Like a prayer:

Administrative law implications of the Supreme Court's freedom of religion decision in *Saguenay*

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In *Mouvement laïque québécois v. Saguenay (City)*,[1] ("*Saguenay*"), the Supreme Court of Canada ordered a municipality and its mayor to stop reciting a prayer at municipal council meetings on the basis that they had breached the state's duty of neutrality and had thus created a discriminatory interference with an individual's freedom of conscience and religion.

Touching on a hot topic – conflicting assertions of religious rights and freedoms – the Court's conclusion piqued the interest of the Canadian public, lawyers and non-lawyers alike. However, because of the way the Court reached its conclusion, Canadian litigators should be particularly interested in *Saguenay*. The Court's analysis provides helpful guidance and an interesting discussion on the appropriate standards of review for a statutory appeal – admittedly not quite as hot a topic, but an important one for many of our day-to-day practices).

Three key lessons in administrative law[2] emerge from the Court's analysis:

1. The appropriate standards of review where a statute provides for an appeal from a decision of a specialized administrative tribunal are those that apply on judicial review (emerging from *Dunsmuir*)[3]), not those applying to appeals from a court's decision (set out in *Housen v. Nikolaisen*)[4].
2. Different standards of review can sometimes apply to separate aspects of one decision, depending on the questions being analyzed. Notably, Justice Abella delivered concurring reasons disagreeing with the majority on this point.
3. Just as a statutory tribunal ought not consider issues outside the jurisdiction provided by its enabling statute, a reviewing court should similarly refrain from considering issues outside the tribunal's jurisdiction in its review.

Background

Saguenay involves a complaint made by Alain Simoneau and the Mouvement laïque québécois (collectively, the "Appellants") to the Quebec Human Rights Tribunal (the "Tribunal"), against the City of Saguenay and its mayor, Jean Tremblay (collectively, the "City") in connection with the recitation of a prayer at the start of the municipal council's public meetings.

Mr. Simoneau, a resident of Saguenay, identified as an atheist and regularly attended municipal council meetings. Each meeting started with the mayor making the sign of the cross while saying "in the name of the Father, the Son, and the Holy Spirit," then leading a prayer that referred to God. The council chambers also displayed a crucifix and other Catholic symbols.

Mr. Simoneau asked the mayor to stop reciting the prayer and, when he refused, the appellants filed a formal complaint to the Commission des droits de la personne et des droits de la jeunesse (the "Commission") on the basis that the practice infringed Mr. Simoneau's freedom of conscience and religion protected by the Quebec *Charter of Human Rights and Freedoms* (the "*Quebec Charter*"). The Commission determined the evidence was sufficient to submit the dispute respecting the prayer to the Tribunal, but declined to submit the complaint respecting the religious symbols.

Case history

The Tribunal granted the application, concluding that the prayer was religious in nature and that the City was showing a preference for one religion to the detriment of others by allowing the prayer to be recited at meetings. The Tribunal determined that this practice was a breach of the state's duty of neutrality, that the prayer interfered with Mr. Simoneau's freedom of conscience and religion in a manner that was more than trivial or insubstantial, and that the interference was discriminatory. The Tribunal ordered the City and the mayor to cease the recitation of the prayer and to remove all religious symbols from council chambers.

The City appealed the Tribunal's decision to the Quebec Court of Appeal, as provided by the *Quebec Charter*. The Court of Appeal's main reasons, written by Gagnon J.A., began by considering the appropriate standard of review. The Court held that the appeal was ultimately about the religious neutrality of the state, a matter of importance to the legal system over which the Tribunal did not have exclusive jurisdiction. As a result, the Court applied a correctness standard of review and proceeded to disagree with the Tribunal's findings, holding that the duty of neutrality did not require the state to abstain from religious matters and that the City's recitation of the prayer did not constitute discrimination.

The majority further held that the Tribunal lacked jurisdiction to deal with the issue of religious symbols, as that question had not been referred to it by the Commission. Nevertheless, Gagnon J.A. expressed the view that the symbols in question were works of art devoid of religious connotation and did not affect the state's neutrality. In concurring reasons, Hilton J.A. argued it was not appropriate for the Court to rule on the issue of religious symbols, holding that since the Tribunal lacked jurisdiction to rule on the question, the Court should also refrain from doing so.

Appropriate standard of review on statutory appeal of a tribunal decision

The Supreme Court began its analysis by considering the applicable standard of review on an appeal from a final decision of the Tribunal. The Court disagreed with the analysis of the Court of Appeal, which, in the majority's view, provided for "a confusing conceptual hybrid." The Court of Appeal had applied the judicial review standard of correctness for most of the decision; but on a question about the qualification of an expert, it applied the appellate standard of palpable and overriding error.

The majority noted that there was conflicting authority as to whether appellate standards of review or administrative law principles of judicial review apply to statutory appeals from a tribunal decision, and it acknowledged that clarification was needed to provide consistency and predictability. Ultimately, the Court concluded:

> 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.[5]

The Court explained that, although the Tribunal is similar to a court in light of the questions it is asked to decide, its adversarial nature and the existence of a statutory right to appeal with leave, it is still at its heart a specialized administrative tribunal: It was created by the *Quebec Charter*, it is not subject to the *Courts of Justice Act* and it has specialized expertise relating to cases involving discrimination. The Tribunal's administrative nature could not be disregarded; although certain characteristics may affect the deference shown to the Tribunal, they could not justify replacing the standards of review applicable to judicial review with appellate standards.

Separate standards of review can be applied to different questions

In considering the appropriate standard of review, the Court relied on a long line of cases for the proposition 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" – and deference should normally be shown as a result. It noted, however, that this presumption can be rebutted under certain circumstances, including where the legislature clearly intended not to protect the tribunal's jurisdiction (such as where its enabling statute provides that its jurisdiction is non-exclusive) or where a general question of law is raised that is of importance to the legal system as a whole and falls outside the administrative tribunal's area of expertise.

The majority held that the latter circumstance was present in this case. The question of "the scope of the state's duty of religious neutrality that flows from the freedom of conscience and religion protected by the *Quebec Charter*" was of general importance to the legal system and required a uniform and consistent answer. This factor, in conjunction with the courts' concurrent jurisdiction over such matters, was sufficient to rebut the presumption and warrant a correctness standard *on this question*.

However, the majority held that the *reasonableness* standard was the appropriate standard for the Tribunal's remaining determinations, such as the question of whether the prayer was religious in nature, the qualification of experts and the assessment of their testimony, and the determination of whether the prayer was discriminatory. The majority held that the Court of Appeal erred in applying the correctness standard to the entire appeal, as these determinations of the Tribunal fell squarely within its expertise and were entitled to deference.

The majority's separate application of the correctness standard to the question of the scope of the duty of neutrality was the only point of disagreement among the Court. For its view, the majority relied on the Court's recent decision in *Tervita Corp. v. Canada (Commissioner of Competition) ("Tervita")*, which upheld the application of a correctness review to a tribunal's determinations of questions of law, and a reasonableness standard for mixed questions of fact and law and questions of fact.[6] In a concurring opinion, Justice Abella discussed her diverging view that a reasonableness standard applied to the Tribunal's entire decision. Justice Abella's concern with the majority's conclusion was twofold. First, in her view, reasonableness was the appropriate standard of review for the Tribunal's decision on the scope of the state's duty of neutrality; and second, it was inappropriate to apply different standards of review to different aspects of one decision.

On the first point, Justice Abella expressed her concern that the majority's application of the correctness standard contradicts the Court's directive in *Dunsmuir* to apply the reasonableness standard when a specialized tribunal is determining a matter within its expertise. She acknowledged that, where "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."[7] However, she highlighted that this is a *binary* exception, and that the question at issue – the scope of the duty of neutrality flowing from freedom of conscience and religion – although certainly of central importance to the legal system as a whole, is part of the Tribunal's "daily fare" of determining whether discrimination has occurred, not outside its area of expertise. In any event, Justice Abella held that *all* issues of discrimination are of central importance to the legal system, and that this is precisely why specialized tribunals with expertise in human rights have been assigned by the legislature to consider these issues. (Notably, Justice Abella wrote a concurring opinion in *Tervita* – the majority opinion of which was relied upon for the majority's conclusion on this point – discussing a similar concern about the need for deference to specialized administrative tribunals.)

Perhaps more importantly, Justice Abella

held that extricating an aspect of the Tribunal's decision from the rest of its analysis "creates another confusing caveat to [the Supreme] Court's attempt in *Dunsmuir* … to set out a coherent and simplified template for determining which standard of review to apply."[8] She noted that using different standards of review for each different aspect of a decision is a departure from the Court's jurisprudence, which previously rejected a suggestion to review a tribunal decision's component parts under multiple standards of review[9] and confirmed that a tribunal's reasons must be read as a whole.[10]

Justice Abella concluded her reasons by raising a compelling concern with the majority's approach: the possibility of the application of different standards of review yielding incompatible results. Although not arising in the present case, this conceivable outcome raises interesting practical questions. As stated by Justice Abella:

> 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.[11]

Inappropriate extensions of jurisdiction by both the Tribunal and the Court of Appeal

On the issue of the religious symbols in council chambers, the Supreme Court agreed with the Court of Appeal's finding that, because the Commission had not submitted the issue to the Tribunal (as required by its enabling statute), it was not open to the Tribunal to consider it.

Notably, however, the Tribunal had held that the *Commission*, by failing to provide reasons in writing for its refusal to submit the dispute respecting religious symbols to the Tribunal, had in fact acted contrary to the same enabling statute. It was on this basis that the Tribunal justified considering the question: It held that the Commission had not properly "refused to act" within the meaning of the statute, and that the principles of access to justice and proportionality allowed it to address the issue.

Nevertheless, the Supreme Court held that the Tribunal was limited by its enabling statute and could not extend its jurisdiction on its own – it had no discretion to consider applications other than those referred to it under the processes provided by statute.

The Supreme Court further held that Gagnon J.A. had erred by speaking to the issue of religious symbols after finding that it was not open to the Tribunal to consider it. Agreeing with Justice Hilton's concurring reasons at the Court of Appeal, the Court held that"[i]t 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."

Curiously, the Supreme Court made no reference whatsoever to the standard of review applicable to the Tribunal's and the Court of Appeal's decisions on the issue of religious symbols. Arguably, the Tribunal's ability to consider the religious symbols issue in the circumstances constituted one of those rare "true questions of jurisdiction" referred to in *Dunsmuir*, in which the tribunal mu explicitly determine whether its statutory grant of power gives the authority to decide a particular matter and a stringent sta dard of correctness is warranted. Assuming this to be the cas one wonders how this conclusion would fit with Justice Abella view that a uniform standard of review should apply to the enti decision. Perhaps the complications and contradictions that coul arise from such an analysis – without any impact on the outcome explain why the Court omitted any discussion of this point.

The result: Prayer at Saguenay council meetings was discriminatory breach of freedom of religion

In addition to the aforementioned findings about administr tive law, the Supreme Court's decision in *Saguenay* is, of course, inte esting for its conclusion on the key issue before it.

The Supreme Court ultimately held that

- The Tribunal was correct to find that the state's duty of ne trality prohibits a state authority from making use of i powers to promote or impose a religious belief.[12]
- The Tribunal was reasonable in concluding that the prayer i question was in fact a practice of a religious nature.[13]
- The Tribunal was reasonable in finding that the prayer was breach of the state's duty of neutrality[14] and had a discriminato effect on Mr. Simoneau's freedom of conscience and religion.[15]
- The Tribunal was reasonable to award Mr. Simoneau $30,0(in compensatory and punitive damages for the City's di criminatory breach.[16]

Notes

1. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 [*Saguenay*].
2. The Court's decision also includes an interesting analysis respecting the admissibility of expert opinion where the expert lacks independence. The Court has since elaborated on its analysis on this point in *Saguenay* in its decision in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23. This article considers the administrative law issues arising in the Court's decision, and will leave the other interesting discussions arising from the case for another day.
3. *Dunsmuir v New Brunswick*, [2008] 1 SCR 190,2008 SCC 9.
4. *Housen v Nikolaisen*, [2002] 2 SCR 235. 2002 SCC 33.
5. *Saguenay, supra* note 1 at para 38.
6. *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 24, 34–40.
7. *Saguenay, supra note* 1 at para 167.
8. *Saguenay, supra* note 1 at para 166.
9. *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650, at para 100, per Abella J: "The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review."
10. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62,[2011] 3 SCR 708; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 79.
11. *Saguenay, supra* note 1 at para 173.
12. *Saguenay supra* note 1 at para 77.
13. *Saguenay supra* note 1 at para 96.
14. *Saguenay supra* note 1 at paras 113, 118 ("[T]he 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 … What the respondents are defending is not a tradition, but the municipality's right to manifest its own faith … nothing could conflict more with the state's duty of neutrality.")
15. *Saguenay supra* note 1 at para126.
16. *Saguenay supra* note 1 at paras 158–161.