

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

**ENGLISH MONTREAL SCHOOL BOARD,
MUBEENAH MUGHAL, and PIETRO MERCURI**

APPELLANTS/
RESPONDENTS ON CROSS-APPEAL

– and –

**ATTORNEY GENERAL OF QUÉBEC,
JEAN-FRANÇOIS ROBERGE, in his official capacity, and
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS/
APPELLANTS ON CROSS-APPEAL

– and –

**MOUVEMENT LAÏQUE QUÉBÉCOIS, and
FRANÇOIS PARADIS, in his official capacity**

RESPONDENTS

(Style of cause continued on next page)

**FACTUM OF THE INTERVENERS,
BRITISH COLUMBIA HUMANIST ASSOCIATION and
CANADIAN SECULAR ALLIANCE**

(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada, S.O.R./2002-156)

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(Style of cause continued)

AND BETWEEN:

**WORLD SIKH ORGANIZATION OF CANADA and
AMRIT KAUR**

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– and –

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AND BETWEEN:

**ICHRAK NOUREL HAK,
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM), and
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

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**FRANÇOIS PARADIS, in his official capacity,
MOUVEMENT LAÏQUE QUÉBÉCOIS, and
POUR LES DROITS DES FEMMES DU QUÉBEC**

RESPONDENTS

AND BETWEEN:

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APPELLANT/
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AND BETWEEN:

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AND BETWEEN:

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APPELLANT/
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– and –

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PARTS I and II – OVERVIEW AND STATEMENT OF POINTS IN ISSUE

1. Canada is a secular democracy.
2. It is a duty of the state to remain neutral in matters of religion.
3. While this Court has repeatedly discussed the state’s duty of religious neutrality, it has not stated clearly from where that duty comes and, more importantly, where it resides within the architecture of the *Charter*.¹
4. The British Columbia Humanist Association (“BCHA”) and Canadian Secular Alliance (“CSA”) argue that the state’s duty of religious neutrality is not merely a byproduct of freedom of religion. The state’s duty of neutrality is a broader concept that, unlike freedom of religion, is not focused on an *individual’s* rights. The duty of state neutrality is focused on the state itself. It is a question of the state’s posture toward, and competence to determine, matters of religion.
5. The BCHA and CSA make submissions concerning the state’s duty of neutrality, its relationship to s. 2(a) of the *Charter*, and the practical and jurisprudential problems of legislative prohibitions on “religion” or “religious symbols” rather than specific items (e.g. face coverings).
6. The submissions are in three parts. The first part observes that freedom of religion is an individual and subjective right. Two principles emerge from that observation. Firstly, the state’s duty of religious neutrality is not subsumed within s. 2(a) of the *Charter*. Secondly, the state is incompetent to determine matters of religion.
7. The second part explains why the state duty of religious neutrality is not subsumed within s. 2(a) of the *Charter* and concludes that the duty is inherent to the *Charter*. It is an unwritten constitutional principle that is necessary to the coherence of, and flowing by implication from, the *Charter’s* architecture.

¹ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004 SCC 48](#); *S.L. v. Commission scolaire des Chênes*, [2012 SCC 7](#); *Mouvement laïque québécois v. Saguenay (City)*, [2015 SCC 16](#) [*Saguenay*]; *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32](#)

8. The third part argues that the question of what constitutes religion or, more particularly, a religious symbol is not a matter of legal debate. This conclusion is supported by a discussion of: (a) the relationship between religion and culture; and (b) the subjective and contingent meaning that may be ascribed to symbols.

PART III – STATEMENT OF ARGUMENT

A. Freedom of religion is an individual and subjective right

9. Freedom of religion is understood in our jurisprudence as an inherently individual and subjective right. Consistent with this, neither the *Charter* nor the jurisprudence defines religion or purports to restrain an individual's freedom of religion to commonly understood religious teachings and precepts.
10. Two principles emerge from this observation.
11. Firstly, the duty of state neutrality is an independent constitutional principle. It is not found within or derivative of s. 2(a) of the *Charter*. Rather, freedom of religion – as enshrined in s. 2(a) of the *Charter* – is an expression of the state's duty of neutrality.
12. Secondly, neither the state nor the courts are competent to define that which is a religious symbol and that which is not.
13. The BCHA and CSA submit that the duty of state neutrality precludes the state from defining what qualifies as religion or a religious symbol.
14. Religion is inherently subjective. Its content and meaning rests with the individual, not with external validation. Symbols, attire, and practices may have deeply religious meaning for some but merely cultural (or other) meanings for others. Canadian jurisprudence has placed this determination in the hands of the believer, not whether those beliefs conform to views of other members of the same religion.²

B. The state's duty of neutrality is inherent to the *Charter*

15. Canada is a secular state. As noted by the majority in *Loyola*, “a secular state respects religious differences, it does not seek to extinguish them.”³

² *Syndicat Northcrest v. Amselem*, [2004 SCC 47](#) [*Amselem*] at paras. 42-43

³ *Loyola High School v. Quebec (Attorney General)*, [2015 SCC 12](#) [*Loyola*] at para. 43

16. Secularism is achieved through the duty of state religious neutrality.
17. This Court has recognized that “state neutrality 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”.⁴
18. In upholding the state’s duty of neutrality, there is no reconciliation of rights between the state and the individual. This is because the state does not have “a freedom to believe or to manifest a belief.”⁵
19. Writing for the majority in *Saguenay*, Justice Gascon stated that “the state’s duty of religious neutrality is based on a democratic imperative.”⁶
20. Chief Justice McLachlin observed that this “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.”⁷
21. This duty of state neutrality has been held to be a “corollary” and “necessary consequence” of enshrining the freedom of conscience and religion in the *Charter*.⁸
22. That does not mean that the duty of state neutrality is subsumed within s. 2(a) of the *Charter*. Rather, the two concepts – state neutrality and freedom of religion – work together and are sometimes in tension. As noted by Justice Gascon in *Saguenay*, “[t]he interplay between freedom of conscience and religion, on the one hand, and this duty of neutrality, on the other, is sometimes a delicate one.”
23. Properly understood, the state’s duty of religious neutrality is both a corollary to the protections offered by s. 2(a) of the *Charter*, and a democratic imperative.
24. As a democratic imperative, the duty of state neutrality exists independent of s. 2(a) of the *Charter*. Similarly, as a corollary to s. 2(a) of the *Charter*, the duty of state neutrality has an existence independent of, but related to, s. 2(a). While s. 33 may be used to make s.

⁴ *S.L. v. Commission scolaire des Chênes*, [2012 SCC 7](#) at para. 32

⁵ *Mouvement laïque québécois v. Saguenay (City)*, [2015 SCC 16](#) at para. 119

⁶ *Mouvement laïque québécois v. Saguenay (City)*, [2015 SCC 16](#) at para. 75

⁷ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004 SCC 48](#) at para. 66

⁸ *Mouvement laïque québécois v. Saguenay (City)*, [2015 SCC 16](#) at paras. 1, 75 & 76

- 2(a) inoperative, it does not remove s. 2(a) from the *Charter* or make its necessary corollaries inoperative.
25. Consistent with the foregoing, this Court has recognized that the *Charter*'s text may not contain a comprehensive statement of the duties and protections offered by the *Charter*. There are unwritten understandings and principles provided by the *Charter* that cannot be found within its text.⁹
 26. In common parlance, the duty of religious neutrality is baked into the *Charter*.
 27. The state's duty of religious neutrality is an unwritten constitutional principle of the second type discussed in *Toronto (City) v. Ontario (Attorney General)*.¹⁰ That is, the duty is necessary to the coherence of, and flowing by implication from, the *Charter*'s architecture.
 28. The duty of state neutrality is similarly not confined to the explicit provisions of s. 2(a) of the *Charter*. Instead, this duty is part of the recognized unwritten constitutional principle of democracy, a principle held to be the "baseline" against which the authors of our Constitution, and our elected representatives under it, have always operated.¹¹
 29. Furthermore, the notion of neutrality being a state duty is incompatible with it being subsumed within a *Charter* right. *Charter* breaches are individual. The jurisprudence is clear that claims for *Charter* breaches must plead a factual matrix for the alleged breach. "Without a pleading of individual circumstances, there is no basis on which to make the required causal connection between the government conduct and the alleged breach."¹²
 30. As noted earlier, s. 2(a) is an expression of the state's duty of neutrality.

⁹ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 at para. 109

¹⁰ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34

¹¹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 62

¹² *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at paras. 31 & 51, leave to appeal to SCC ref'd 2008 CanLII 39172 (SCC)

C. The state is incompetent to determine matters of religion

31. Legislation that purports to restrict religion is not only a breach of the state's duty of neutrality, it is legally incoherent. The state is simply not competent to determine matters of religion.
32. This proposition is not limited to legislative competence. It reflects our understanding of freedom of religion within a secular state.
33. Freedom of religion is, and has always been, grounded in the individual. Since this Court's seminal decision in *Big M*, "it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise."¹³
34. This is reflected in the test for establishing a breach of s. 2(a) of the *Charter*. A plaintiff must first demonstrate a "sincerely held religious belief". The strength of the belief is not relevant.¹⁴
35. "[R]eligious freedom is premised on the personal volition of individual believers."¹⁵
36. The validity of a belief or its conformity with established doctrine are not relevant. In *Amselem*, Justice Iacobucci stated:

In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.
37. Justice Iacobucci warned against the incorporation of distinctions between "obligation" and "custom", or between "objective obligation" and "subjective obligation or belief", as "dubious, unwarranted and unduly restrictive."¹⁶

¹³ *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 [*Big M*] at para. 135

¹⁴ *R. v. N.S.*, 2012 SCC 72 at para. 13

¹⁵ *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 219 [Rowe J., concurring]

¹⁶ *Syndicat Northcrest v. Amselem*, 2004 SCC 47 [*Amselem*] at para. 61

38. The Ontario Court Appeal (citing the Australian High Court) concisely articulated the legal and judicial posture toward religion:

The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious [...] In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is “one in, all in”.¹⁷

39. It necessarily follows that the practice of a religion – and the meaning of symbols – is also individual and subjective. That which may be religious to one, may not be to another, and *vice versa*.
40. Under a Canadian understanding of freedom of religion, the believer determines his or her religion, how to practice it, and the symbols that bear religious significance.
41. This must be contrasted with the state’s duty of religious neutrality, which is necessarily focused on the state, not an individual.
42. When the state purports to legislate about religion or religious symbols in a manner that deprives the believer of agency, the state exhibits a fundamental misunderstanding of freedom of religion as an individual right and violates its duty of neutrality.
43. This stands in contrast to legislation that has the effect of restricting religious freedom – intended or otherwise – but does not purport to determine what is and is not religious.¹⁸
44. The difference is subtle but important. When the state restricts specific behaviour, it does not determine on behalf of individuals that the restricted behaviour is religious. It remains for individuals to assert their freedom of religion.
45. Conversely, legislation that expressly purports to restrict religion turns our freedom of religion jurisprudence on its head. It puts the state in the position of determining an individual’s religion through enforcement of the legislative scheme.
46. This difference is exemplified by contrasting sections 6 and 8 of *Loi sur la laïcité de l’État*.¹⁹ Section 8 provides a clear prohibition on face coverings. The reason one might

¹⁷ *Church of Scientology and The Queen (No. 6), Re*, [1987 CanLII 122 \(ON CA\)](#)

¹⁸ See, for example, *Alberta v. Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#)

¹⁹ *Loi sur la laïcité de l’État*, [CQLR c. L-0.3](#).

choose to wear a face covering is not relevant. While the effect of s. 8 may be to infringe the religious freedom of some persons, the section does not put the state in the position of determining why a person would wear a face covering. It does not determine for an individual that the face covering is religious in nature.

47. Conversely, s. 6 prohibits the wearing of a religious symbol “in connection with a religious conviction or belief” or that “is reasonably considered as referring to a religious affiliation.” Absent an individual pronouncing that a symbol is worn in connection with a religious conviction or belief, section 6 puts the state in the role of determining, on behalf of the individual, whether a symbol is religious.

48. In addressing section 6, the Quebec Court of Appeal stated:

On reading s. 6 of the *Act*, or the other excerpts thereof mentioned by the *Act*'s opponents, it is impossible to argue that they do not “give sufficient guidance for legal debate”. When the time comes, such a legal debate will provide an opportunity to decide between the various arguments submitted in the instant case regarding the scope of the *Act* and to adopt a firm interpretation of the provisions in question. To criticize the *Act* for not clarifying in advance what will emerge from this process of interpretation is to expect something from it that no statute is capable of delivering. This refutes the argument based on the *Act*'s vagueness.²⁰

49. Respectfully, the above excerpt misses the point. Whether something is religious is not a “legal debate”. It is a question of an individual's religious convictions – a sincerely held belief. In suggesting there is room for a legal debate, the Quebec Court of Appeal failed to heed to this Court's decision in *Amselem*.

50. The foregoing takes on greater purchase when one considers:

- a) the interplay between culture, religion, politics and tradition; and
- b) that a symbol's meaning (if any) is not inherent, but rather a matter of perspective.

a. The distinction between religion and culture is unclear

51. Culture, religion, politics and tradition are not separate things. They do not exist independent of one another.

²⁰ *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, [2024 QCCA 254](#) at para. 200

52. In his book *Dominion: The Making of the Western Mind*, British historian, Tom Holland, argues that Western morality, values and social norms are products of Christianity. To Holland, Christianity infuses Western morals and values “so utterly that many failed even to detect their presence. Like dust particles so fine as to be invisible to the naked eye, they were breathed in equally by everyone: believers, atheists and those who never paused so much as to think about religion.”²¹
53. That is not to say that we live in a Christian – as opposed to secular – society. Rather, it is an acknowledgment that the distinction between religion and culture is nebulous, evolving and often unseen.
54. Religion does not exist separate and apart from broader society. Religion influences and is influenced by societal trends and changes, and the evolution of moral values.

b. A symbol’s meaning (if any) is a matter of perspective

55. Humans ascribe meaning to symbols. Symbols acquire meaning through political, cultural, religious or other means. A symbol may acquire a meaning understood by many, or it may acquire a specific meaning to a specific individual. A symbol may have multiple, sometimes contradictory meanings. A symbol’s meaning may change over time.
56. Symbols have different meanings to different people. The swastika is an ancient symbol of Indian religions signifying good fortune. Since the 1930s it has also been associated with Nazi Germany.
57. In contemporary society, debates rage about symbols and their meaning. To some the Confederate flag is a sign of pride in one’s Southern US heritage. To others it is a sign of white supremacy and slavery.
58. Closer to home, the Canadian flag was a symbol of the so-called “Freedom Convoy”. It is also a symbol of pride for some. Whether the Canadian flag was a symbol of support for the Freedom Convoy, a sign of national pride in opposition to the Freedom Convoy, or something else entirely would depend on who was asked.

²¹ [Barney Zwartz, “Christianity still shapes modern Western morality” *The Sydney Morning Herald* \(15 November, 2019\)](#)

59. These examples demonstrate that a symbol has no inherent meaning. Meaning is subjective and contingent. Meaning depends on the characteristics, knowledge and cultural background of an individual. A particular symbol may have an innately understood meaning to one person. Another person of another background may not recognize the same symbol as having any meaning at all.
60. Meaning is not only dependent on the person who might ascribe it meaning. It is also contingent on circumstances. One would ascribe a different meaning to a swastika inlaid in the marble floor of a home in Mumbai than to a swastika spray painted on the side of a mosque in Ottawa. The symbol is the same. The circumstances of its display are different. To those familiar with the symbol and its different meanings, the circumstances determine the meaning.
61. A symbol is not inherently religious. A symbol may be given a religious meaning. That meaning may be unique to a single person or shared by many people. There will be those for whom the symbol has no, or a different, meaning.
62. Consistent with the foregoing, symbols may begin as something secular and take on a religious meaning, or *vice versa*. Religious imagery may be used in a non-religious context for artistic or other purposes.
63. When is the use of a symbol religious? The answer depends on who you ask.
64. One need only consider common Canadian holidays.²² Christmas celebrates the birth of Jesus Christ. It is undoubtedly rooted in Christianity.
65. Christmas is celebrated by more than just Christians. Many atheists and those of other religions also celebrate aspects of Christmas. It has become a cultural tradition.
66. Symbols of Christmas are ubiquitous during “the holidays”. Are they all religious symbols? Is a sweater with a Santa Claus image a religious symbol? Are earrings in the shape of Christmas trees religious symbols?

²² The word ‘holiday’ derives from ‘holy day’ and implies a religious purpose. Nevertheless, to many the word has no religious connotation and is used to describe days that are purely secular.

67. Whether a symbol of Christmas is religious is a matter of perspective. One who wears a symbol may consider it religious, while one looking upon it may not, or *vice versa*. Neither person is wrong. They simply have different perspectives.
68. The state's duty of neutrality is incompatible with the state having a perspective. The state cannot decide which perspective is correct. As a matter of law, there is no "correct" perspective. There is only perspective.

D. Conclusion

69. In deciding this case, the Court should recognize the state's duty of religious neutrality as being separate and distinct from the individual's right to freedom of religion enshrined in s. 2(a) of the *Charter*.
70. As demonstrated, the state has a duty of religious neutrality that is inherent to the *Charter*, and is not affected by an invocation of s. 33.
71. Furthermore, Canada, as a secular state, is *in principle* incapable of distinguishing between religious, cultural, political, and other symbolism. Any attempt to ban religious imagery requires the state to make a determination as to what is religious – something it is incompetent to do.

PART IV – SUBMISSIONS CONCERNING COSTS

72. BCHA and CSA do not seek costs and ask that no costs be awarded against them.

PART V – ORDER SOUGHT

73. BCHA and CSA do not request any orders.

PART VI – CONFIDENTIALITY

74. BCHA and CSA have no submissions on this.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 17th day of September, 2025.



Wes McMillan

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PART VII – TABLE OF AUTHORITIES

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