

The Globe and Mail (Canada)
December 22, 1992 Tuesday

FIFTH COLUMN
LAW AND SOCIETY

Bryan Schwartz explains what the courts think about Santa and City Hall

THERE is no Santa clause - at least not in the Canadian Constitution, including the Charter of Rights. Indeed some sections of the Charter may be slumbering grinch. So, given the Charter's guarantees of religious freedom and equality, how is it that governments can single out a Christian holiday for special treatment?

In 1990, an Ontario trial judge struck down a Christmas closing law that made no allowances for non-Christians. The provincial Court of Appeal disagreed, and upheld the law. Our supreme legal beings have not yet addressed the issue. From their past revelations, however, we can prophesy their response.

In 1985, the Supreme Court of Canada struck down the federal Lord's Day Act. It was an easy mark. The name of the statute was religious and it selectively favoured traditional Sabbath activities.

A year later, the Supreme Court considered an Ontario law, the Retail Business Holidays Act. It required most businesses to close on Sunday. This time, the Supreme Court approved. The name of the statute was secular. So was its main purpose: to provide a common day of family togetherness and recreation.

In making the secondary determination - which day of the week? - governments can consider the religious traditions of the majority. Most of the judges cautioned that Sunday closing laws should try to accommodate those who regularly observe the Sabbath on other days. (A typical compromise is to give business operators the option of closing on their own Sabbath and staying open on Sunday).

About Christmas, the Supreme Court would likely say this: While the holiday has a religious name and origin, it has taken on a larger life. It evokes complex feelings - of repose, family and good will - that can be welcomed by those of other faiths or not. No one is forced to observe any religious rites on Dec. 25. Non-Christians may have to take an extra day off later in the year to celebrate their own most-cherished holy day. But that burden, the court would probably conclude, is slight enough that governments need not worry about it.

Can a government install Christmas displays on public property? The U.S. Supreme Court has several times meditated upon this issue and has pronounced the following test: Is government favouring a particular religion or just acknowledging a well-established social tradition? The cases applying this test make some wonderfully scholastic distinctions. Apparently, a U.S. civic government cannot place a nativity scene at City Hall; that's promoting religion. But if the cradle is accompanied by a decorated tree, plastic reindeer and a cardboard Santa, the scene is merely a recognition of the holiday season. To be on the constitutionally safe side, the government should toss in some extra elves, a menorah and a sign proclaiming "celebrating religious liberty."

A U.S. city can also establish a "public forum." It can invite all private citizens to use a government site to display their symbols of political or religious belief. The government cannot be faulted if only one group accepts the invitation. (In the U.S. case law, that one group has often been the Lubavitchers, a redoubtable group of Hasidic Jews. They install large menorahs, which you can see in many Canadian cities. By the way, remember the climactic courtroom scene of *Miracle on 34th Street*? A judge rules that a kindly old man, who has occupied the Santa Claus position at Macy's department store, is the real Father Christmas. The "proof" is that the U.S. post office has delivered him some children's letters to Santa. But can a federal agency recognize the credentials of a supernatural and quasi-religious figure without violating the separation of church and state? No one even asks. It just goes to show: judges won't steal Christmas.

Here in Manitoba, there is a "multicultural tree" in the rotunda of the legislature. People are invited to add decorations in their own ethnic traditions. Next to it, there is a menorah. Outside, there is a permanent memorial to the Holocaust. Inscribed on it are the names of many members of my own family. In the context of all those public symbols, I cannot begrudge the provincial recognition of Christmas Day. For some it can be a holy day; for others a holiday - or at least a day of respite in the cold winter.

Bryan Schwartz is a professor of law at the University of Manitoba.