File No. 35201

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE QUÉBEC COURT OF APPEAL)

BETWEEN:

LOYOLA HIGH SCHOOL

and

JOHN ZUCCHI

APPELLANTS
(Respondents)

- and -

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant)

APPELLANTS' FACTUM

(Pursuant to the *Rules of the Supreme Court of Canada*, s. 42)

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TABLE OF CONTENTS

APPELLANTS' FACTUM **Page**

Volume I

TABLE OF CONTENTS

APPELLANTS' FACTUM **Page**

Volume I

APPELLANTS' FACTUM

PART I – STATEMENT OF FACTS

Overview

[1] This case raises the issue of whether or not the State can presume conclusively, without evidence or any consideration of the issue, that a confessional Catholic private school is ipso facto incapable of offering its students an "equivalent program" to the ministerial Ethics and Religious Culture program (hereinafter **"ERC"** or the **"program"**).

[2] Appellant Loyola High School (**"Loyola"**) is not challenging the constitutionality of any legislation, but rather invoking a regulatory provision that allows a private school to teach its own version of ERC (or any other ministerial program) where its program is equivalent.

[3] In processing Loyola's request, government officials committed two errors. First, they assumed that a confessional approach could not be equivalent. Second, they failed to give any consideration to the impact of denying Loyola's request on its rights as a religious school pursuant to s. 3 of the Quebec *Charter of Human Rights and Freedoms* and s. 2*a*) of the *Canadian Charter of Rights and Freedoms*.

[4] In the case of *S.L.* v. *Commission scolaire des Chênes*,[1] this Court considered a claim by Catholic parents in the Quebec public school system using a statutory provision allowing for exemptions from otherwise compulsory programs in the provincial school curriculum and invoking their freedom of religion. They argued that as Catholic parents, they had a religious obligation to raise their children in the Catholic faith and that ERC impeded their ability to fulfill that obligation. On the basis of expert evidence and program materials, they argued that ERC constituted a form of indoctrination into a nonreligious worldview. This Court ruled that, on the basis of the evidence before it, the parents had failed to prove their contention and that, as a question of fact, this Court should not upset the trial judge's finding that the program was not a form of indoctrination, but rather an objective presentation of world religions and ethical systems.

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[1] 2012 SCC 7, [2012] 1 S.C.R. 235: Appellants' Authorities, **Vol. II, Tab 37**.

[5] In the present case, the trial judge concluded, on the basis of different evidence, that ERC, as conceived, tends to trivialize and discredit religious belief.[2] At trial, the Attorney General for the Province of Quebec (hereinafter the **"AGQ"**) had led expert evidence in support of the contrary proposition, evidence which the trial judge found to have missed the point.[3]

[6] Moreover, it is not disputed by the AGQ that ERC, even conceived as "objective," requires appellant Loyola to abandon its Catholic viewpoint in the teaching of ethics and Catholic religion. It is this common ground between the parties that will form the basis for what follows. In that light, the focus will be on the issue of whether or not the State can impose the following obligations upon a Catholic school: (i) to cease teaching ethics from the standpoint of the moral teachings of the Roman Catholic Church; (ii) to cease teaching Catholic religion from a Catholic viewpoint; (iii) to teach both from an expressly non-Catholic viewpoint.

[7] Appellant Loyola's position in the present case is the following. If it sees fit to do so, the State may insist upon the teaching, to all Canadian children, about world religions and ethical systems. This is part of fostering mutual understanding in a multicultural society. Loyola has in fact been teaching in this way for over a quarter of a century. As will be more fully set out below, Loyola's program adheres to and in fact warmly embraces the ERC program objectives, which are intended to foster an understanding and appreciation of world religions and to teach respect and tolerance for those of all faiths. The line which the State must not cross, however, is to force a Catholic school to cease being Catholic by being obliged to teach ethics and its own religious tradition from a standpoint which is disengaged from that tradition.

Loyola High School

[8] Loyola is an English-language high school for boys located in Montreal, Quebec. It began as the English-language section of the Collège Sainte-Marie/St. Mary's College, a Jesuit school founded in the 1840s. Loyola became a separate institution in the 1890s. Loyola is legally

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2 Superior Court judgment, par. 53-55, discussing the expert evidence of Gérard Lévesque; Appellants' Record, **Vol. I, p. 20** (French), **p. 111** (English).

3 This was the expert evidence of Georges Leroux, discussed at par. 56-58 of the Superior Court judgment: Appellants' Record, **Vol. I, p. 20-21** (French), **p. 111-12** (English).

constituted as a not-for-profit corporation under Part III of the Quebec *Companies Act*.[4] For purposes of incorporation, the members of the corporation are members of the Jesuit Order founded by Saint Ignatius of Loyola in the 16th century. The president of Loyola is a member of the Jesuit Order, as are several members of faculty.

[9] As a Jesuit school, Loyola is under the authority of the Roman Catholic Church and, for that reason, is required to adhere to the principles established by the Roman Catholic Church for Catholic schools. Those principles include teaching ethics in accordance with the teachings of the Catholic Church and teaching Catholic religion in a manner which is engaged with Catholic belief and tradition and in which God and faith are central to life.[5] As a Catholic and Jesuit school, faith permeates all aspects of the life of the school and must do so if the character and mission of the school are to be respected.[6]

John Zucchi

[10] John Zucchi, co-appellant with Loyola in his capacity as tutor to his son Thomas, is a professor of Canadian history at McGill University and a former Chairman of the Department of History. He, his wife and their son Thomas are practising Roman Catholics. Thomas and his parents chose Loyola as a school in which Thomas could receive a Catholic education.

Constitutional and legislative change

[11] A word needs to be said at this point about the constitutional and legislative background to the adoption and implementation, in the 2008-2009 school year, of the ERC program by the Quebec Ministry of Education, Recreation and Sport (hereinafter the **"MELS"**). Beginning in the 1960s, study was undertaken of the possibility of reforming the Quebec public school system, which was structured by way of Catholic and Protestant school boards and schools. The curriculum was similarly structured, offering "Catholic Moral and Religious Education"

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4 R.S.Q., c. C-38. Exhibit P-26: Appellants' Record, **Vol. IX, p. 5**.

5 Exhibit P-11 (*L'école catholique*): Appellants' Record, **Vol. VI, p. 73**. English version available at www.vatican.ca. Testimony of Douglas Farrow, Appellants' Record, **Vol. V, p. 32-38**. Superior Court judgment, par. 281, Appellants' Record, **Vol. I, p. 58** (French); **p. 148-49** (English).

6 Exhibit P-14 (Booklet entitled "What Makes a Jesuit High School Jesuit?"): Appellants' Record, **Vol. VI, p. 114**. Exhibit P-15 (Loyola Student Handbook 2008-2009), Appellants' Record, **Vol. VI, p. 122**.

and "Protestant Moral and Religious Education." In the 1970s, a third option was created, known as "Moral Education," for families who were neither Catholic nor Protestant. This included people of other religious persuasions, as well as people with no religious affiliation.

[12] Assistance was sought from this Court regarding the extent to which reform could be undertaken without amending the constitutional rights set out at s. 93 of the *Constitution Act 1867*.[7] In 1997, the Government of Canada and the Government of Quebec amended the *Constitution Act 1867* by the addition of s. 93A, which repealed paragraphs (1) to (4) of s. 93 for the Province of Quebec. Over the next several years, public school boards and later public schools themselves came to be organized along linguistic rather than denominational lines. Finally, the three programs mentioned above were all abolished and replaced by ERC, effective July 1, 2008. Loyola's program, which will now be described below, had at that time been taught for some 25 years as being compatible with the ministerial requirements for "Catholic Religious and Moral Education."

Loyola's ethics and world religions program

[13] Loyola's program has the following characteristics:

(a) With respect to the ethics component, its central focus is the social teaching of the Roman Catholic Church. This teaching stresses the need to reject individualism and to embrace family and community, solidarity and social responsibility, with special emphasis on caring for the sick and the poor.

(b) The ethics component involves studying all major ethical positions. In particular, on all significant ethical questions, students are required to understand not only the position of the Roman Catholic Church, but also those of all major thinkers and viewpoints.

(c) In examinations and term papers dealing with ethics, students must understand all positions. Moreover, they are free to criticise the position of the Catholic Church on any given issue and will be graded on the basis of the quality of their reasoning, not on the basis of adherence to the Catholic position in preference to other positions.

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7 *Reference re* Education Act *(Que.)*, [1993] 2 S.C.R. 511: Appellants' Authorities, **Vol. II, Tab 34**.

(d) That said, as one would expect of a Jesuit school, Loyola proposes the social and ethical teachings of the Catholic Church as a basis on which students are invited to govern themselves. These principles are put into action through Loyola's Christian Service Program in the community.[8]

(e) Turning from ethics to world religions, Loyola's program devotes a significant amount of study to Roman Catholic Christianity, which is taught in a manner that seeks to engage the students in a dynamic way with the Christian faith and its teachings as a guide for life.

(f) There is also significant attention to the study of the faith, beliefs and practices of adherents to Judaism, Islam, Buddhism, Hinduism and Indigenous beliefs.[9] Students are also expected to understand nonreligious worldviews, such as atheism and agnosticism.

(g) The Jesuit approach to the study of religion necessarily requires enquiry into faith. According to this approach, to study any religion without reference to God and faith — as understood by the tradition under study itself — is to fundamentally denature it. According to Jesuit pedagogy, to study religion by reducing it to a series of cultural habits and practices is to show a lack of respect for those who adhere to the particular religion being studied.

The Ethics and Religious Culture program and its equivalence to Loyola's program

[14] As its name suggests, the ERC program has as its subject matter ethics, on the one hand, and religious culture, on the other. Loyola's program covers that same subject matter.

[15] ERC sets out two objectives: (1) recognition of others; (2) pursuit of the common good. Loyola fully embraces those two objectives.

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8 Testimony of Paul Donovan: Appellants' Record, **Vol. III, p. 77-78**.

9 See Exhibit P-17 (Review Questions for Secondary V), Appellants' Record, **Vol. VI, p. 227**.

[16] ERC also seeks to teach three so-called "competencies": (1) ethical reflection; (2) understanding the phenomenon of religion; (3) dialogue. Loyola fully espouses those three competencies.[10]

[17] In sum, Loyola's program shares three significant common points with ERC:

(a) subject matter;

(b) objectives;

(c) competencies.

[18] On those three points, the two programs are, for all intents and purposes, identical.

Differences between the two programs

[19] There are also certain important differences between the two programs.

[20] With respect to the ethics component of the program, ERC requires that the instructor refrain from advancing any one position over any other. According to ERC, "to ensure against influencing students in developing their point of view, teachers abstain from sharing theirs."[11]

[21] For Loyola, this means several things in practice. First, it means that teaching ethics from a Roman Catholic viewpoint is prohibited. If a student presents a position contrary to Catholic moral teaching, a teacher in a Jesuit school is required to affirm that position, as long as it is not illegal. For example, in a discussion of pornography, the view of a student expressing approval for legal pornography or a desire to later pursue a career as a pornographer could not be the subject of criticism by the instructor from the standpoint of the moral teachings of the Catholic Church. Likewise, in a discussion setting off a playboy and a proponent of conjugal fidelity, ERC does not permit a Catholic teacher to favour one position over the other.[12]

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10 There is one fact here which is in dispute: the AGQ claims that Loyola's program does not include dialogue, a point to which we shall return below.

11 Exhibit NK-3 (ERC program in English), Appellants' Record, **Vol. II, p. 153**. Exhibit PGQ-31.1 (ERC program in French): Appellants' Record, **Vol. X, p. 99**: "Ainsi, pour ne pas influencer les élèves dans l'élaboration de leur point de vue, [l'enseignant] s'abstient de donner le sien."

12 See the discussion of this point in the testimony of the expert called by the AGQ, Georges Leroux: Appellants' Record, **Vol. V, p. 144-48**.

[22] These constraints mean that Loyola simply cannot teach the ministerial ERC program and continue to be a Catholic Jesuit school. The AGQ readily acknowledges that given the exigencies of ERC, Loyola's teachers must effectively cease to be Catholic for the duration of the ERC class.

[23] ERC is also incompatible with respect to its requirements regarding the teaching of religions in so far as it concerns the Roman Catholic faith. Loyola, as a Catholic school, must present the Catholic faith in a way in which God is recognised as the Supreme Good and Final End of humankind.[13] This obligation comes from Church legal texts that form part of the internal canon law of the Roman Catholic Church. That this obligation exists and applies to Loyola was the subject of expert evidence[14] which was accepted by the trial judge, as a question of fact, and went unchallenged by the AGQ, who did not adduce evidence to the contrary or even cross-examine the expert.[15]

[24] Loyola's teaching of religions other than its own (and of nonreligious worldviews) is of course objective and respectful. There is therefore no incompatibility with ERC here. Loyola's program simply seeks to take its teaching a step further than ERC by instilling an appreciation of the faith components of those other religions, for example by inviting a rabbi to speak about Judaism and an imam to speak on Islam,[16] the whole with a view to cultivating even greater respect for the members of those faith groups.

[25] But with respect to its own faith, a Catholic school simply cannot present its discussion of Christianity in the disengaged, aloof manner required by ERC, where the instructor must distance himself or herself from his or her own beliefs.[17] It cannot teach the Sermon on the

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13 Superior Court judgment, par. 274-282: Appellants' Record, **Vol. I, p. 57-59** (French), **p. 148-49** (English).

14 Exhibit P-7 (Expert report of Douglas Farrow): Appellants' Record, **Vol. VI, p. 40**. Testimony of Douglas Farrow: Appellants' Record, **Vol. V, p. 1**.

15 Superior Court judgment, par. 61, Appellants' Record, **Vol. I, p. 21** (French), **p. 112** (English).

16 Testimony of Paul Donovan: Appellants' Record, **Vol. III, p. 75**.

17 Exhibit NK-3 (ERC program in English), Appellants' Record, **Vol. II, p. 153** ("it is important that the teacher maintain a critical distance regarding their own world-views especially with respect to their own convictions values and beliefs"). Exhibit PGQ 31.1 (ERC program in French): Appellants' Record, **Vol. X, p. 99** ("il lui faut [à l'enseignant] comprendre l'importance de conserver une distance critique à l'égard de sa propre vision du monde, notamment de ses convictions, de ses valeurs et de ses croyances").

Mount as if it were not true or as if its truth were at best the subject of speculation. It must present its faith in a manner where students are invited to engage with it in a living way, not merely as a subject of detached intellectual curiosity. If it cannot do so, it simply can no longer be a Catholic school.

[26] The AGQ recognises that ERC requires a Catholic school to deny its Catholicity and to "defer" it to some other moment in the day.

Loyola's steps with the MELS

[27] Loyola is governed by the *Act respecting Private Education*.[18] Private schools that are subject to that statute are required to teach the same curriculum as the public schools in the Province of Quebec.[19] That said, the statutory regime, as adopted by the Quebec legislature, is meant to be flexible, open and permissive of variation and difference in private schools. There are several provisions expressing and giving effect to that openness, one of which is central to the present case. The relevant section is s. 22 of the *Regulation respecting the application of the Act respecting Private Education*[20], which reads as follows:

> 22. Every institution shall be exempt from the application of the first paragraph of section 32 of the Act respecting private education (chapter E-9.1) provided the institution dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent.

[28] On March 30, 2008, Loyola's administration expressed its disquiet regarding ERC to the MELS and made a request to be able to teach its own program in its stead.[21] On May 13 and 14, 2008, the MELS official requested and received a short summary of Loyola's program.[22] No further information about Loyola's program was sought at any future time. On August 7, 2008, the Minister denied the request[23]. Believing the Minister had perhaps misunderstood the

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18 R.S.Q., c. E-9.1.

19 *Act respecting Private Education*, R.S.Q., c. E-9.1, s. 32.

20 R.R.Q., c. E-9.1, r. 1.

21 Exhibit P-1: Appellants' Record, **Vol. V, p. 163**.

22 The summary is Exhibit P-2: Appellants' Record, **Vol. V, p. 165**. The e-mail exchanges of those two days are found at Natalie Knott's Undertaking 2: Appellants' Record, **Vol. III, p. 14**.

23 Exhibit P-3: Appellants' Record, **Vol. V, p. 168**. The documents in the MELS's possession at that stage are filed as Line Gagné's Undertaking 1, Apellants' Record, **Vol. III, p. 53**.

nature of the request, Loyola wrote to her once again on August 25, 2008.[24] Loyola explained that it was entitled to the application of s. 22 because its program was indeed equivalent, referring notably to the shared objectives of recognition of others and pursuit of the common good. Loyola also explained why certain aspects of ERC, especially those connected to its mandatory pedagogy, were incompatible with its mission and character as a Jesuit school. Significantly, Loyola also expressly mentioned that because it is a religious school, its constitutional freedom of religion was at stake in its request,[25] a point it had already referred to in its first letter.[26]

MELS's analysis

[30] Loyola's request and program were analysed by MELS officials. In a largely francophone civil service, the task of reviewing Loyola's program was given to Natalie Knott, a teacher seconded to the MELS from the English-language sector in the context of the implementation of ERC.[27] Prior to conducting her review, Mrs. Knott received instructions by e-mail from Jacques Pettigrew, the MELS official with overall responsibility for the ERC program.[28] She was (correctly) informed by Mr. Pettigrew that the criterion was equivalence. Mrs. Knott was also told (incorrectly this time) that the prism through which equivalence should be assessed was to ask herself whether or not the program was "confessional." If it was, then it could not be equivalent, or so she was told by Mr. Pettigrew.

[31] Mrs. Knott applied the criterion of "confessionality" and concluded that Loyola's program, being confessional, was not equivalent. She prepared a memorandum for Mr. Pettigrew in English to that effect.[29] That memorandum was sent to Mr. Pettigrew and then translated intoFrench.[30] The document then became part of a memo to the Minister[31] which was

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24 Exhibit P-4: Appellants' Record, **Vol. V, p. 169**.
25 Exhibit P-4 (end): Appellants' Record, **Vol. V, p. 171**.
26 Exhibit P-1 (end): Appellants' Record, **Vol. V, p. 163**.
27 Testimony of Jacques Petitgrew: Appellants' Record, **Vol. V, p. 154-59**.
28 Natalie Knott's Undertaking 1, Appellants' Record, **Vol. III, p. 9**. Testimony Mr. Jacques Petitgrew: Appellants' Record, **Vol. V, p. 154-59**.
29 Exhibit NK-1: Appellants' Record, **Vol. II, p. 126**.
30 Exhibit NK-2: Appellants' Record, **Vol. II, p. 129**. Examination of Natalie Knott of February 13, 2009, Questions 42-58: Appellants' Record, **Vol. II, p. 119-25**.
31 Exhibit LG-3: Appellants' Record, **Vol. III, p. 46**.

circulated to the Minister's office[32] before returning to Line Gagné, Associate Deputy Minister, for signature.[33] It was this refusal that Loyola challenged in Quebec Superior Court.

The MELS's failure to consider Charter rights

[32] Despite the fact that Loyola had expressly stated that fundamental rights were at stake, this issue was never addressed by anyone at the MELS. Indeed, the entire ministerial process was overseen by Ms Gagné, Associate Deputy Minister. Examined out of court, she indicated that no consideration had been given to the fundamental rights issue at stake in the case[34]. Mr. Pettigrew said that he did not see analysis of fundamental rights as entering into his mandate.[35] As for Mrs. Knott, she was not provided with either of the documents in which Loyola had expressed that concern.[36]

The judgment of the Quebec Superior Court

[33] On November 13, 2008, Ms Gagné sent the ministerial decision to Loyola.[37] Loyola challenged that decision in Quebec Superior Court.[38] The matter was heard at a five-day hearing, involving oral testimony from Paul Donovan (principal), co-plaintiff John Zucchi and Jacques Pettigrew for the MELS. Natalie Knott and Line Gagné had been examined out of court. There was also testimony by three experts: Gérard Lévesque and Douglas Farrow for the Appellants and Georges Leroux for the AGQ.

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32 Exhibit LG-2: Appellants' Record, **Vol. III, p. 44**. Examination of Line Gagné, Appellants' Record, **Vol. III, p. 25-38**.

33 Exhibit P-5: Appellants' Record, **Vol. V, p. 172**.

34 Examination of Line Gagné: Appellants' Record, **Vol. III, p. 39-42**.

35 Testimony of Jacques Pettigrew: Appellants' Record, **Vol. V, p. 162**.

36 Exhibits P-1 and P-4. Examination of Mrs. Natalie Knott of February 18, 2009, Questions 12-13: Appellants' Record, **Vol. III, p. 14-15**. Testimony of Jacques Pettigrew: Appellants' Record, **Vol. V, p. 151-53**.

37 Exhibit P-5: Appellants' Record, **Vol. V, p. 172**.

38 Loyola had by that time also contested the first decision, Exhibit P-3. The trial judge viewed that earlier decision as having been superseded by the later one, Exhibit P-5: Superior Court judgment, par. 96-99: Appellants' Record, **Vol. I, p. 29** (French), **p. 120** (English).

[34] From the standpoint of pure administrative law, Dugré J. found that the Minister's decision could not be based on the criterion of confessionality. Indeed, such a criterion was absent from the empowering provision found in the regulation. Moreover, unlike other provisions in the same regulation that gave the Minister the power to herself establish criteria to be applied in other situations, the provision in question did not. Therefore, the Minister herself had no power to promulgate the criterion of confessionality, but only to apply the concept of equivalence according to the normal meaning of that word. Nor did she have the power to delegate to ministerial staff a power she herself did not have.[39] Her decision therefore could not stand as a matter of administrative law. Moreover, Dugré J. found that the Appellant's program was indeed equivalent according to the normal meaning of that word.

[35] Second, the trial judge dealt with the constitutional issue of freedom of religion. The AGQ had taken the view that the Appellant, as a corporation, did not possess such a right. The trial judge disagreed, holding that, under the Quebec Charter, the Appellant, as a religious corporation and as a religious school expressing religious teaching, did indeed benefit from freedom of religion.[40]

[36] On the substantive issue of whether or not there was a violation of that right in this case, Dugré J. found that there was. He accepted, as a question of fact, the undisputed expert evidence adduced by the Appellants to the effect that to adopt the ministerial program would be a violation of its obligations as a Catholic school. He described the Minister's attitude as tyrannical, comparing it to the treatment suffered by Galileo at the hands of the Church in the 17th century[41] and held that the violation could not be justified in a free and democratic society.

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39 Superior Court judgment, par. 102-61, Appellants' Record, **Vol. I, p. 29-43** (French), **p. 120-34** (English).

40 Superior Court judgment, par. 213-61, Appellants' Record, **Vol. I, p. 50-54** (French), **p. 140-45** (English).

41 Superior Court judgment, par. 331, Appellants' Record, **Vol. I, p. 67** (French), **p. 157** (English).

The judgment of the Quebec Court of Appeal

[37] The AGQ appealed. The Quebec Court of Appeal allowed the appeal in a decision dated December 4, 2012.[42] The reasons of Fournier J.A. were concurred in by Hilton J.A. and Wagner J.A. (as he then was).

[38] On appeal, the AGQ once again argued that Loyola, as a religious corporation, has no freedom of religion with which the State need be concerned, saying that only natural persons enjoy such a right to remain free from State coercion in religious matters. The AGQ took the view that the State is free, without limit, either legal or constitutional, to restrict Loyola's religious beliefs, practice and expression, on the ground that Loyola is a corporation.

[39] The Court of Appeal chose not to address this issue squarely. Instead, it declined to dismiss Loyola's recourse on this ground on the basis that, in any event, Loyola could claim public interest standing. [43] Loyola had never sought to claim standing on that basis.

[40] Analysing the Minister's decision, the Court of Appeal held that it withstood scrutiny on a standard of reasonableness. According to the Court of Appeal, the Minister's use of a criterion of confessionality was reasonable because of *"the [Government's] stated political will to deconfessionalise education"*.[44]

[41] On June 13, 2013, this Court granted Loyola and John Zucchi leave to appeal.

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42 *Québec (Procureur général)* v. *Loyola High School*, 2012 QCCA 2139, Appellants' Record, **Vol. I, p. 187**.

43 Court of Appeal judgment, par. 160-61, Appellants' Record, **Vol. I, p. 222-23**.

44 *"Tenant compte de la volonté politique affirmée qui est de déconfessionnaliser l'enseignement"* : Court of Appeal judgment, par. 126, Appellants' Record, **Vol. I, p. 210**.

PART II – STATEMENT OF QUESTIONS IN ISSUE

[42] The questions in issue are as follows:

(a) Does Loyola enjoy freedom of religion as entrenched in s. 2*a*) of the *Canadian Charter of Rights and Freedoms* and s. 3 of the Quebec *Charter of Human Rights and Freedoms*?

(b) What is the applicable standard of review?

(c) Does the Minister's decision bear scrutiny under the applicable standard of review?

PART III – STATEMENT OF ARGUMENTS

A. Does Loyola enjoy freedom of religion as entrenched in s. 2*a*) of the *Canadian Charter of Rights and Freedoms* and s. 3 of the Quebec *Charter of Human Rights and Freedoms*?

[43] The AGQ argues that Loyola, as a corporate entity, has no religious freedom to claim and that the State is free to ignore claims to religious freedom by corporate entities. This is incorrect.

[44] Two observations flow from the case of *Big M Drug Mart*, this Court's first case on freedom of religion in the Charter era.[45] First, religious freedom, as it is understood in Canada, is rooted in a historical context. Second, it is a freedom that is to be interpreted particularly broadly, such that it is strengthened, not diminished, by entrenchment in a constitutional Charter.

A.1. Historical background

[45] The Treaty of Paris of 1763 and the *Quebec Act* of 1774 guaranteed the free practice of Roman Catholicism to the new Roman Catholic subjects of His Majesty King George III. This was in part motivated by a desire to secure the loyalty of those new subjects in the context of growing unrest in the 13 English colonies to the south. Whatever the reason, however, this was a bold step, given that Roman Catholics remained subject to significant restrictions in England, notably the obligation, under the *Test Acts*, to deny certain elements of Catholic dogma as a precondition to employment in certain sectors.

[46] The nature of the freedom granted to Roman Catholics in the second half of 18th century deserves attention. It was not the right for each individual Catholic to freely engage in private metaphysical speculation on religious issues. It was much more than that. It was the freedom to practise Roman Catholicism in all of its aspects, both individual and corporate.

[47] At the time of confederation, religious education, being viewed as perhaps the most critical aspect of that corporate religious right, was the subject of a historic compromise between the two religious groups which together formed the majority of the Canadian population at the

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45 *R.* v. *Big M Drug Mart Ltd*., [1985] 1 R.C.S. 295: Appellants' Authorities, **Vol. II, Tab 32**.

time: Protestant Christians and Roman Catholic Christians. The privileges of these two historically dominant communities raised issues after Confederation with the arrival of other religious communities, notably with significant Jewish immigration and the conversion of some Canadians to other religious persuasions such as those of the Jehovah's Witnesses. In both the pre- and post-Charter eras, the courts applied the notion of religious freedom to ensure that the historical privileges of the Protestant and Roman Catholic communities did not constitute an impediment to the religious practice, either individual or corporate, of Canadians belonging to other religious groups.

[48] The jurisprudence of this Court from the 1950's reflects this understanding of the corporate dimension of religious practice and its importance. This was borne out in the 1951 case of *Boucher*[46] in discussion of restrictions and reprisals

> for conducting religious services in private homes or on private lands in Christian fellowship; for holding public lecture meetings to teach religious truth as they believe it of the Christian religion; who, <u>for this exercise of what has been taken for granted to be the unchallengeable rights of Canadians</u>… [emphasis added]

[49] Two years later, in 1953, the Court once again affirmed the importance of corporate aspects of religious freedom in *Saumur*.[47] In that case, the appellant, a Jehovah's Witness, had taken issue with a municipal by-law restricting distribution of tracts and literature in public streets. In those pre-Charter days, he relied on the *Freedom of Worship Act*,[48] which, with its anachronistic fines for troubling public worship ($1 minimum fine; $8 maximum fine) is still in force in the Province of Quebec today. This legislation had its roots in a pre-Confederation statute. Choosing not to rely on the statute, Rand J. returned to the Articles of Capitulation of 1760, the Treaty of Paris of 1763, the *Quebec Act* of 1774, as well as to other constitutional statutes from 1791 and 1840. He concluded:[49]

> From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognised as a principle of fundamental character; and although

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46 *Boucher* v. *R.*, [1951] S.C.R. 265 at 285, Rand J.: Appellants' Authorities, **Vol. I, Tab 6**.

47 *Saumur* v. *Quebec (City)*, [1953] 2 S.C.R. 299: Appellants' Authorities, **Vol. II, Tab 36**.

48 R.S.Q., c. L-2.

49 *Saumur* v. *Quebec (City)*, [1953] 2 S.C.R. 299 at 327: Appellants' Authorities, **Vol. II, Tab 36**.

> we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance is unquestionable. [emphasis added]

[50] In that same case, Kellock J. specifically addressed an argument put forward by counsel for the AGQ to the effect that the *Freedom of Worship Act* applied only to the carrying on of religious exercise in some place of worship. This assertion, although far less bold than the one being advanced today by the AGQ, was vigorously rejected.[50]

[51] In that same era, this Court expressed outrage and punished State interference in religious gatherings and not just in individual religious practices.[51]

[52] This was the backdrop against which s. 3 of the Quebec *Charter of Human Rights and Freedoms*[52] was adopted in 1975 and s. 2*a*) of the *Canadian Charter of Rights and Freedoms* came into force in 1982. The framers of these Charters could scarcely have had in mind so restrictive a view as that now being put forward by the AGQ.

[53] In the post-Charter era, the Courts began to use the Charter to eliminate all forms of religious coercion flowing from the historically favoured position of Protestant and Catholic Christians.[53] The Court has also decided that the historical compromise creating a constitutional right to denominational schools in the public system could not be extrapolated to extend to other religious groups.[54] In all of these cases, the concern was not to protect idiosyncratic religious claims, but rather to address the concerns of religious Canadians as members of their religious groups and communities, be they the Jewish community, the Sikh community, or others.

[54] Having painted the historical picture in very broad strokes, it is important to note that the corporate dimension has been present at all times. Certainly, Protestant Christians, the

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50 *Saumur* v. *Quebec (City)*, [1953] 2 S.C.R. 299 at 342: Appellants' Authorities, **Vol. II, Tab 36**.

51 *Chaput* v. *Romain*, [1955] S.C.R. 834 at 866 (Abbott J.): Appellants' Authorities, **Vol. I, Tab 12**.

52 R.S.Q., c. C-12.

53 *Zylberberg* v. *Sudbury Board of Education* (1988), 52 D.L.R. 577, 65 O.R. 2d 641 (Ont. C.A.): Appellants' Authorities, **Vol. II, Tab 41**; *Canadian Civil Liberties Assn.* v. *Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341: Appellants' Authorities, **Vol. I, Tab 8**.

54 *Adler* v. *Ontario*, [1996] 3 S.C.R. 609: Appellants' Authorities, **Vol. I, Tab 1**.

historical majority in Canada as a whole, have always understood the importance of the corporate dimension of their spiritual life, even seeing it as a key part of their identity. In a study of the United Church of Canada, Canada's largest Protestant denomination, author Kevin Flatt states as follows:[55]

> In Canadian mainline Protestantism of the nineteenth and twentieth centuries, churches that believed in this evangelical approach to Christianity characteristically expressed that belief through certain corporate or institutional practices, which consequently became signals or markers of evangelical identity.

[55] The author of that study goes on to explain the importance of such corporate practices as organized social action, Sunday school programs and summer vacation Bible schools.

[56] The corporate dimension is also an integral part of the Roman Catholic Church and Roman Catholics see it as such, recognizing the importance of community and of an institutional foundation for their practice of their faith.

[57] Likewise, Canadians of other faiths do not see themselves as individual thinkers about the metaphysical, but as communities. The *Amselem*[56] case had the peculiarity of being concerned with certain believers who disagreed with others of their own faith about certain religious practices and the precise extent and nature of the requirements of that practice. There was therefore an individual, idiosyncratic element to the religious practice in question. But there too, the practice was one of families and a religious community functioning corporately in the context of the Jewish religion. This Court's deference to the idiosyncratic belief, on the basis of its sincerity, cannot be taken as a weakening of corporate religious freedom.

[58] One can therefore see that for the last 250 years, corporate religious freedom has been protected in Canada.

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55 Kevin N. Flatt, *After Evangelicalism: The Sixties and the United Church of Canada* (Montreal & Kingston: McGill-Queen's University Press, 2013) at p. 10: Appellants' Authorities, **Vol. II, Tab 43**.

56 *Syndicat Northcrest* v. *Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551: Appellants' Authorities, **Vol. II, Tab 39**.

A.2. The broad character of the protection of religious freedom under both Charters

[59] Loyola has presented its claim as based both on the Quebec Charter and the Canadian Charter and continues to do so before this Court. The trial judge's decision to rule on the basis of the Quebec Charter alone is, however, consistent with principles set out by this Court, where it has been stated that in Quebec cases, the Quebec Charter must be looked to first.[57] His detailed reasoning on this point was based on the word *person* as defined in the Quebec *Interpretation Act*.[58] It is also to be noted that under Quebec civil law, a corporate legal person enjoys "the extra-patrimonial rights and obligations flowing from its nature".[59]

[60] Likewise, in discussion of the Canadian Charter, author Peter Hogg is of the view that religious corporations enjoy freedom of religion under s. 2*a*) of the Canadian Charter and appears to view the proposition as self-evident.[60]

[61] Generally speaking, rights protected by the Quebec Charter must be interpreted broadly and liberally, in order for its objective to be achieved[61]. Likewise, for the Canadian Charter, attempts to narrow the scope of the Charter's protections were found early on to be incompatible with its framers' intention.[62] In particular, the need to give a general and broad scope to freedom of religion was also affirmed from the outset in this Court's jurisprudence on the Canadian Charter.[63] The conception of the scope of freedom of religion, as found in the Quebec and Canadian Charters, cannot be less than it was in pre-Charter Canada.

[62] State denial of a corporate dimension to religious practice is an attack on the identity of those Canadians who adhere to this or that religious persuasion. Here, while the State is refraining

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57 *Chaoulli* v. *Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at par. 26: Appellants' Authorities, **Vol. I, Tab 11**.

58 R.S.Q., c. I-16.

59 *Civil Code of Québec*, L.Q., 1991, c. 64, art. 302.

60 "There may be some corporations that are formed for the exercise of religious beliefs, for example, a church organized as a corporation. No doubt, such a corporation could invoke s. 2(a)." (P. Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Carswell, 2007, loose-leaf), p. 37-2.): Appellants' Authorities, **Vol. II, Tab 44**.

61 *Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Maksteel Québec Inc.*, 2003 SCC 68, [2003] 3 S.C.R. 228, at par. 10: Appellants' Authorities, **Vol. II, Tab 31**.

62 *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 155: Appellants' Authorities, **Vol. I, Tab 20**.

63 *R.* v. *Big M Drug Mart Ltd*., [1985] 1 R.C.S. 295: Appellants' Authorities, **Vol. II, Tab 32**.

from physically taking Loyola students out of their Catholic environment, it is effectively achieving the same result by entering that environment and obliging Catholic instructors to put aside their Catholic faith and identity.

[63] Secularism means first and foremost separation of Church and State, not State intrusion upon religious institutions. In the British tradition, this principle is at least as old as *Magna Carta* (1215), s. 1 of which was *libertas ecclesiae*; i.e. the freedom of the Church from State interference.

[64] The State's respect for corporate forms of religious practice is also reflected in the existence of various statutes which expressly provide for it.[64]

[65] By its very nature, religious freedom contains elements of expression and association which are by definition corporate. In *Big M*, Dickson C.J. mentioned teaching as an integral part of religious freedom.[65] This aspect of it is of course to a significant extent worked out through corporate entities in the form of schools.

[66] In conclusion on this point, Canadian law has, for some 250 years, protected the corporate dimension of religious practice, beginning with Roman Catholics and extending that protection to other groups. The AGQ would have this Court adopt a much diminished view of that right. That view not only flies in the face of specific protections going back to the 18th century, but is indefensible as an interpretation of the Quebec and Canadian Charters.

B. <u>What is the appropriate standard of review?</u>

[67] Dugré J. devoted considerable attention to the question of standard of review, concluding that the standard of review was correctness.[66] The Court of Appeal used a standard of reasonableness. Appellant Loyola does not intend to devote a lengthy analysis to the issue

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64 Examples in Quebec include the following: *Religious Corporations Act*, R.S.Q., c. C-71; *Act respecting the Constitution of Certain Churches*, R.S.Q., c. C-63; *Act respecting fabriques*, R.S.Q., c. F-1; *Freedom of Worship Act*, R.S.Q., c. L-2.

65 *R.* v. *Big M Drug Mart Ltd*., [1985] 1 R.C.S. 295 at 336: Appellants' Authorities, **Vol. II, Tab 32**.

66 Superior Court judgment, par. 82-144, Appellants' Record, **Vol. I, p. 25-40** (French), **p. 116-31** (English).

because, for the reasons stated in the next section, the Minister's decision does not bear scrutiny on either standard. Loyola does, however, point out the following.

[68] Putting aside the issue of religious freedom, several aspects of the purely administrative law issues point to a standard of correctness. First, there is the issue of whether or not the Minister had power to decide on the basis of the criterion of confessionality. That goes to jurisdiction. The same can be said of the issue of whether or not a public servant within the MELS, Mr. Pettigrew, could take it upon himself to introduce this criterion.

[69] As to expertise, there was no experience in the MELS with respect to addressing concerns of this type from a religious school. Even if there had been such expertise, it was not deployed in this case.

[70] There is no private clause in the legislation, there being only a general provision in the *Code of Civil Procedure* that this Court has given limited importance in the past.[67]

[71] The Minister's power is not of a policy nature, but rather involves adjudicating with respect to a particular request.

[72] The wording of s. 22 par. 1 of the regulation says "shall." The French text uses the present indicative, which is a common way of stating imperative statutory duties in French-language drafting. Moreover, the use of the word *juger* in the French text does not make the power discretionary.[68] French-speaking administrative lawyers distinguish between a *pouvoir lié* and a *pouvoir discrétionnaire*. These notions are routinely applied in Quebec courts.[69] English-speakers sometimes distinguish between *duty* and *discretion*.[70] Disagreeing with Dugré J. on this point, Fournier J.A. felt that the discretionary aspect of the Minister's power in this case

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67 *Code of Civil Procedure*, R.S.Q., c. C-25, art. 100. See Superior Court judgment, par. 91, Appellants' Record, **Vol. I, p. 26** (French), **p. 117** (English). *Mount Sinai Hospital Center* v. *Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, par. 117: Appellants' Authorities, **Vol. II, Tab 25**.

68 *E.W. Bickle Ltd.* v. *Minister of National Revenue*, [1979] 2 F.C. 448 (F.C.A.) at 455: Appellants' Authorities, **Vol. I, Tab 18**.

69 See, for example, *Boucher* v. *Côté*, AZ-91021570 (Que. S.C.): Appellants' Authorities, **Vol. I, Tab 5**.

70 S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed. by J.M. Evans (London: Stevens & Sons Limited, 1980) at 283: Appellants' Authorities, **Vol. II, Tab 47**.

lay at the level of her assessment of equivalence.[71] But that is to confuse the legal characterization of a program as equivalent or not with the legality, or lack thereof, of the application of a particular criterion.

[73] There are also the important contextual elements to be discussed below restricting the scope of whatever discretion there may be in the power.

[74] Finally, assuming at this point that Loyola is correct with respect to the first issue, discussed above, there is the constitutional component. Where constitutional questions involve the validity of legislation (which is not the case here), the standard of review is correctness.[72] According to the *Doré* decision, where consideration of fundamental rights and freedoms takes place in the context of a discretionary administrative decision, the standard of review is not necessarily correctness; it may be reasonableness (as it was in *Doré* itself).[73]

[75] In *Doré*, with a disciplinary committee composed of lawyers, it was decided that that particular body was best placed to assess the proper balancing between the concerns at stake in the disciplinary process and the freedom of expression with which those concerns had to be balanced. Here, where MELS officials simply ignored the fundamental rights issue before them, the same cannot be said.

[76] Taking all of those points together, there is a strong case to be made for applying a standard of correctness. The Appellants also remind the Court of Binnie J.'s concurring reasons in *Dunsmuir*, where he indicated that where a reasonableness standard is chosen, the choice of reasonable options will be greater or smaller depending on the context of the specific situation.[74] In the present case, where the fundamental right and freedom of s. 2*a*) of the Canadian Charter and s. 3 of the Quebec Charter is at stake, the decision maker is necessarily on a very tight leash.

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71 Court of Appeal judgment, par. 95, Appellants' Record, **Vol. I, p. 205**.

72 *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, par. 58: Appellants' Authorities, **Vol. I, Tab 17**.

73 *Doré* v. *Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, par. 43: Appellants' Authorities, **Vol. I, Tab 16**.

74 *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: Appellants' Authorities, **Vol. I, Tab 17**.

C. Does the Minister's decision bear scrutiny under the applicable standard of review?

C.1. Legislative context

[77] In analysing the exercise of a power of this kind, the analysis is to be contextual[75], notably from the standpoint of the statutory framework.[76] This is a longstanding principle of English public law.[77] Here, this framework shows the intention of the legislature to permit flexibility in the implementation of ministerial programs.

[78] In Quebec, the powers of the Minister of Education, Recreation and Sport and of his or her government department, the MELS, are set out by statute.[78] The preamble to that statute contains the following wording:

> Whereas persons and groups are entitled to establish autonomous educational institutions and, subject to the requirements of the common welfare, to avail themselves of the administrative and financial means necessary for the pursuit of their ends;

[79] In this preamble, the Quebec National Assembly has therefore stated, as a guide for all actions of the Minister and the MELS, a clear commitment to diversity. It has been recognized by the Quebec Court of Appeal that this preamble circumscribes the Minister's powers.[79]

[80] A further contextual element is the presence of legislation governing public schools,[80] and a separate statute concerning private schools.[81] The latter statute gives regulatory powers to the Lieutenant-Governor in Council, who has exercised that power, notably through the adoption

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75 *Doré* v. *Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, par. 54: Appellants' Authorities, **Vol. I, Tab 16**; *Catalyst Paper Corp.* v. *North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, par. 18: Appellants' Authorities, **Vol. I, Tab 9**; *Chamberlain* c. *Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710: Appellants' Authorities, **Vol. I, Tab 10**.

76 *Chamberlain c. Surrey School District No. 36*, 2002 CSC 86, [2002] 4 R.C.S. 710: Appellants' Authorities, **Vol. I, Tab 10**.

77 *Padfield* v. *Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.): Appellants' Authorities, **Vol. II, Tab 29**, cited with approval by this Court in *Oakwood Development Ltd.* v. *St. François Xavier (Regional Municipality of)*, [1985] 2 S.C.R. 164 at 174: Appellants' Authorities, **Vol. II, Tab 28**.

78 *Act respecting the Ministère de l'Éducation, du Loisir et du Sport*, R.S.Q., c. M-15.

79 *Mont-Bénilde* c. *Morin*, [1983] C.A. 443 at 448: Appellants' Authorities, **Vol. II, Tab 23**.

80 *Education Act*, R.S.Q., c. I-13.3.

81 *Act respecting Private Education*, R.S.Q., c. E-9.1.

of the *Regulation regarding the application of the Act respecting private education*.[82] The regulation contains a number of provisions allowing private schools to adapt their curriculum according to particular needs. Although only the first paragraph of s. 22 is strictly speaking relevant, these provisions all provide elements of context and are therefore reproduced in full:

> 22. Every institution shall be exempt from the application of the first paragraph of section 32 of the Act respecting private education (chapter E-9.1) provided the institution dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent.
>
> In addition, if the Minister so authorizes, a religious non-profit organization or association shall be exempt from the application of subparagraph 1 of the first paragraph of section 25, the fourth paragraph of section 32 and section 35 of the Act provided the organization or association meets the conditions set out by the Minister.
>
> 22.1. The Minister may, on the conditions he determines, exempt from the application of all the provisions of the Act any person or body dispensing in its facilities a portion or all of the programs of study in vocational training determined by the Minister and enumerated in a list set up by both the Minister and the Minister of Employment and Social Solidarity.

[81] All of these provisions bear witness to the legislature's intention that proper account be taken of the specificities of private schools. Further provisions in the legislation create other possible avenues whereby private schools may adapt their curriculum to suit local needs.[83] Although the second paragraph of s. 22 is not strictly speaking applicable here, the reference to religious non-profit organizations and associations is also an important contextual element, insofar as it indicates that schools which fit that description are viewed as welcome participants in the Quebec school system, albeit only as private schools following the constitutional and legislative changes which began in 1997.

[82] Having examined the immediate statutory and regulatory context in which the Minister exercises her powers, the observation made in the preceding paragraph leads us to discuss a higher contextual level, which is the overall context of deconfessionalisation. The point here is that the focus of moving from public schools based on denominational lines to linguistically

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82 R.R.Q., c. E-9.1, r. 1.

83 Notably at each of the first and second paragraphs of s. 30 of the *Act respecting Private Education*, R.S.Q., c. E-9.1.

based school boards and schools, was directed at the public school system. Confessional approaches to teaching remained not only permitted, but honoured in the Quebec school system.

[83] In light of the above context, Dugré J. found correctly that it was not open to MELS officials to overlay a criterion of confessionality onto the equivalence criterion set out in the first paragraph of s. 22 of the Regulation. As a matter of pure administrative law, this is simply outside the decision-maker's jurisdiction.

[84] This Court has cautioned against situations where a public official has attempted to exercise a power for purposes or reasons not disclosed in the legislative provision vesting him with the power, particularly where that unstated purpose is restrictive of religious freedom.[84] Here, to allow a criterion involving religious confession to intrude into the analysis is contrary to both the stated objectives and underlying values of the legislation. Such an approach cannot bear scrutiny.[85]

[85] As a matter of pure administrative law, a public authority cannot restrict its power on the basis of criteria not set out in the relevant provision:[86] "une autorité publique ne peut lier l'exercice de sa compétence à l'existence d'une condition qui n'est pas prévue par la loi ou un règlement."

[86] Even in the presence of discretion, the following principle applies:[87]

> De plus, le fait qu'un agent ou un organisme public se fonde substantiellement, dans l'exercice de son pouvoir discrétionnaire, sur des considérations qui ne sont pas pertinentes et qui n'ont aucun lien véritable avec l'affaire dont il est saisi, suffit à vicier cet exercice et à le faire déclarer *ultra vires* par les tribunaux.

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84 *Saumur* v. *Quebec (City)*, [1953] 2 S.C.R. 299 at 332-33: Appellants' Authorities, **Vol. II, Tab 36**.

85 *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121: Appellants' Authorities, **Vol. II, Tab 35**.

86 R. Dussault and L. Borgeat, *Traité de droit administratif*, 2nd ed., Tome III (Ste-Foy: Presses de l'Université Laval, 1989) at 298: Appellants' Authorities, **Vol. II, Tab 42**.

87 R. Dussault and L. Borgeat, *Traité de droit administratif*, 2nd ed., Tome III (Ste-Foy: Presses de l'Université Laval, 1989) at 491-92: Appellants' Authorities, **Vol. II, Tab 42**.

[87] In this case, the criterion of confessionality was the brainchild of Mr. Pettigrew.[88] Dugré J. decided that the Minister had no power to promulgate such a criterion, nor any power to delegate a power, particularly one she herself did not have. Dugré J. was, in Loyola's respectful view, correct in so deciding. That said, at a much more concrete level, Mr. Pettigrew simply assumed, without evidence, that confessional approaches could not work and that a religious school cannot teach the program in a manner faithful to its mission and identity and still attain the program objectives. That he could not do within the statutory framework in question.[89]

C.2. The decision is reviewable for its failure to consider the Charter right

[88] In addition to avoiding introducing extraneous elements into the analysis, an administrative decision maker must also give proper consideration to relevant factors, particularly where Charter rights are involved. This has been stated on several occasions by this Court. In *Arsenault-Cameron*, Major and Bastarache JJ. Wrote the following:[90]

> The Minister has a duty to exercise his discretion in accordance with the dictates of the Charter. […] In reaching his decision, the Minister failed to give proper weight to the promotion and preservation of minority language culture and to the role of the French Language Board in balancing the pedagogical and cultural considerations. This was essential to giving full regard to the remedial purpose of the right. The approach adopted by the Minister therefore increased the probability that his decision would fail to satisfy constitutional review by the courts.

[89] In *Doré,* Abella J. stressed the importance for the decision-maker to properly incorporate the Charter right into the analysis.[91] Consideration must be given to the Charter right by the administrative decision-maker in a manner which seeks balance and proportionality between State objectives and the right in question. In short, the decision-making process must take into

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88 Natalie Knott's Undertaking 1, Appellants' Record, **Vol. III, p. 9**. Testimony of Jacques Petitgrew: Appellants' Record, **Vol. V, p. 154-59**.

89 *Board of Education for the Town of Etobicoke* v. *Highbury Developments Limited*, [1958] S.C.R. 196, Appellants' Authorities, **Vol. I, Tab 4**.

90 *Arsenault-Cameron* v. *Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3 at par. 30: Appellants' Authorities, **Vol. I, Tab 3**.

91 *Doré* c. *Barreau du Québec*, 2012 SCS 12, [2012] 1 S.C.R. 395, par. 55-58: Appellants' Authorities, **Vol. I, Tab 16**.

account the specific characteristics of the statutory regime[92] and any constitutional principles, written or unwritten,[93] which may be in play.

[90] As has been indicated, there was a complete failure on the part of the Minister and MELS officials to even turn their minds to the issue of Loyola's religious freedom, despite it having been expressed in the request.[94] This appears to have been due to the question having been simply overlooked at all levels, rather than on the kind of formal position now taken by the AGQ to the effect Loyola has no right to be considered.

C.3. The violation of religious freedom

[91] The nature of the violation is as follows. Loyola, as a Catholic school, cannot remain a Catholic school if, in teaching ethics, it is required to eschew the moral teaching of the Roman Catholic Church. It cannot remain a Catholic school if, in teaching Catholic religion, it is required to disengage from its Catholic perspective. The AGQ does not dispute that ERC imposes those two requirements. The impugned ministerial decision places the issue in stark relief, making the confessional character of Loyola's program the very basis for denial of its request to teach its own program.

[92] That Loyola, as a Catholic school, must teach ethics and Catholic religion from its own Catholic perspective is not disputed by the AGQ. Although he originally retained an expert witness on this point, he ultimately declined to call him. Nor did the AGQ cross-examine the expert called by Loyola. In short, this was not even a disputed fact. It is therefore settled that Loyola, as a Catholic school, is in violation of its obligations under the canon law of the Roman Catholic Church if it is denied the request it put to the Minister. In overturning the trial judge on this undisputed point, the Court of Appeal failed to identify any palpable and overriding error.

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92 *Montréal (City)* v. *Montreal Port Authority*, [2010] 1 S.C.R. 427: Appellants' Authorities, **Vol. II, Tab 24**.

93 *Lalonde* v. *Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 577; 208 D.L.R. (4th) 577; 153 O.A.C. 1; O.J. No. 4768, 2001 CanLII 21164 (ON CA): Appellants' Authorities, **Vol. I, Tab 21**.

94 Exhibits P-1 and P-4: Appelants' Record, **Vol. V, p. 163 and 169**.

[93] Moreover, the trial judge ruled, as a finding of fact, that this violation was serious. The Court of Appeal changed that characterization — with respect, unjustifiably — deciding that the violation was trivial. Such a finding is in conflict with the jurisprudence of this Court, which has always recognized the specificity of Catholic schools:[95]

> The Board found that the Catholic school differed from the public school. This difference does not consist in the mere addition of religious training to the academic curriculum. The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs.

[94] Likewise the Ontario Court of Appeal has said:[96]

> The evidence establishes that the aim of Catholic education is not merely the transmission of knowledge and development of skills, but rather the integral formation of the whole person according to a vision of life that is revealed in the Catholic tradition. Religious faith on the part of the teachers is a valid consideration if the aim of the school to create a community of believers with a distinct sense of the Catholic culture is to be achieved.

[95] One can think of various ways in which the Catholic character of a Catholic school could be infringed. There could be a prohibition with respect to prayer or religious services. There could be a prohibition of religious elements outside of the ethics and religion component. Both of these would be very significant violations. It is difficult, however, to conceive of a worse violation than that of forcing a disengagement from Catholicism in the teaching of ethics and religion themselves. This is not merely interference with Catholic practice; it is interference with religious belief.

[96] In *Big M*, mandatory Sunday closure of commercial enterprises was ruled to be in violation of s. 2a) as a coercive enforcement of the Christian practice of rest on Sundays. The *Lord's Day Act* did not impose any religious observance beyond abstention from work. In this case, a Catholic school, unless permitted to use its own program, would be forced to refrain from teaching ethics and Catholic religion according to its Catholic convictions.

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95 *Caldwell* v. *Stuart*, [1984] 2 S.C.R. 603, 624: Appellants' Authorities, **Vol. I, Tab 7**.

96 *Daly* v. *Ontario (Attorney General)* (1999), 44 O.R. (3d) 349 (Ont. C.A.): Appellants' Authorities, **Vol. I, Tab 14**.

[97] What would one say if the students were bussed to another location one hour a day to receive non-Catholic religious and moral instruction? The situation here is equivalent and, in one aspect, worse, because in addition to the effect on the students, their faith, identity and culture, it imposes non-Catholic teaching on Catholic teachers, some of whom are even ordained priests. What would one say if the State began mandating non-faith based sermons for priests at Sunday mass or rabbis at Saturday synagogue gatherings?

[98] At the Court of Appeal, Fournier J.A. appears to have decided partly on the basis that Loyola has not sought any similar exemption from any other program.[97] That is simply because no other ministerial program imposes the kinds of requirements that ERC does.

[99] It also needs to be stressed that it is fallacious and odious to conclude that the violation is in any way mitigated by the fact that the imposition of a non-Catholic position on a Catholic school is only partial, i.e. only during the teaching of ERC itself. That would be like telling an observant Jew or a Muslim not to worry because there is only a little bit of pork in the soup.

[100] Finally, even if one were to accept, for the sake of argument, a narrow view of the coercive element in the obligation to expunge a Catholic approach from the teaching of ethics and Catholic religion in a Catholic school, surely this Court's decision in *Doré* would nevertheless require, under that hypothesis, that due consideration be given to the concerns raised by the school with respect to the decision. In any event, MELS officials made no determination of the level of seriousness of Loyola's concern. They simply ignored it.

[101] Before turning to the issue of balancing, a word about dialogue, one of the three competencies in the program. The MELS decision of November 13, 2008 has six bullet points.[98] Five are based on the criterion of confessionality as the basis for concluding that Loyola's program is not equivalent to the ministerial program. One bullet point, the fourth, refers to the competency of dialogue.

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97 Court of Appeal judgment, par. 182: Appellants' Record, **Vol. I, p. 226**.

98 Exhibit P-5: Appellants' Record, **Vol. V, p. 172**.

[102] Jesuits and Jesuit institutions are famous both for the practice of *disputatio* and for the development of dialogical arts, particularly as applied to religious culture and the study of religion. Pope Francis, the first Jesuit pope, has himself exemplified this. It is therefore a show of ignorance to accuse Loyola of being averse to dialogue. To the extent that there was any question as to this, contact should have been made with Loyola. This is simply common sense, in addition to being in conformity with administrative law principles as codified in Quebec.[99] No such contact was made, however, either by Mr. Pettigrew or anyone else.[100]

[103] Moreover, the parties having chosen to lead evidence and debate the issue in Superior Court, the trial judge found, as a fact, that Loyola's program includes dialogue.[101]

[104] The AGQ argues that the Minister would have violated the Charter had she granted the request. The reasoning is that the program, being compulsory, would amount to the State imposing indoctrination. This argument ignores the full freedom that prospective students and their families make in choosing the school in the first place. Vegetarians are not required to choose the steakhouse for dinner.

[105] In the lower courts, the AGQ has pointed to the fact that Loyola does not turn away non-Catholics or even non-Christians. In fact, while 90% of Loyola's students are Roman Catholics, there are about 10% Greek Orthodox Christians and a small number of non-Christian students who choose the school. Loyola's student handbook makes the Catholic and Jesuit character of the school clear to all. Loyola could, given its character, limit enrollment to Roman Catholics. It has chosen to be more open. Those who, despite not being Roman Catholics, choose Loyola nevertheless, do so for reasons which they are not required to explain.

[106] The school principal is also entitled by law to exempt any student who asks not to attend religious and moral instruction. The situation was the same prior to the change in the curriculum. No such request has ever been made.

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99 *Act respecting Administrative Justice*, R.S.Q., c. J-3, s. 5.

100 Testimony of Jacques Pettigrew: Appellants' Record, **Vol. V, p. 160-61**.

101 Superior Court judgment, par. 149-51: Appellants' Record, **Vol. I, p. 41** (French), **p. 132** (English).

C.4. Balancing

C.4.1 The objective of deconfessionalisation

[107] The AGQ has sought to justify the MELS' decision on the basis of deconfessionalisation.[102] For the purposes of this subsection of the analysis, it shall be assumed that that is indeed the State objective which is being pursued and which must be balanced against Loyola's rights.

[108] The process referred to in Quebec as "deconfessionalisation" has had one important characteristic: it has been voluntary. The process began with the Parent Commission, which was set up some 50 years ago, in 1963. It recommended transferring responsibility for public education from the Roman Catholic Church (and from the Protestant churches) and vesting it in a newly created Ministry of Education. This recommendation came with the assent of Roman Catholics. The chairman of the commission, Antoine-Marie Parent, was himself a Roman Catholic cleric and former principal of Université Laval in Quebec City. Université Laval and the Université de Montréal both voluntarily chose to surrender their papal charters and move to a lay structure. The process was achieved through natural evolution, dialogue, consultation and consensus. At no time was coercion used as the means to transform a religious institution into a lay or secular one or to deprive a religious institution of its religious character. As this Court has said, coercion is the very essence of an infringement of freedom of religion.[103]

[109] From prior to the Charter era, the right to religious freedom has been subject to restriction only to the extent that the public peace is threatened. This can take the form of either direct interference with the rights of others or that of impediments to important government programs designed to address significant social evils (identity theft in *Hutterian Brethren*[104]).

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102 Defence of AGQ: Appellants' Record, **Vol. III, p. 28**.

103 *R.* v. *Big M Drug Mart Ltd*., [1985] 1 R.C.S. 295: Appellants' Authorities, **Vol. I, Tab 32**.

104 *Alberta* v. *Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567: Appellants' Authorities, **Vol. I, Tab 2**.

[110] Another principle is that while freedom of religion may be restricted for the attainment of some important social objective, the objective cannot *itself* be to restrict or coerce religious practice.[105] In short, coerced deconfessionalisation is simply indefensible.

[111] The stated reason for the restriction of Loyola's religious rights is that its program is confessional. The position taken by Mr. Pettigrew can therefore be seen as predicated on the idea that religiously based viewpoints are of lesser merit than nonreligious ones. This philosophical position is well documented. While English speakers use the word "secularism", the Romance languages distinguish between *laïcité* and *laïcisme* (in French); between *laicidad* and *laicismo* (in Spanish). In both cases, the former refers to separation of Church and State in the Anglo-Saxon sense, whereas the latter refers to a position which disqualifies confessional perspectives from civic life. Only the former is in conformity with Canadian constitutional law.[106] The MELS decision could be seen as an example of the latter. It is not only surprising but disturbing to see the MELS taking a position where confessional approaches are, *a priori*, viewed as being beyond the pale.

[112] There is also a connection between the more radical approach (*laïcisme*) and the denial of corporate religious freedom which attempts to limit religious freedom to a reduced status as a purely individual right, as one Spanish scholar points out:[107]

> By *laicismo* one must understand a design of the State as absolutely foreign to the phenomenon of religion. Its attitude is more of non-contamination than of indifference or genuine neutrality. That sharp separation, which relegates all religious conviction to the intimate sphere of the individual conscience, can end up being, rather than neutral, neutralizing of its possible projection into the public sphere. Its pathological version even leads to possible discrimination on the basis of religion. Given proposals can be disqualified as being *confessional* based on the simple fact that they may be associated with the doctrine and morals of a given religion which is freely practised by citizens.

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105 *R.* v. *Big M Drug Mart Ltd*., [1985] 1 R.C.S. 295 at 353: Appellants' Authorities, **Vol. II, Tab 32**.

106 *Chamberlain c. Surrey School District No. 36*, 2002 CSC 86, [2002] 4 R.C.S. 710: Appellants' Authorities, **Vol. I, Tab 10**; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine* v. *Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, par. 67 (reasons LeBel J., dissenting as to the disposition of the appeal): Appellants' Authorities, **Vol. I, Tab 13**.

107 Translated from Spanish: Andrés Ollero, "Laicidad y laicismo en el marco de la Constitución española" in A. Ollero and C. Hermida del Llano, eds., *La libertad religiosa en España y en el derecho comparado* (Madrid: Iustel, 2012), 17 (first paragraph): Appellants' Authorities, **Vol. II, Tab 45**.

[113] In reality, however, in Quebec society, where debate on *laïcité* and its meaning is a national sport,[108] no serious thinker is arguing for restrictions on religious schools of the type which flow from the minister's decision.

[114] The 2007 Bouchard-Taylor report, which the AGQ has filed, likewise supports the more open approach, as evidenced by the following quotation. This report has gained growing acceptance in Quebec society and is now referred to by people of all opinions and political stripes:[109]

> Cultural and, in particular, religious differences need not be confined to the private domain. The following logic underpins this choice: it is healthier to display our differences and get to know those of the Other than to deny or marginalize them.

[115] That this is so could not have been stated more forcefully than it was by Prof. Georges Leroux, a leading apologist for ERC and, significantly, the one expert witness which the AGQ called to testify at trial in the present case. According to Professor Leroux, confessional approaches to teaching remain appropriate in the Quebec private school system: "Quant à l'école confessionnelle, elle garde sa légitimité dans le système privé, mais elle n'a pas sa place dans le système public."[110]

[116] Perhaps the best proof of all is the attitude taken in 1997 by current Premier Pauline Marois, then Minister of Education. In anticipation of the constitutional amendment which came to fruition later that year, Mrs. Marois made a declaration which is a model of respect for the rights of citizens. Even public schools were to be deconfessionalised only following a period of consultation with parents, in a spirit of respect for democratic freedoms of those with religious convictions and those without.[111]

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108 Recent books on the topic include: Bruno Demers and Yvan Lamonde, *Quelle laïcité* (Montreal: Médiaspaul, 2013); Jean Dorion, *Inclure: quelle laïcité pour le Québec?* (Montreal: Québec Amérique, 2013).

109 Exhibit PGQ-25 (Bouchard-Taylor Report): Appellants' Record, **Vol. IX, p. 114**: "Les différences culturelles (et en particulier religieuses) n'ont pas à être refoulées dans le domaine privé. […] Le principe qui fonde ce choix est le suivant : il est plus sain d'afficher ses différences et d'apprivoiser celles de l'Autre que de les occulter ou de les marginaliser." The quote is taken from the abridged English version of the report.

110 Exhibit P-8: Appellants' Record, **Vol. VI, p. 72**. Quoted in the Superior Court judgment, par. 164, Appellants' Record, **Vol. I, p. 43** (French), **p. 134** (English).

111 Exhibit PGQ-5 (Ministerial declaration of March 26, 1997), Appellants' Record, **Vol. IX, p. 8**.

[117] In short, the MELS decision in this case is simply an aberration. Without proper reflection either about the underlying logic, much less about the consequences of the decision, MELS officials decided both incorrectly and unreasonably.

[118] The government wishes to pursue the teaching of openness to diversity. Not only does Loyola have no disagreement with that idea; it warmly embraces it. In that context, one must ask whether suppression of confessional approaches is rationally connected with the teaching of diversity. (Although the wording is from *Oakes*, it should be recalled that the recent *Doré* decision did not eschew this Court's approach in *Slaight Communications*[112] as much as integrate it into the administrative law analysis.) To answer that question in a manner susceptible of justifying the Minister's decision requires one to conclude that a Catholic school cannot form young men who are open to diversity and who pursue the common good. For any Canadian, be he or she Catholic, Protestant or Buddhist, that would be a shocking conclusion. It is no more acceptable than to have said, in the heyday of a predominantly Christian Canada, that only education from a Christian viewpoint was capable of producing good Canadians.[113]

[119] Questioned at trial about the confessionality criterion he had given to Mrs. Knott, Mr. Pettigrew answered in the following way:[114]

> Q. N'est-il pas exact que dans votre esprit, dans votre échange et dans le courriel que vous envoyez à madame Knott, c'était clair, selon vous, que ce qui était proposé comme équivalent par Loyola ne pouvait pas être confessionnel?
>
> R. S'il fallait, si je déterminais, à ce moment-là, qu'un programme confessionnel était non équivalent, il était clair qu'à ce moment-là, il fallait qu'elle me démontre comment il pouvait être équivalent, parce que le Programme éthique et culture religieuse ne l'est pas.

[120] That is to reverse the evidentiary requirement. In balancing, the burden is on the State to indicate why a confessional approach is unable to attain the State's objectives of promoting recognition of others and pursuit of the common good.

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112 *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038: Appellants' Authorities, **Vol. II, Tab 38**.

113 *Canadian Civil Liberties Assn.* v. *Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341: Appellants' Authorities, **Vol. I, Tab 8**.

114 Testimony of Jacques Pettigrew : Appellants' Record, **Vol. V, p. 159**.

[121] Questioned at trial as to whether Loyola's program could achieve the ministerial objectives of recognition of others and pursuit of the common good, Professor Leroux (the expert called by the AGQ) acknowledged that they could.[115]

C.4.2 Proportionality

[122] This brings us to another key point, which is the weighing of proportionality. This is analogous to the *Oakes* criterion of minimum impairment. There are two potentially competing interests at stake: (i) education fostering respect for others of different faiths or of no faith; (ii) protection of the integrity of Loyola as a Catholic school. Both have been stressed in the jurisprudence of this Court. On the one hand, the Court has stressed the importance of children being taught about religions and value systems other than their own and of the salutary effects of the cognitive dissonance this can produce.[116] On the other, it has insisted on the need to respect the specificity of religious schools.[117]

[123] According to this Court, the presence of consideration of less intrusive measures is important.[118] Given Loyola's request, the Minister should have noted the following: (i) acceptance by Loyola of the program objectives of recognition of others and pursuit of the common good; (ii) content presenting ethical issues from all angles, not just that of the moral teachings of the Roman Catholic Church; (iii) a deep commitment to teaching world religions. In brief, Loyola's firm undertaking to teaching diversity, with a healthy dose of cognitive dissonance.

[124] The fact that Loyola's program had been, for a quarter of a century, Loyola's enhanced version of "Catholic Moral and Religious Education," also bears witness to the program and its proven track record.

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115 Testimony of Georges Leroux: Appellants' Record, **Vol. V, p. 140-43**.

116 *Chamberlain c. Surrey School District No. 36*, 2002 CSC 86, [2002] 4 R.C.S. 710: Appellants' Authorities, **Vol. I, Tab 10**; *S.L.* v. *Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235: Appellants' Authorities, **Vol. II, Tab 37**.

117 *Caldwell* v. *Stuart*, [1984] 2 S.C.R. 603 at 624: Appellants' Authorities, **Vol. I, Tab 7**; *Trinity Western University* v. *College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772: Appellants' Authorities, **Vol. II, Tab 41**.

118 *Health Services and Support — Facilities Subsector Bargaining Assn.* v. *British Columbia*, 2007 SCC 27, [2007] 2 R.C.S. 391 at par. 156: Appellants' Authorities, **Vol. I, Tab 19**.

[125] In that context, the only reasonable decision was to view Loyola's program as equivalent to the ministerial program for purposes of applying the first paragraph of s. 22 of the Regulation. This is because that was the only way to honour both the State's objective of achieving education to diversity all the while respecting Loyola's specificity as a Catholic school. In short, this is the only outcome where there is no violation of a Charter right. In contrast, the alternative leads to a violation.

[126] The Minister should also have given consideration to the preservation of diversity, one of the objectives which the program promotes. She should have asked herself whether she was helping diversity or hurting it. Education must not merely pay lip service to diversity. It must practise what it preaches.[119]

[127] The impugned decision makes reference to the fact that Loyola has the right to teach four so-called "units" of catechetical Catholic teaching. The AGQ suggests that Loyola can defer its Catholic perspective to the small number of hours allotted to that. Here, it is important to explain that the catechetical component covers only such questions as Catholic dogma, the sacraments, and so forth. It is not a substitute for Catholic ethics and religion.

[128] The preservation of Canada's diverse multicultural fabric is itself a principle set out at s. 27 of the Canadian Charter. Its importance has been stressed by this Court.[120] This principle means that the State cannot assume that there is only one way, its way, of achieving State goals. In the case of *Boucher*, Rand J. wrote as follows:[121]

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. […] [O]ur compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. [emphasis added]

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119 *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6: Appellants' Authorities, **Vol. II, Tab 26**.

120 *S.L.* v. *Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235: Appellants' Authorities, **Vol. II, Tab 37**.

121 *Boucher* v. *R.*, [1951] S.C.R. 265 at 288: Appellants' Authorities, **Vol. I, Tab 6**.

[129] Christian Reus-Smit has argued that it is important to look beyond superficial analysis of legal texts to the deep constitutional structures that are based on prevailing beliefs about the moral purpose of the state, the organizing principles of sovereignty, and the norm of procedural justice.[122] This is merely another way of phrasing Rand J.'s idea of the "compact of free society", which is in a sense the legal DNA of a nation. It is hard to think of anything more utterly contrary to "the compact of free society," as we have come to develop and know it in Canada, as the coercive enforcement of uniformity as reflected in the Minister's decision.

[130] There is nothing new about respect for diversity. In a passage quoted twice by Kellock J. in *Saumur*, it was stated, in the 1950s, that "[f]rom this principle [religious freedom] of our public law flow the rights and liberties which are dearest to our mixed population".[123] There has been remarkable consistency in the jurisprudence of this court: a broad conception of freedom of religion, both pre- and post-Charter; periodic attempts to restrict the scope of the freedom; rejection of those attempts.

[131] There are Canadians who take a different view on social issues from that of the Roman Catholic Church. Some may even strongly oppose the Church's position on certain issues. They are free to do so. That said, where Loyola students are not expected slavishly to adopt those positions and are taught both to understand and to respect contrary views held by others, it is hard to see how the State could, as a matter of proportionality, go so far as to insist on suppression of teaching from a Catholic perspective. If that were to be the case, the State not only could, but should also closely control the content of all religious teaching.

[132] One would be remiss not to address what is perhaps the unwritten and unsaid subtext of the State's concern with promoting respect for diversity: fears of religious extremism. Needless to say, no mention is made of this in the decision; none is to be found in any statute. But in the report of the Bouchard-Taylor commission, which the AGQ has filed and relies on, the background is unmistakably a concern with the increasing difficulties associated with welcoming immigration not only in greater numbers, but from a wider range of countries of

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122 C. Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity and Institutional Rationality in International Relations* (Princeton: Princeton University Press, 1999): Appellants' Authorities, **Vol. II, Tab 46**.

123 *Saumur* v. *Quebec (City)*, [1953] S.C.R. 299 at 342 and 349: Appellants' Authorities, **Vol. II, Tab 36**.

origin than before. That said, it is difficult to see how the State's heavy-handed approach to religiously affiliated schools could be supported by an unstated, unsubstantiated and (what would be, if it *were* stated) an expressly antireligious position. There is no evidence that the State must go that far. And it would be a sad day indeed for Canada if ever such proof were to be tendered and found compelling in the eyes of a court of law.

[133] What now of a hypothetical, similar request from a less open school, one which would in fact view it as a Charter violation to be required to teach about other religions or about ethical positions other than its own? There being no factual framework in the present case for that scenario, resolution is best left until a proper case arises for decision.[124] That issue gives rise to discussion of the delicate balance between the rights and wishes of children and parents and the State's rights and interests. The least and the most that can be said here is that State insistence on "education to diversity" is something which is both simple and clear and susceptible of being applied in an even-handed manner to all faith groups.

[134] This is in conformity with this Court's longstanding jurisprudence.[125] Religious difference is accepted (and indeed welcomed) by the State, but the religious group must be prepared to engage with the State and to accept the State's minimal requirements.

[135] At the level of analysis of reasonable justification, account must also be taken of the State's need for modesty. This is a necessary part of State neutrality. Just as it refrains from taking a position on metaphysical issues and truth claims, the State must exhibit modesty in allowing Canadians, both religious and nonreligious, to flourish and conduct their lives as they see fit, in accordance with their desires and convictions.

[136] There is also a broader social context here. A historically predominantly Christian society, with ethics based on Judeo-Christian moral principles, has, particularly since the 1960s, changed into a society where a new worldview has taken hold. It is a nonreligious worldview. That this is true can be demonstrated by reference, on the one hand, to a drastic decline in religious practice and, on the other, by the rejection, by many, of religious frames of reference

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124 *MacKay* v. *Manitoba*, [1989] 2 S.C.R. 357: Appellants' Authorities, **Vol. II, Tab 22**; *Danson* v. *Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 Appellants' Authorities, **Vol. I, Tab 15**.

125 *R.* v. *Jones*, [1986] 2 S.C.R. 284 : Appellants' Authorities, **Vol. II, Tab 33**.

for moral decisions or, at the very least, radical shifts in perspective, at least on certain contentious issues. With that as a backdrop, the question is the following: Are young Canadians who wish to remain devout Catholics and to do their high school education in a Catholic school to be deprived of that right? Surely not. The very purpose of Charter protections is to ensure that dominant conceptions of the good (be they religious or not) not impose their dominance at the expense of others.

[137] In 2013, teenagers no longer sit back and do everything they are told (if indeed they ever did), particularly when it comes to choices about education. When they decide to go to a Catholic high school, it is usually because it is their choice, not merely that of their parents. This case is also the case of Thomas Zucchi, represented in this litigation by his father John. The right at stake here, in addition to being the right of a private confessional school, is Thomas's right to the education he seeks and to his personal choices in the area of education. In short, this is part of his personal freedom to choose the type of life he seeks for himself as a high school student soon to be an adult. The general concept of individual freedom of choice has, in various contexts, been found to be an underlying Charter value.[126]

D. Conclusion

[138] At the MELS, Mrs. Knott was not told or otherwise informed of Loyola's fundamental rights concerns. In addition, she was given a criterion of "confessionality" to apply, which is not only absent from the relevant regulatory provision, but also contrary to the letter and the spirit of the Quebec legislature's openness to private confessional schools.

[139] The decision which was ultimately issued by the Minister on the basis of Mrs. Knott's analysis was both incorrect and unreasonable.

[140] Loyola is entitled to the application of the s. 22 of the Regulation. It asks that the appeal be allowed and that the decision of the Superior Court be reinstated.

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126 *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336: Appellants' Authorities, **Vol. II, Tab 32**; *Nova Scotia (Attorney General)* v. *Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at par. 63: Appellants' Authorities, **Vol. II, Tab 27**; *Quebec (Attorney General)* v. *A*, 2013 SCC 5: Appellants' Authorities, **Vol. II, Tab 30**.

PART IV – SUBMISSIONS ON COSTS

[141] The Appellants request costs.

[142] If this Court were to dismiss the appeal, the Appellants ask that it be dismissed without costs on the basis that they have brought to this Court an issue of major public importance with implications for Quebec and Canadian society as a whole.

PART V – ORDER REQUESTED

[143] Appellant Loyola High School and Co-Appellant John Zucchi request that their appeal be allowed and that the order issued by Dugré J. be reinstated, with costs in this Court and the courts below.

THE WHOLE RESPECTFULLY SUBMITTED.

Dated at Montreal this 1st day of November 2013.

M^e Mark Phillips
M^e Jacques S. Darche
Borden Ladner Gervais LLP
Counsel for Appellants

PART VI – ALPHABETICAL TABLE OF AUTHORITIES

CASES **Paragraph(s)**

CASES **Paragraph(s)**

CASES **Paragraph(s)**

SCHOLARLY LITERATURE

PART VII – CONSTITUTION, STATUTES AND REGULATION

Charte canadienne des droits et libertés	***Canadian Charter of Rights and Freedoms***
2. Chacun a les libertés fondamentales suivantes : *a*) liberté de conscience et de religion;	**2.** Everyone has the following fundamental freedoms: (*a*) freedom of conscience and religion;

Charte des droits et libertés de la personne, L.R.Q., c. C-12	***Charter of Human Rights and Freedoms***, R.S.Q., c. C-12
3. Toute personne est titulaire des libertés fondamentales telles la liberté de conscience, la liberté de religion, la liberté d'opinion, la liberté d'expression, la liberté de réunion pacifique et la liberté d'association.	**3**. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

Loi sur l'enseignement privé, L.R.Q., c. E-9.1	***Act respecting private education***, R.S.Q., c. E-9.1
32. À l'enseignement primaire et à l'enseignement secondaire général, les programmes d'études, en ce qui a trait à l'enseignement des matières obligatoires sont ceux établis par le ministre en vertu de l'article 461 de la Loi sur l'instruction publique (chapitre I-13.3). Il en est de même en ce qui a trait aux activités ou contenus que le ministre peut prescrire dans les domaines généraux de formation. […]	**32.** The elementary school program of studies and the secondary school program of studies in general education shall, for compulsory subjects, be the programs established by the Minister under section 461 of the Education Act (chapter I-13.3). The same applies with respect to the activities or content the Minister may prescribe in the broad areas of learning. […]

Loi sur l'instruction publique, L.R.Q., c. I-13.3	***Education Act***, R.S.Q., c. I-13.3
461. Le ministre établit, à l'éducation préscolaire, les programmes d'activités et, à l'enseignement primaire et secondaire, les programmes d'études dans les matières obligatoires ainsi que dans les matières à option identifiées dans la liste qu'il établit en application de l'article 463 et, s'il l'estime opportun, dans les spécialités professionnelles qu'il détermine. Ces programmes comprennent des objectifs et un contenu obligatoires et peuvent comprendre des objectifs et un contenu indicatifs qui doivent être enrichis ou adaptés selon les besoins des élèves qui reçoivent les services. […]	**461.** The Minister shall establish the programs for preschool education, the programs of compulsory subjects for elementary and secondary schools as well as the elective subjects specified in a list drawn up by him under section 463 and, if he considers it appropriate, the programs of vocational education. Every program shall include compulsory objectives and contents and may include optional objectives and contents that shall be enriched or adapted according to the needs of students who receive the services. […]

Règlement d'application de la Loi sur l'enseignement privé, R.R.Q., c. E-9.1, r. 1	***Regulation respecting the application of the Act respecting private education***, R.R.Q., c. E-9.1, r. 1
22. Tout établissement est exempté de l'application du premier alinéa de l'article 32 de la Loi sur l'enseignement privé (chapitre E-9.1) pourvu que l'établissement offre des programmes jugés équivalents par le ministre de l'Éducation, du Loisir et du Sport. […]	**22.** Every institution shall be exempt from the application of the first paragraph of section 32 of the Act respecting private education (chapter E-9.1) provided the institution dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent. […]