of correctness, which it applied to the entire appeal. It erred in doing so. It should have shown deference to the Tribunal's assessment of the effect of the prayer on Mr. Simoneau's freedom of conscience and religion and could not disregard the Tribunal's findings in this regard unless they were unreasonable. But they were supported by solid evidence.

[124] Moreover, these findings are similar to findings made by other courts in similar circumstances. In *Zylberberg v. Sudbury Board of Education (Director)* (1989), 65 O.R. (2d) 641, the Ontario Court of Appeal had to determine whether the possibility of being exempted from participation in a religious practice rendered that practice less intrusive. The regulations at issue in that case required that each school day be opened or closed with the reading of religious texts and the recitation of a prayer. The law included an exemption for pupils whose parents objected to those activities. The court held that the existence of an exemption did not mean that freedom of conscience and religion was not infringed. The requirement that the exemption be requested meant that pupils and their parents were forced to reveal that their religious identity was different from that of the majority:

... the right to be excused from class, or to be exempted from participating, does not overcome the infringement of the Charter freedom of conscience and religion by the mandated religious exercises. On the contrary, the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant religion. In our opinion, the conclusion is inescapable that the exemption provision fails to mitigate the

infringement of freedom of conscience and religion by s. 28(1).  
[Emphasis added; p. 656.]

[125] In a subsequent case, *Freitag v. Penetanguishene (Town)* (1999), 47 O.R. (3d) 301, the Ontario Court of Appeal reached a similar conclusion in a similar situation:

The “subtle and constant reminder” of his difference from the majority is what causes the appellant to feel intimidated and uncomfortable at council meetings. It has also deterred him from running for a council which proclaims and identifies itself as it does. In *Zylberberg*, this court . . . held, at p. 655, that the need to seek an exemption from attending the opening exercises “compels students and parents to make a religious statement” so that the effect of the exemption provisions was to discriminate against religious minorities by stigmatizing them. . . .

Similarly, the appellant is clearly stigmatized by his decision not to stand and recite the Lord’s Prayer, so that the fact that he is not prohibited from making that choice does not save the Town’s practice from infringing his *Charter* right. [Emphasis deleted; paras. 39-40.]

[126] In sum, regardless of the approach taken in the analysis, the Tribunal’s finding in the instant case of discrimination contrary to ss. 3 and 10 of the *Quebec Charter* was reasonable. The exclusion caused by the practice and the By-law in the case at bar resulted in an infringement of Mr. Simoneau’s freedom of conscience and religion, and it follows that the prayer necessarily had the effect of impairing his right to full and equal exercise of that freedom (*Ford*, at pp. 786-87).

[127] In closing, as to the City’s by-law regulating the prayer, I will repeat that it was adopted after Mr. Simoneau had filed his complaint with the Commission, if

not in reaction to that complaint. What the respondents hoped to do in adopting the By-law was to ensure that the prayer was consistent with the *Quebec Charter* on the basis of *Allen v. Renfrew (County)* (2004), 69 O.R. (3d) 742, a decision of the Ontario Superior Court of Justice that I will discuss below. In light of the analysis of the facts in the case at bar, however, that does not alter the outcome. A by-law adopted to regulate a discriminatory religious practice that is incompatible with the state's duty of neutrality must also be discriminatory. Even though the By-law's preamble indicates an intention [TRANSLATION] "to ensure decorum and highlight the importance of the work of the councillors", it can be seen from the evidence as a whole that this purpose was secondary. Decorum could have been ensured in many other ways that would not have led the City to adopt a religious belief.

[128] Finally, although the adoption of a by-law normally opens the door to the application of the justificatory provision (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 53), the onus of justification was on the respondents (*Oakes*, at pp. 136-37; *Edwards Books*, at p. 768). Since they have advanced no substantive argument in this regard, I will not discuss this further.

(c) *Other Submissions of the Respondents*

[129] Despite these findings of the Tribunal, the respondents raise four other arguments in favour of finding that the prayer is valid and is not discriminatory, which I will now discuss.

(i) Absolute Neutrality and True Neutrality

[130] In the respondents' view, barring the municipal council from reciting the prayer would amount to giving atheism and agnosticism prevalence over religious beliefs. The Court of Appeal advanced this same argument in its reasons (para. 71). Its comments on benevolent neutrality were along the same lines.

[131] This Court has referred in the past to the difficulty the definition of the concept of neutrality seems to cause. In *S.L.*, the Court referred to comments made by Professor R. Moon:

We must recognize that trying to achieve religious neutrality in the public sphere is a major challenge for the state. The author R. Moon has clearly described the difficulty of implementing a legislative policy that will be seen by everyone as neutral and respectful of their freedom of religion:

If secularism or agnosticism constitutes a position, worldview, or cultural identity equivalent to religious adherence, then its proponents may feel excluded or marginalized when the state supports even the most ecumenical religious practices. But by the same token, the complete removal of religion from the public sphere may be experienced by religious adherents as the exclusion of their worldview and the affirmation of a non-religious or secular perspective . . . .

. . . Ironically, then, as the exclusion of religion from public life, in the name of religious freedom and equality, has become more complete, the secular has begun to appear less neutral and more partisan. With the growth of agnosticism and atheism, religious neutrality in the public sphere may have become impossible. What for some is the neutral ground on which freedom of religion and conscience depends is for others a partisan anti-spiritual perspective.

(“Government Support for Religious Practice”, in *Law and Religious Pluralism in Canada* (2008), 217, at p. 231) [para. 30]

[132] Stressing that absolute state neutrality is impossible to attain, the Court defined its non-absolutist conception of neutrality as follows:

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

(*S.L.*, at para. 32)

Thus, a neutrality that is non-absolute is nevertheless a true neutrality. But this true neutrality presupposes that the state abstains from taking a position on questions of religion.

[133] Contrary to the respondents' argument, abstaining does not amount to taking a stand in favour of atheism or agnosticism. The difference, which, although subtle, is important, can be illustrated easily. A practice according to which a municipality's officials, rather than reciting a prayer, solemnly declared that the council's deliberations were based on a denial of God would be just as unacceptable. The state's duty of neutrality would preclude such a position, the effect of which would be to exclude all those who believe in the existence of a deity.

[134] In short, there is a distinction between unbelief and true neutrality. True neutrality presupposes abstention, but it does not amount to a stand favouring one view over another. No such inference can be drawn from the state's silence. In this

regard, I will say that the benevolent neutrality to which the Court of Appeal referred is not really compatible with the concept of true neutrality. As understood by that court, neutrality would in the instant case require tolerance for the state's profession of a clearly identified religious belief on the basis of tolerance for its history and culture. I do not believe that is the sense of true state neutrality with respect to freedom of conscience and religion.

(ii) Non-denominational Nature of the Prayer

[135] The respondents stress the non-denominational nature of the prayer and argue that this makes the prayer an inclusive practice that neither favours nor hinders any religion and can therefore infringe nobody's freedom of conscience and religion. On this point, too, the Court of Appeal said the same thing (paras. 88-96). I find that this argument must fail for two reasons.

[136] First, it has not been established in this case that the prayer is non-denominational. The Tribunal's findings of fact instead tend toward the opposite result, as can be seen from the foregoing analysis. In light of the recitals of the preamble to the By-law, the wording of the prayer and the context in which the prayer was recited, the Tribunal observed that the council's practice was strongly associated with Catholicism (paras. 239-41). The Tribunal's finding cannot be determined to be unreasonable having regard to the facts and the law unless we substitute our own finding for it, which is what the Court of Appeal did by re-assessing the evidence and accepting the theory of the respondents' experts.

[137] Second, even if it were accepted that the prayer at issue is *prima facie* a non-denominational practice, it is nonetheless a religious practice, as the respondents themselves conceded at the hearing in this Court. The respondents argue in this regard that a state that is [TRANSLATION] “somewhat religious” can be tolerated in the context of state neutrality provided that it is inclusive, and that this tolerance can be justified on the basis of historical and traditional values. They add that the separation of church and state does not necessarily mean that the two are totally separate. I find that the respondents are on the wrong track in this respect. True neutrality is concerned not with a strict separation of church and state on questions related to religious thought. The purpose of neutrality is instead to ensure that the state is, and appears to be, open to all points of view regardless of their spiritual basis. Far from requiring separation, true neutrality requires that the state neither favour nor hinder any religion, and that it abstain from taking any position on this subject. Even if a religious practice engaged in by the state is “inclusive”, it may nevertheless exclude non-believers; whether it is consistent with the *Quebec Charter* depends not on the extent to which it is inclusive, but on its exclusive nature and its effect on the complainant’s ability to act in accordance with his or her beliefs.

[138] On this point, the respondents rely, as did the Court of Appeal, on two Ontario cases. In the first case, *Freitag*, to which I referred briefly above, the Ontario Court of Appeal held that a Christian prayer recited at the opening of public meetings of a municipal council infringed the freedom of conscience and religion of a non-Christian citizen. In *obiter*, the court suggested that it would have held a

non-denominational prayer to be valid. However, its comments were limited to suggesting that such a practice might satisfy the minimal impairment criterion of the test for justification under s. 1 of the *Canadian Charter* (paras. 51-52). It cited as an example the prayer recited by the Speaker of the House of Commons before that body's meetings.

[139] In the second case, *Renfrew*, the Ontario Superior Court of Justice found a prayer it characterized as being non-denominational to be valid. In light of the facts that had been established in that case, and contrary to the findings of the Tribunal in the case at bar, the court held that the prayer was not religious:

The prayer in its present form is not in substance a religious observance, coercive or otherwise and it does not impose any burden on the applicant or any restriction on his exercise of his own beliefs. The recital of this prayer does not compel the applicant, in contrast to *Freitag*, to participate in a Christian or other denominational form of worship. The mere mention of God in the prayer in question is not in this court's opinion, sufficient in its effect on the applicant to interfere in any material way with his religious beliefs. [Emphasis added; para. 27.]

[140] These cases are of no assistance to the respondents. Insofar as the practice authorized in *Renfrew* was one whose effect constituted an insubstantial impairment, that case can be distinguished from the case at bar. Furthermore, although we need not cast doubt on the findings of fact of the judge in that case, the Tribunal's findings in the instant case are clear. The City's practice is religious, and its effect on the complainant was more than trivial. Likewise, to the extent that *Freitag* does not close the door on the application of the justificatory provision, the reasoning of the Ontario

Court of Appeal in that case does not apply here. It was reasonable for the Tribunal to conclude that the City could not have recourse to the justificatory provision (paras. 283-85), and the respondents have submitted no arguments in this regard.

(iii) The Prayer of the House of Commons

[141] The respondents submit that the City's prayer must be valid because it is similar to the one recited by the Speaker of the House of Commons before that body's meetings. Gagnon J.A. also referred to the latter prayer in his reasons (paras. 94-95).

[142] In the specific context of this appeal, this argument must fail for three reasons. 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 (*Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 (C.A.); see also *Renfrew*, at para. 22).

[143] In the absence of detailed evidence on Parliament's practice and the circumstances thereof, and of full argument on this point, it would be inappropriate for the Court to discuss its content or to use it to support a finding that the City's prayer is valid.

(iv) Preamble to the Canadian Charter and the Supremacy of God

[144] Finally, the respondents argue that the reference to the supremacy of God in the preamble to the *Canadian Charter* establishes the moral source of the values that charter protects. In their view, a prayer that refers to that same source cannot, in itself, interfere with anyone's freedom of conscience and religion. The Court of Appeal also mentioned this reference (at para. 100), although it did not discuss it in detail.

[145] The preamble to the *Canadian Charter* reads as follows:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

[146] In my opinion, the respondents' argument in this regard truncates the analysis on the issue of freedom of conscience and religion. Contrary to what their argument suggests, that analysis is not limited to a single reference to God in the prayer. On its own, that reference is not determinative. Rather, the analysis concerns the state's observance of a religious practice. 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.

[147] The reference to the supremacy of God in the preamble to the *Canadian Charter* cannot lead to an interpretation of freedom of conscience and religion that

authorizes the state to consciously profess a theistic faith. The preamble, including its reference to God, articulates the “political theory” on which the *Charter*’s protections are based (see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 95, in which the Court was discussing the preamble to the *Constitution Act, 1867*). It must nevertheless be borne in mind that the express provisions of the *Canadian Charter*, such as those regarding freedom of conscience and religion, must be given a generous and expansive interpretation. This approach is necessary to ensure that those to whom the *Canadian Charter* applies enjoy the full benefit of the rights and freedoms and, thereby, that the purpose of that charter is attained (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 23; *Big M*, at p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156). The same is equally true of the *Quebec Charter*.

[148] Thus, the reference to God in the preamble cannot be relied on to reduce the scope of a guarantee that is expressly provided for in the charters. Professor L. Sossin explains this as follows in “The ‘Supremacy of God’, Human Dignity and the *Charter of Rights and Freedoms*” (2003), 52 *U.N.B.L.J.* 227, at p. 229:

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, nor 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*, as well as with the specific provisions regarding freedom of religion and conscience under s. 2. [Emphasis added.]

[149] This leads me to conclude that the reference to the supremacy of God does not limit the scope of freedom of conscience and religion and does not have the effect of granting a privileged status to theistic religious practices. Contrary to what the respondents suggest, I do not believe that the preamble can be used to interpret this freedom in this way.

(d) *Conclusion*

[150] 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 religious 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 prayer creates a distinction, exclusion and preference based on religion that has the effect of impairing Mr. Simoneau's right to full and equal exercise of his freedom of conscience and religion. The Court of Appeal could not simply substitute its own view for that of the Tribunal without first establishing in what way the Tribunal's findings were unreasonable, which it did not do. This Court must intervene to restore the Tribunal's judgment in this regard. I will conclude my analysis by discussing the remedies that were granted.

D. *Remedies*

(1) Declaration of Inoperability of By-law VS-R-2008-40

[151] The Tribunal declared the By-law to be [TRANSLATION] “inoperative and invalid” (para. 355). The respondents submit that the Tribunal lacks the jurisdiction to make such a declaration, as only the Superior Court has the power to make a blanket declaration of invalidity. The respondents are right. The Tribunal’s declaration on this point must be amended.

[152] The *Quebec Charter* has a special place in Quebec’s hierarchy of rules. Section 52 confers a certain primacy on ss. 1 to 38; in principle, no provision of any Act may derogate from them. As a result, these provisions can be said to have quasi-constitutional status (*Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, at para. 116; *Boisbriand*, at para. 27; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789 (“*CUM*”), at paras. 14-15 and 20; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592, at para. 29). If the Tribunal finds that a complainant’s rights have been interfered with, the complainant is entitled to obtain the cessation of that interference (ss. 49, 80 and 111 of the *Quebec Charter*; *Béliveau St-Jacques*, at para. 117). If the interference results from the application of a regulatory provision, s. 52 confers on the Tribunal the power to consider the provision in question inoperative and of no force or effect for the purposes of the case before it. Thus, the Tribunal can make a declaration of inoperability (*CUM*, at para. 27).

[153] However, this Court has held that an administrative tribunal such as the Tribunal does not have jurisdiction to make a general declaration of invalidity (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 31; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257, at para. 44). Only a court of law has the power to do so.

[154] In the case at bar, the appellants asked the Tribunal to declare the By-law inoperative and of no force or effect in relation to Mr. Simoneau and, in particular, to order that the interference with his rights cease. Insofar as the By-law infringed the *Quebec Charter*, the Tribunal could declare it to be inoperable against him. However, it could not declare it to be “inoperative and invalid” without further clarification, as that would amount to a general declaration of invalidity, which it does not have the jurisdiction to make. In any event, the Tribunal’s orders completed its declaration.

(2) Orders

[155] The Tribunal made the following orders:

**ORDERS** the defendant Ville de Saguenay, the members of the municipal council, its officers and employees, and the defendant Jean Tremblay to cease reciting a prayer in the municipal council chamber;

**ORDERS** Ville de Saguenay to remove from each room where the municipal council gathers for public meetings all religious symbols, including the Sacred Heart statue and the crucifix; [paras. 356-57]

[156] Since the Tribunal did not have jurisdiction to rule on the issue of the religious symbols, it was not open to it to order their removal (para. 357). It was even less open to it to order the removal of “all religious symbols”, whereas the evidence was limited to the Sacred Heart statue and the crucifix.

[157] Where the prayer is concerned (para. 356), however, the Tribunal had great latitude. It could make any necessary orders to put an end to the interference. One possible recourse was for it to impose obligations to do or not to do (*CUM*, at para. 26).

### (3) Compensatory and Punitive Damages

[158] The Tribunal ordered the respondents solidarily to pay \$30,000 in compensatory and punitive damages (paras. 358, 359 and 360). The respondents submit, first, that it was not open to the Tribunal to award damages solely because of the adoption of the By-law, since they had acted in good faith. They argue that they are protected by the public law immunity that is inherent in the exercise of their regulatory power. This argument must fail. Even if such an immunity applied in the City’s favour (*Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304, at paras. 19-27), the damages awarded to Mr. Simoneau were intended primarily to compensate him for an injury suffered before the By-law was even adopted.

[159] Moreover, given the exclusion Mr. Simoneau had experienced and the mayor's acts that had stigmatized him, the Tribunal found that he had suffered a moral injury (paras. 318-22 and 329). It also found that the interference with the complainant's rights was not only unlawful, but intentional. The Tribunal referred, *inter alia*, to the [TRANSLATION] "religious battle" (para. 333) the mayor had openly conducted on behalf of the council in order to continue to impose his faith on citizens (paras. 333-34).

[160] On the question of compensatory damages, it is true that the telephone calls and abusive comments by citizens, although in bad taste, had little to do with the mayor's actions. There is no indication that the mayor or the City encouraged anyone to harass Mr. Simoneau. Likewise, the anxiety and stress Mr. Simoneau and his spouse suffered are related to the legal proceedings. They had to deal with the media coverage of those proceedings. Even though the Tribunal should not have taken these factors into account in awarding such damages (at paras. 323-28), its decision on this subject, viewed as a whole, satisfied the reasonableness test.

[161] On punitive damages, I find that the parties acted with a sincere belief that their position was right, and that in civil law such damages are an exceptional remedy (*Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at para. 150; *Genex Communications inc. v. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, [2009] R.J.Q. 2743, at para. 87). Nevertheless, the Tribunal applied the appropriate legal principles to the facts adduced in evidence,

relying on the relevant decisions of this Court on this subject (paras. 330-32). In those cases, the Court had stressed that the reference in s. 49 of the *Quebec Charter* to unlawful and intentional interference concerns a person who “acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause” (*Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, at para. 121; see also *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 60). The Tribunal concluded that the intention expressed by the mayor of leading a religious battle showed that he intended to achieve the result he did, and to interfere with Mr. Simoneau’s right. The Tribunal had a broad discretion to decide on the scale of the appropriate remedies. It gave reasons for its decision, and they are intelligible. It is entitled to deference on these questions.

(4) Extrajudicial fees

[162] The Tribunal refused to award the appellants the reimbursement of their extrajudicial fees. In its view, the respondents’ defence did not constitute an improper use of procedure. I would add that to defend oneself vigorously, but legitimately, is not in itself improper. The issue here was an important one, indeed one of public interest. In this Court, the appellants submit that, for the purposes of his action, Mr. Simoneau is substituted for the Commission as a result of s. 84 of the *Quebec Charter*:

Within 90 days after he receives such notification, the complainant may, at his own expense, submit an application to the Human Rights Tribunal to pursue such remedy and, in that case, he is, for the pursuit of the remedy, substituted by operation of law for the commission with the same effects as if the remedy had been pursued by the commission.

Their argument is that if the Commission had submitted an application to the Tribunal, they would have paid no fees. If the substitution is to have “the same effects”, they should be automatically entitled to their extrajudicial fees.

[163] This argument is without merit. Section 84 para. 2 provides that the complainant may personally submit an application to the Tribunal “at his own expense”. In such a case, the complainant is substituted by operation of law for the Commission. There is no basis for concluding that the Commission is automatically entitled to the reimbursement of its extrajudicial fees. On the contrary, s. 126 of the *Quebec Charter* grants the Tribunal a broad discretion to order the reimbursement of costs and disbursements. It is silent regarding the criteria to be applied in exercising this discretion, however. In Quebec, as was held in *Viel v. Entreprises Immobilières du Terroir ltée*, [2002] R.J.Q. 1262 (C.A.), at paras. 72-84, the reimbursement of extrajudicial fees is justified only if a party is guilty of an improper use of procedure. The Tribunal’s conclusion that no improper use of procedure occurred in the instant case is certainly reasonable.

## VI. DISPOSITION

[164] I would therefore allow the appeal, with costs in this Court and in the Court of Appeal, and restore the conclusions set out in paras. 355, 356, 358, 359 and 360 of the Tribunal's reasons, namely those that (1) declare By-law VS-R-2008-40 inoperative and invalid, although I would specify that this declaration applies only to Mr. Simoneau (para. 355); (2) order the respondents to cease the recitation of the prayer in the chambers where the municipal council meets (para. 356); and (3) order the respondents solidarily to pay Mr. Simoneau \$15,000 in compensatory damages (para. 358) and \$15,000 in punitive damages (para. 359), with interest plus the additional indemnity and costs, including the expert's fees, which were set at \$3,500 (para. 360).

The following are the reasons delivered by

ABELLA J. —

[165] I agree with the majority that the appeal should be allowed, but I have concerns about how the Tribunal's decision was reviewed. In particular, using different standards of review for each different aspect of a decision is a departure from our jurisprudence that risks undermining the framework for how decisions of specialized tribunals are generally reviewed. In *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at para. 100, this Court expressly rejected the proposition that a decision of a tribunal can be broken into its

many component parts and reviewed under multiple standards of review. And in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, we confirmed that the reasons of a specialized tribunal must be read as a whole to determine whether the result is reasonable: see also *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, at para. 79.

[166] Extricating the question of the “state’s duty of religious neutrality that flows from . . . freedom of conscience and religion” and other aspects of the Tribunal’s decision from the rest of its discrimination analysis is in direct conflict with this jurisprudence and creates yet another confusing caveat to this Court’s attempt in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, to set out a coherent and simplified template for determining which standard of review to apply. It also contradicts *Dunsmuir*’s directive that, based on the specialized expertise of tribunals, reasonableness applies when tribunals are interpreting their home statute: para. 54.

[167] It is true that we also concluded in *Dunsmuir* that if the issue is one of general law that is *both* of central importance to the legal system as a whole *and* outside the adjudicator’s specialized area of expertise, correctness applies. But it is important to stress that this is a binary exception to the presumptive application of reasonableness for decisions of specialized tribunals. Evaluating a *component* of an enumerated right more rigorously than the right itself, has the effect of negating the

admonition in *Dunsmuir*, at para. 60, that questions of general importance to the legal system attract the correctness standard *only if* they are outside the tribunal's expertise.

[168] In this case, we are dealing with a human rights tribunal. Its mandate is to determine whether discrimination has occurred based on a number of enumerated rights. One of those rights is freedom of religion and conscience. This is undoubtedly a question of "central importance to the legal system as a whole", but far from being "outside the adjudicator's specialized area of expertise", it is the Tribunal's daily fare. Since 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 religious neutrality. It is not a transcendent legal question meriting its own stricter standard, it is an inextricable part of deciding whether discrimination based on freedom of religion has taken place. 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. It is not an immutable criterion which yields consistent measurements, it is, like the right from which it flows, an important concept that both forms and takes its shape from the circumstances. To extricate it from the discrimination analysis as being of singular significance "to the legal system as a whole", elevates it from its contextual status into a defining one.

[169] Ironically, this has the effect of subjecting one aspect of freedom of religion to more rigorous scrutiny than the main issue of whether the right itself has

been violated and there has been discrimination, a question we have traditionally subjected to a reasonableness standard. Surely the various elements of an enumerated right, such as state religious neutrality in the case of freedom of religion, deserve no more heightened scrutiny than the right itself.

[170] We have never dissected the right in order to subject its components to different levels of scrutiny. What we have considered instead is whether the decision as a whole should be upheld as reasonable. In *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360, for example, this Court reviewed the British Columbia Human Rights Tribunal's decision that the failure to provide educational support to a child with dyslexia constituted discrimination on the basis of disability. We did not subject the questions of how the tribunal interpreted disability, or the role of education, or how public funds are dispersed, to separate standards of review. Each of these components is undoubtedly of central importance to the legal system, but each is also inextricably tied to the ultimate issue, namely whether discrimination took place, an issue at the core of a human rights tribunal's specialized mandate.

[171] And in *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, where this Court reviewed the Saskatchewan Human Rights Tribunal's decision that certain flyers constituted discrimination based on sexual orientation, a reasonableness standard was applied. Again, we did not excavate the decision to find and separately scrutinize aspects of the tribunal's discrimination analysis that might be of central importance to the legal system.

[172] All issues of discrimination are of central importance to the legal system, but they are also, because of that very importance, issues legislatures across the country have assigned to specialized tribunals with expertise in human rights, not to the generalist courts. Atomizing what is meant to be a holistic approach to determining whether discrimination has occurred, undermines an analysis that requires careful scrutiny of *all* of the interconnected relevant factual and legal parts.

[173] My final concern is a practical one. What do we tell reviewing courts to do when they segment a tribunal decision and subject each segment to different standards of review only to find that those reviews yield incompatible conclusions? How many components found to be reasonable or correct will it take to trump those found to be unreasonable or incorrect? Can an overall finding of reasonableness or correctness ever be justified if one of the components has been found to be unreasonable or incorrect? If we keep pulling on the various strands, we may eventually find that a principled and sustainable foundation for reviewing tribunal decisions has disappeared. And then we will have thrown out *Dunsmuir*'s baby with the bathwater.

*Appeal allowed with costs.*

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