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The Evangelical Fellowship of Canada

They said WHAT!?

A brief analysis of the Supreme Court of Canada's decision in *S.L. v. Commission Scolaire des Chênes*

(2012 SCC 7)

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1. Introduction

The Supreme Court of Canada released a decision with an unanticipated twist in *S.L. v. Commission Scolaire des Chênes* on Friday, February 17. The case was focused on the request of S.L. and D. J. to exercise their parental right to request their children's exemption from a grade 1 to grade 11 curriculum (the Ethics and Religion in Culture program, "ERC") of Quebec's Ministry of Education. They believed the program conflicts with their religious beliefs because elements of the curriculum equate all religions as being essentially the same.
Before considering the decision, it is important to reflect on who was in the courtroom when this case was heard at the Supreme Court of Canada.

When you see a group of religious organizations on the same side as the Canadian Civil Liberties Association (CCLA) it's time to take note. The case at hand is likely more than just another case about religious freedom. When government is on the other side of the case, this configuration of interveners usually tells us that the government is engaged in action that experienced constitutional law lawyers perceive as intruding on the fundamental human rights of Canadians. The CCLA and religious groups are finding themselves increasingly on the same side of lawsuits opposing government action that violates rights.

And, when you see religious freedom oriented organizations like The Evangelical Fellowship of Canada and Christian Legal Fellowship joined by a governance oriented organization like the Canadian Council of Christian Charities (CCCC) then you can be quite certain the case is about more than individual rights. The CCCC intervenes when a case has a demonstrated potential to impact how Christian charitable organizations function in Canada. The Quebec Ministry of Education mandated the ERC program not just for public schools, but for private schools, religious schools and homeschooling. This impacts individuals, families and religious schools whether Catholic, Protestant, Jewish or otherwise.

2. Win, Lose or…Disqualified?

The popular media has generally reported that the government won and the parents lost. Truth be told, S.L. and D.J. did not so much "lose" as they were "disqualified." The key to the Court's decision was a technical legal distinction based on the parents' presentation at the lower court. The parents believed it sufficient to state that the curriculum document itself offended their religious beliefs, rather than demonstrating that the ERC had objectively interfered in some way with their ability to pass their religion on to their children, and therefore violating their right to religious freedom.

Accordingly, Justice LeBel stated:

> The manner in which this legal debate began did not facilitate the task of examining and resolving the legal issues raised by the parties. [para. 45]

This determination as the foundation for the Court's decision is problematic as the Court seems to suggest that one's relationship with one's children must be damaged by the school system before one can take action to prevent such harm from occurring. The Court also stated:

> Although the sincerity of a person's belief that a religious practice must be observed is relevant to whether the person's right to freedom of religion is at issue, an infringement of this right cannot be established without objective proof of an interference with the observance of that practice. [para. 2]

Please note that this did not allow the Quebec government, or any other, to exit the courtroom with a license to violate religious beliefs through religious curriculum. Some of the concluding words in the decision note:

> As a result of the state of the record, however, I am also unable to conclude that the program and its implementation could not, in the future, possibly infringe the rights granted to the appellants and persons in the same situation …
> … the legal situation could change during the existence of the ERC program. [para. 58]

In other words, if the course is implemented in a way that can be demonstrated to interfere with parents' ability to pass their faith on to their children – perhaps by belittling the beliefs of the faith community in question or noting them to be questionable or false – then the issue of the program's infringement on religious freedom and parental rights remains to be determined by the courts at some future date.
In short, the government would be wise to review the curriculum and revise it to instruct on the place of ethics and religion in the development and life of the culture of Quebec, and provide education about religion rather than religious education. Such an approach to education, one which would examine the contribution of religion to contemporary culture and the pluralist nature of Canada's constitutionally multicultural society, would satisfy the ERC curriculum goals of respect and tolerance. It would also likely meet with an acceptance from parents that challenging the beliefs of faith communities does not.

While recognizing the constitutional place of the province to establish educational curriculum (s. 93 of the *Constitution Act, 1867*), the Court also stated:

> … the Program's design and the content of the educational and administrative framework do not make it easy to assess the program's concrete impact in the everyday workings of Quebec's public school system. In other words, is it a program that will provide all students with better knowledge of society's diversity and teach them to be open to differences? Or is it an educational tool designed to get religion out of children's heads by taking an essentially agnostic or atheistic approach that denies any theoretical validity to the religious experience and religious values? Is the program consistent with the notion of secularism that has gradually been developed in constitutional cases, particularly in the field of education? The state of the record makes it impossible to answer these questions with confidence. [para. 53]

> This Court's decisions have stressed the importance of neutrality in the public school system. They have recognized that the very nature of a public education system implies the creation of opportunities for students of different origins and religions to learn about the diversity of opinions and cultures existing in our society, even in religious matters. Imparting information about different views of the world cannot be equated with a violation of freedom of religion (*Chamberlain v. Surrey School District No. 36* at paras. 65-66 and 211-12). Moreover, in the modern Canadian political system, the state in principle takes a position of neutrality. And it is barred from enacting private legislation that favours one religion over another (*R. v. Big M Drug Mart Ltd*., at p. 351, *per* Dickson J. (as he then was)). In a diverse country like Canada, such a position has become essential to preserving the constitutional freedom to believe or not believe and to express one's beliefs (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*). Under the constitutional principles governing state action, the state has neither an obligation to promote religious faith nor a right to discourage religious faith in its public education system. Only such true neutrality is in keeping with the secularism of the state... [para. 54]

By not deciding against the parents or endorsing the curriculum, the court may be suggesting that the politicians and the parents get together to work out an amicable solution.

Although a non-decision on the issue that was believed to be at the heart of this case, in the short (60 paragraphs, double spaced on 27 pages) decision the Supreme Court of Canada still made much notable comment about the role of the state in regard to freedom of religion and parental rights in Canada in spite of determining there was no legal ground on which they could decide the case for or against the parents or the government curriculum in question.

3. Separation of Church and State…it's in the U.S. Constitution

The Court affirmed that while a "gradual separation of church and state in Canada has been part of a broad movement to secularize public institutions" there is no Canadian legal or constitutional recognition of the separation of church and state as a concept as found in the U.S. Constitution. Having commented on this notion previously, most notably in their decision *in Chamberlain v. Surrey School District No. 36* and *Trinity Western University v. College of Teachers*, the Court attempted to clarify the various ideas in regard to its comments on "secularism" including the philosophical ideas of "inclusive secularism", the "politics of difference" and "authentic pluralism" (Charles Taylor) and "accommodation pluralism" (John Gray) by referencing a principle they described as "state religious neutrality."

> The concept of state religious neutrality in Canadian case law has developed alongside a growing sensitivity to the multicultural makeup of Canada and the protection of minorities. Already in *Big M Drug Mart*, Dickson J. had stated that "the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion" (p. 351). In

> the same way, the Ontario Court of Appeal held in *Canadian Civil Liberties Assn.* that imposing a religious practice of the majority had the effect of infringing the freedom of religion of the minority and was incompatible with the multicultural reality of Canadian society (p. 363). [para. 21]
>
> While it is true that the *Canadian Charter*, unlike the U.S. Constitution, does not explicitly limit the support the state can give to a religion, Canadian courts have held that state sponsorship of one religious tradition amounts to discrimination against others. [para. 17]

The Court admitted "that, from a philosophical standpoint, absolute neutrality does not exist."

> 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 affected individuals affected. [para. 32]

As noted earlier, it would appear to be an appropriate role for the state to develop curriculum to educate about religion and culture from a descriptive perspective, without providing "religious education" by engaging in an assessment of the truth of religious beliefs. Secularism or anti-religion can be just as "religious" a "doctrine" as religion, expressing a position on religious beliefs and failing to accommodate the multiple religious, cultural and philosophical expressions that enrich Canadian society. The place of the religious Canadian in Canadian society is equal with the place of all others. In education, this necessarily includes space for religiously based education to teach such a curriculum from the particular religious perspective.

4. The Elements of Freedom of Religion…and its infringement

The parties and interveners in this case all engaged in the courtroom on the issue of freedom of religion as it was seen to be the heart of the case. The Court took the opportunity of this case to affirm principles it stated in *Syndicat Northcrest v. Amselem*.

> … In that case, Iacobucci J. explained that a person does not have to show that the practice the person sincerely believes he or she must observe or the belief the person endorses corresponds to a religious precept recognized by other followers. If the person believes that he or she has an obligation to act in accordance with a practice or endorses a belief "having a nexus with religion",the court is limited to assessing the sincerity of the person's belief (paras. 39, 43, 46 and 54). [para. 22]

The Court also affirmed that the "right of parents to bring up their children in their faith is part of the freedom of religion guaranteed by the *Canadian Charter*." [para. 50]

However, the Court presented clarification on how "infringement" of the right to freedom of religion is assessed.

> At the stage of establishing an infringement, however, it is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities. This may of course involve any legal form of proof, but it must nonetheless be based on facts that can be established objectively. For example, in *Edwards Books*, the legislation required retailers who were Saturday observers to close a day more than Sunday observers. In *Amselem*, the infringement resulted from a prohibition against erecting any structure on the balconies of a building held in co-ownership, while the appellants believed that their religion required them to dwell in their own succahs. [para. 23]
>
> It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the *Canadian Charter* and the *Quebec Charter*, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role. [para. 24]

This is a departure from previous rulings in which the Court has made decisions based on legislation and proposed legislation that has not yet caused an objective infringement of rights. It also somewhat reverses the requirement for government to demonstrate that it is choosing the path least infringing or least likely to infringe on *Charter* rights.

5. Parental Rights

Of concern is that, in essence, by requiring objective evidence of infringement in a case involving curriculum designed by the state for the education of children, the Court has said parents who desire to protect their children from harm caused by government action must first allow that harm to occur in order to demonstrate its existence. This is troubling, although hopefully not what they intended and likely to be clarified at some future date. But what is the cost in the interim while we wait to find out? If parents have the right to determine their children's education (and, more particularly in this instance, religious instruction) then what about applying the concept of the reasonable apprehension of harm to such a mandatory government initiative? That is one standard employed by government agencies and the courts when removing children from parental care.

Parents' rights have not been stripped away, but neither have they been robustly supported. The court notes in regard to those rights in this instance – defined by the court as a situation

where the parents believed it sufficient that the curriculum document itself offended their religious beliefs, rather than demonstrating that the ERC had objectively interfered in some way with their ability to pass their religion on to their children – that:

> Parents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(a) of the *Canadian Charter* and of s. 3 of the *Quebec Charter*. [para. 40]

The decision is disappointing in that it fails to directly address the questions of protecting the innocent faith of young children with developing minds from a curriculum – taught by those whom they are encouraged to trust; whether in public school, private school, religious school or at home by their parents – that advocates there is no difference between Jesus, Thor and Allah or heaven, Valhalla and reincarnation when what they are supposed to be learning about is how to respect the differences between their beliefs and the beliefs of others.

Reassuring in the decision were the comments on the need for the state to be neutral in education, respectful of religion and sensitive in curriculum development. Let's hope the Government of Quebec (and all provincial governments) have assessed these latter points and will seek out ways to observe them with sensitivity to Canada being a pluralist, multicultural, multi-faith society. If not, we'll be back in the courtroom dealing with the same curriculum in the not too distant future.