22ND ANNUAL CHURCH & CHARITY LAW SEMINAR

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Where are We Headed? Freedom of Religion in the Courts

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OVERVIEW

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- Loyola High School v Quebec (Attorney General)
- Carter v Canada (Attorney General)
- Mouvement laïque Québécois v Saguenay (City)
- Trinity Western University v Nova Scotia Barristers' Society
- Trinity Western University v The Law Society of Upper Canada
- Canada (Minister of Citizenship and Immigration) v Zunera Ishaq

A. INTRODUCTION

- The court decisions in the cases discussed in this brief presentation contain complex facts and legal analysis
- The purpose of this presentation is to provide a brief overview of the cases without a detailed description of the facts or intricate legal analysis
- Legal citations of the cases are provided for those who wish to dig deeper
- The cases demonstrate that freedom of religion is alive and well in Canada

B. LOYOLA HIGH SCHOOL V QUEBEC (ATTORNEY GENERAL) ("LOYOLA"), 2015 SCC 12 (March19, 2015)

1. Why this Case is Important

- This case is a robust affirmation of the communal aspects of freedom of religion

2. Case Summary

- The Quebec Minister of Education requires a program on Ethics and Religious Culture ("ERC") to be taught in the schools
- In the ERC program students are required to study world religions, reflect on ethical questions and dialogue

- Teachers are required to provide instruction from a neutral perspective
- The Education Minister can exempt private schools from the ERC program if they offer an alternative but equivalent program
- Loyola, a private Catholic school, was denied an exemption because its alternative program proposed to teach the ERC program from a Catholic perspective
- It was also denied an exemption when it proposed teaching world religions from an objective perspective but Catholicism and the ethics of world religions from a Catholic perspective

- Both the majority (4 judges) and minority (3 judges) decisions affirmed that religion has *communal aspects* that are protected by the *Charter*
- The majority recognized the "socially embedded nature of religious belief, and the deep linkages between this belief and its manifestations through communal institutions and traditions" but decided that it was not necessary to determine whether Loyola as a corporation has the right to freedom of religion under the *Charter* because the Loyola community who "seek to offer and wish to receive a Catholic education" are protected by the *Charter*

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- The minority concluded that "the individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith."
- The SCC held that requiring religious schools to each their own religion objectively seriously infringes freedom of religion

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- To tell a Catholic school how to explain its faith undermines the liberty of the members of its community
- However the majority held that teaching ethics of other world religions in a neutral way would not infringe Loyola's freedom of religion
- The minority held that to expect Loyola to ensure that all viewpoints are worthy of belief would infringe its freedom of religion

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3. Ramifications of Case

- The Court's decision about the communal nature of religion will assist faith based institutions for whom providing physician assisted death would be contrary to their mission and institutional conscience
- The impact of the case has already been demonstrated in the Trinity Western cases for institutions wishing to maintain their faith based identity

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- The Court's statements on the meaning of "secularism" will be helpful in future cases because they do no require that religion be absent from the public square
- "A secular state respects religious differences, it does not seek to extinguish them"
- The Court affirmed that secularism includes "respect for religious differences" and that through this "form of neutrality, the state affirms and recognizes the religious freedom of individuals and their communities"

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C. CARTER V CANADA (ATTORNEY GENERAL), 2015 SCC 5 (Feb. 6, 2015)

1. Why this Case is Important

- Struck down the *Criminal Code* provisions on assisted suicide to the extent that they prohibit physician assisted suicide in certain circumstances
- The SCC underlined that the rights of patients and physicians (including their religious beliefs) "will need to be reconciled"

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2. Case Summary

- The SCC unanimously held that physicians may help a competent adult die if he or she
  - Clearly consents to the termination of life, and
  - Has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in his or her circumstances
- The patient need not be terminally ill but euthanasia for minors, persons with psychiatric disorders or minor medical conditions would not fall within these parameters

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- The Court held that the prohibition on assisted suicide infringed the *Charter* rights to life, liberty and security of the person with their underlying values of autonomy and dignity
- The prohibition in the *Criminal Code* designed *to* protect the vulnerable cast too wide a net catching individuals who are not vulnerable
- In the Court's view the vulnerable could be protected by a regulatory regime based on the exemption crafted by the Court and with proper administrative safeguards

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- The Court thus distinguished the *Carter* case from the 1993 decision in *Rodriguez*, which, on very similar facts, upheld the *Criminal Code* provisions against assisted suicide
- The Court decided that *Rodriguez* did not need to be followed because the law had developed with respect to the principle of "overbreadth" and that the "matrix of legislative and social facts differed"
- The SCC declared sections 241(b) and 14 of the *Criminal Code* on assisted suicide invalid but suspended the declaration for one year to give time for a legislative response

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- The Court stated that "Nothing in this declaration would compel physicians to provide assistance in dying. The *Charter* rights of patients and physicians will need to be to be reconciled in any legislative and regulatory response to this judgment."

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3. Ramifications of Case

- Individuals and families are affected
- Doctors, lawyers, psychiatrists, pharmacists, ethicists and other professions are affected
- Federal and provincial legislators will have to come up with a regulatory scheme that protects the vulnerable and respects the *Charter* rights of physicians and faith based health care institutions

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D. MOUVEMENT LAÏQUE QUÉBÉCOIS V SAGUENAY (CITY), 2015 SCC 16 (April 15, 2015)

1. Why this Case is Important

- SCC builds on its earlier comments in *Loyola* on *state neutrality* that the state must neither encourage nor discourage any form of religious belief or non-belief
- State neutrality does not require the separation of Church and State but openness to to all points of view irrespective of their spiritual basis
- Neutrality is not complete secularity

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2. Case Summary

- Saguenay City council meetings were started with the following prayer
  - "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"

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- Council members and residents attending the meeting could leave the Council chamber during the prayer and the start of the meeting was delayed to give them time to return started
- Alain Simoneau, a resident of Saguenay who was an atheist and frequently attended council meetings, filed a complaint about the prayer to the Human Rights Tribunal which eventually found its way to the SCC
- The Quebec Court of Appeal held that the prayer did not violate Mr. Simoneau's freedom of religion and conscience because the state's duty of neutrality does not preclude
  "historical manifestations of the religious dimension of Quebec society"

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The SCC overruled the Quebec Court of Appeal

- The state's duty of religious neutrality results from an evolving interpretation of freedom of religion and conscience according to which the state must not interfere in religion, beliefs and non-belief
- If the state promotes a form of religious expression under the guise of cultural heritage it breaches its duty of neutrality
- A neutral public space means that everyone is encouraged to participate in public life irrespective of their beliefs

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- The prayer resulted in a distinction based on religion which turned the council meetings into a preferential place for people with theistic beliefs
- Disallowing the prayer was not the same as giving atheism preference over religious beliefs; neutrality is different from promoting atheism
- The reference to the "Supremacy of God" in the Constitution does not authorize the state to profess a theistic belief; it simply articulates the "political theory" on which the protections of the Charter are based

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- The Court stated that it would be inappropriate to use the prayer recited by the Speaker of the House of Commons before its proceedings to support a finding that the Council prayer was valid without detailed evidence on Parliament's practice and the circumstances of the prayer

3. Ramifications of the Case

- How will the requirement of neutral public spaces affect religious symbols?

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E. TRINITY WESTERN UNIVERSITY V NOVA SCOTIA BARRISTER'S SOCIETY, 2015 NSSC 25 (Jan. 28, 2015)

1. Why this Case is Important

- The Nova Scotia Supreme Court was the first Canadian court to rule on the accreditation of the proposed law school at Trinity Western University ("TWU")
- The Court concluded that "the refusal to accept the legitimacy of institutions because of a concern about the perception of the state endorsing their religiously informed moral positions would have a chilling effect on the liberty of conscience and freedom of religion"

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2. Case Summary

- TWU is a private evangelical Christian university
- Students must sign a Community Covenant, which requires them to adhere to certain behavior, including abstaining from "sexual intimacy outside of marriage between a man and a woman"
- The Nova Scotia Barristers' Society ("NSBS") refused to recognize law degrees from TWU unless it changed its Community Covenant or exempted lawyers from it
- NSBS, otherwise, admitted that TWU students would be properly qualified to practice law in Nova Scotia

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- The Court held that "Learning in an environment with people who promise to comply with a code is a religious practice and an expression of faith….Requiring a person to give up that right in order to get his or her professional education recognized is an infringement of religious freedom
- The Court emphasized that the NSBS is a state actor, which has to comply with the *Charter*, while TWU, as a private organization, is not required to do the same
- The Court also found that the SCC's 2001 TWU decision was still relevant because "equality rights have not jumped the queue to now trump religious freedom"

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F. TRINITY WESTERN UNIVERSITY V THE LAW SOCIETY OF UPPER CANADA 2015 ONSC 4250 (July 2, 2015)

1. Why this Case is Important

- This decision adds to the growing body of case law concerning TWU's proposed law school
- The cases involve similar facts but the reasoning of the Ontario court differs in almost every regard from the earlier reasoning of the Nova Scotia Supreme Court

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2. Case Summary

- The Ontario and Nova Scotia cases reach different conclusions in part due to the different decision making processes in each province
- The Law Society of Upper Canada (LSUC) has a broader mandate to advance the cause of justice, maintain the rule of law and act in the public interest as well as greater control over the educational requirements for admission than the Nova Scotia Barristers (NSBS)
- The LSUC voted to deny accreditation to TWU

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The Ontario Superior Court of Justice found that the LSUC decision interfered with TWU's right to religious freedom, relying on the robust communal interpretation in *Loyola* quoting with approval from the case as follows:

- "Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom"

- However, the Court concluded that the LSUC engaged in a proper proportionate balancing of the competing Charter rights because while the LSUC decision did not prevent

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TWU from opening a law school or expressing its religious beliefs, its community covenant did exclude some people from applying to TWU because of their beliefs

3. Ramifications of the Decision

- The Court's affirmation of the expansive definition of freedom of religion in *Loyola* is significant for communal/institutional rights to freedom of religion
- Given the conflicting decisions in Ontario and Nova Scotia, the issues are ultimately headed to the SCC

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G. ZUNERA ISHAQ v CANADA (Minister of Citizenship and Immigration) 2015 FC 156

1. Why this Case is Important

- This case received a lot of attention during the federal election but was not decided according to the Charter but according to administrative law principles
- This case shows that religious freedoms can be protected outside of a *Charter* challenge in certain circumstances

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2. Case Summary

- Case concerned a ministerial policy which required citizenship candidates to remove face coverings to take the oath at a citizenship ceremony
- Zunera Ishaq, a devout Muslim, challenged the policy because it was contrary to her faith to remove her niqab in public
- Ms. Ishaq had no problem in removing her niqab to verify her identity or for security purposes in private in the presence of a woman

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- The Federal Court and Federal Court of Appeal found it unnecessary to do a *Charter* analysis because the mandatory nature of the policy fettered the discretion of the citizenship judges contrary to the Regulations of the *Citizenship Act* and was thus void on administrative law grounds
- The Regulations require citizenship judges to "administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof"

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- The Federal Court held that religious solemnization is not just about applicants using the holy book of their choice but about "how the oath is administered and the circumstances in which candidates are required to take it"

3. Ramifications of Case

- The Court's decision on how the oath is to taken is bound to have ramifications in other contexts

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