

SUPREME COURT OF CANADA

CITATION: Loyola High School v. Quebec (Attorney General), 2015 DATE: 20150319 SCC 12 DOCKET: 35201

BETWEEN:

Loyola High School and John Zucchi

Appellants and

Attorney General of Quebec

Respondent - and -

Canadian Council of Christian Charities, Evangelical Fellowship of Canada,
Christian Legal Fellowship, World Sikh Organization of Canada,
Association of Christian Educators and Schools Canada,
Canadian Civil Liberties Association, Catholic Civil Rights League,
Association des parents catholiques du Québec, Faith and Freedom Alliance,
Association de la communauté copte orthodoxe du grand Montréal,
Faith, Fealty and Creed Society, Home School Legal Defence Association of
Canada, Seventh-day Adventist Church in Canada, Seventh-day Adventist
Church — Quebec Conference, Corporation archiépiscopale catholique romaine
de Montréal and

Archevêque catholique romain de Montréal Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: Abella J. (LeBel, Cromwell and Karakatsanis JJ.

(paras. 1 to 81) concurring)

JOINT REASONS CONCURRING McLachlin C.J. and Moldaver J. (Rothstein J. concurring)

PARTIALLY IN RESULT:

(paras. 82 to 164):

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LOYOLA HIGH SCHOOL v. QUEBEC (ATTORNEY GENERAL)

Loyola High School and John Zucchi

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Indexed as: Loyola High School v. Quebec (Attorney General)

2015 SCC 12

File No.: 35201.

2014: March 24; 2015: March 19.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Judicial review — Standard of Review — Ministerial discretion — Mandatory ethics and religious culture program — Private denominational school proposing alternative program — Request for exemption denied by Minister — Proper approach to judicial review of discretionary administrative decisions engaging Charter protections — Whether Minister's decision proportionately balanced religious freedom with statutory objectives of mandatory program — Regulation respecting the application of the Act respecting private education, CQLR, c. E-9.1, r. 1, s. 22.

Constitutional law — Charter of Rights — Freedom of religion — Schools — Mandatory ethics and religious culture program — Private denominational school proposing alternative program — Request for exemption denied by Minister — Whether Minister's insistence that proposed alternative program be entirely secular in its approach is reasonable given the statutory objectives of mandatory program and s. 2(a) of the Canadian Charter of Rights and Freedoms.

Human rights — Freedom of religion — Schools — Mandatory ethics and religious culture program — Private denominational school proposing alternative program — Request for exemption denied by Minister — Whether Minister's insistence that proposed alternative program be entirely secular in its approach is reasonable given the statutory objectives of mandatory program — Whether Minister's decision limits freedom of religion under s. 3 of the Charter of human rights and freedoms, CQLR, c. C-12.

Loyola High School is a private, English-speaking Catholic high school for boys. It has been administered by the Jesuit Order since the school's founding in the 1840s. Most of the students at Loyola come from Catholic families.

Since September 2008, as part of the mandatory core curriculum in schools across Quebec, the Minister of Education, Recreation and Sports has required a Program on Ethics and Religious Culture (ERC), which teaches about the beliefs and ethics of different world religions from a neutral and objective perspective.

The stated objectives of the ERC Program are the "recognition of others" and the "pursuit of the common good". They seek to inculcate in students openness to human rights, diversity and respect for others. To fulfil these objectives, the ERC Program has three components: world religions and religious culture, ethics, and dialogue. The three components are intended to support and reinforce one another. The orientation of the Program is strictly secular and cultural and requires teachers to be objective and impartial. They are not to advance the truth of a particular belief

system or attempt to influence their students' beliefs, but to foster awareness of diverse values, beliefs and cultures. The Program provides a framework that teachers are required to use to help students develop these competencies, but leaves teachers with considerable flexibility in developing their own lessons.

The purpose of the religious culture component is to help students understand the main elements of religion by exploring the socio-cultural contexts in which different religions take root and develop. The purpose of the ethics component is to encourage students to think critically about their own ethical conduct and that of others, as well as about the values and norms that different religious groups adopt to guide their behaviour. The purpose of the dialogue component is to help students develop the skills to interact respectfully with people of different beliefs.

Pursuant to s. 22 of the *Regulation respecting the application of the Act respecting private education*, the Minister can grant an exemption from the ERC Program if the proposed alternative program is deemed to be "equivalent". Loyola wrote to the Minister to request an exemption from the Program, proposing an alternative course to be taught from the perspective of Catholic beliefs and ethics. The Minister denied the request based on the fact that Loyola's whole proposed alternative program was to be taught from a Catholic perspective. It was not, as a result, deemed to be "equivalent" to the ERC Program.

Loyola brought an application for judicial review of the Minister's decision. The Superior Court found that the Minister's refusal of an exemption

infringed Loyola's right to religious freedom and accordingly granted the application, quashed the Minister's decision, and ordered an exemption. On appeal, the Quebec Court of Appeal concluded that the Minister's decision was reasonable and did not result in any breach of religious freedom. Before this Court, Loyola modified its request to teach the whole program from a Catholic perspective, and was now prepared to teach about the doctrines and practices of other world religions neutrally. But, significantly, it still wanted to teach about the *ethics* of other religions from a Catholic perspective. The Minister's position remained the same — no part of the program could be taught from a Catholic perspective, including Catholic doctrine and ethics.

Held: The Minister's decision requiring that all aspects of Loyola's proposed program be taught from a neutral perspective, including the teaching of Catholicism, limited freedom of religion more than was necessary given the statutory objectives. As a result, it did not reflect a proportionate balancing and should be set aside. The appeal is allowed and the matter remitted to the Minister for reconsideration.

Per LeBel, Abella, Cromwell and Karakatsanis JJ.: This Court's decision in Doré v. Barreau du Québec, [2012] 1 S.C.R. 395, sets out the applicable framework for reviewing discretionary administrative decisions that engage the protections of the Charter — both its guarantees and the foundational values they reflect. The discretionary decision-maker is required to proportionately balance the

relevant *Charter* protections to ensure that they are limited no more than necessary given the applicable statutory objectives. The reasonableness of the Minister's decision in this case therefore depends on whether it reflected a proportionate balance between the objectives of promoting tolerance and respect for difference, and the religious freedom of the members of the Loyola community.

Freedom of religion means that no one can be forced to adhere to or refrain from a particular set of religious beliefs. This includes both the individual *and* collective aspects of religious belief. Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions.

The context in this case is state regulation of religious schools. This raises the question of how to balance robust protection for the values underlying religious freedom with the values of a secular state. The state has a legitimate interest in ensuring that students in all schools are capable, as adults, of conducting themselves with openness and respect as they confront cultural and religious differences. A vibrant, multicultural democracy depends on the capacity of its citizens to engage in thoughtful and inclusive forms of deliberation. But a secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. Nor can a secular state support or prefer the practices of one group over another. The pursuit of secular values means

respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them.

Loyola is a private Catholic institution. The collective aspects of religious freedom — in this case, the collective manifestation and transmission of Catholic beliefs — are a crucial part of its claim. The Minister's decision requires Loyola to teach Catholicism, the very faith that animates its character, from a neutral perspective. Although the state's purpose is secular, this amounts to requiring a Catholic institution to speak about its own religion in terms defined by the state rather than by its own understanding. This demonstrably interferes with the manner in which the members of an institution formed for the purpose of transmitting Catholicism can teach and learn about the Catholic faith. It also undermines the liberty of the members of the community who have chosen to give effect to the collective dimension of their religious beliefs by participating in a denominational school.

In the Quebec context, where private denominational schools are legal, preventing a school like Loyola from teaching and discussing Catholicism from its own perspective does little to further the ERC Program's objectives while at the same time seriously interfering with religious freedom. The Minister's decision suggests that engagement with an individual's own religion on his or her own terms can be presumed to impair respect for others. This assumption led the Minister to a decision

that does not, overall, strike a proportionate balance between the *Charter* protections and statutory objectives at stake in this case.

That said, the Minister is not required to permit Loyola to teach about the ethics of other religions from a Catholic perspective. The risk of such an approach would be that other religions would necessarily be seen not as differently legitimate belief systems, but as worthy of respect only to the extent that they aligned with the tenets of Catholicism. This contradicts the ERC Program's goals of ensuring respect for different religious beliefs. In a multicultural society, it is not a breach of anyone's freedom of religion to be required to learn (or teach) about the doctrines and ethics of other world religions in a neutral and respectful way. In a religious high school, where students are learning about the precepts of one particular faith throughout their education, it is arguably even more important that they learn, in as objective a way as possible, about other belief systems and the reasons underlying those beliefs.

Teaching the ethical frameworks of other religions in a neutral way may be a delicate exercise, but the fact that there are difficulties in implementation does not mean the state should be asked to throw up its hands and abandon its objectives by accepting a program that frames the discussion of ethics primarily through the moral lens of a school's own religion.

It is the Minister's decision as a whole that must reflect a proportionate and therefore reasonable balancing of the *Charter* protections and statutory objectives in issue. Preventing a school like Loyola from teaching and discussing Catholicism,

the core of its identity, in any part of the program from its own perspective, does little to further the ERC Program's objectives while at the same time seriously interfering with the values underlying religious freedom. The Minister's decision is, as a result, unreasonable.

Per McLachlin C.J. and Rothstein and Moldaver JJ.: Loyola, as a religious organization, is entitled to the constitutional protection of freedom of religion. The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola.

The first issue is whether Loyola's freedom of religion was infringed by the Minister's decision. The second issue is whether the Minister's decision — that only a purely secular course of study may serve as an equivalent to the ERC Program — limits Loyola's freedom of religion more than reasonably necessary to achieve the goals of the program. However one describes the precise analytic approach taken, the essential question raised by this appeal is whether the Minister's decision limited Loyola's right to religious freedom proportionately — that is, no more than was reasonably necessary.

Loyola proposed an alternative to the ERC Program that takes the following form: (1) Loyola will teach Catholicism from the Catholic perspective, but will teach other religions objectively and respectfully; (2) Loyola will emphasize the Catholic point of view on ethical questions, but will ensure all ethical points are

presented on any given issue; and (3) Loyola will encourage students to think critically and engage with their teachers and with each other in exploring the topics covered in the program. Loyola's proposal departs from the generic ERC Program in two key respects. When teaching both Catholicism and ethics, Loyola's teachers would depart from the strict neutrality that the ERC Program requires.

The freedom of religion protected by s. 2(a) of the *Charter* is not limited to religious belief, worship and the practice of religious customs. Rather, it extends to conduct more readily characterized as the propagation of, rather than the practice of, religion. Where the claimant is an organization rather than an individual, it must show that the claimed belief or practice is consistent with both its purpose and operation. While an organization itself cannot testify, the credibility of officials and representatives who give testimony on the organization's behalf will aid in evaluating this consistency. It is proper to assess the claimed belief or practice in light of objective facts such as the organization's other practices, policies and governing documents. The beliefs and practices of an organization may also reasonably be expected to be less fluid than those of an individual, therefore inquiry into past practices and consistency of position would be more relevant than in the context of a claimant who is a natural person.

This is not a case where the assessment of consistency is difficult, or where there is a reasonable concern that the expressed belief is made in bad faith or for an ulterior purpose. Having found that Loyola's belief in its religious obligation to

teach Catholicism and ethics from a Catholic perspective is consistent with its organizational purpose and operation, it is evident that the Minister's denial of an exemption from the ERC Program — which has the effect of requiring Loyola to teach its entire ethics and religion program from a neutral, secular perspective — infringes Loyola's freedom of religion in violation of s. 2(a) of the *Charter*.

The government bears the burden of showing that the Minister's insistence on a purely secular program of study to qualify for an exemption limited Loyola's religious freedom no more than reasonably necessary to achieve the ERC Program's goals. There is nothing inherent in the ERC Program's objectives (recognition of others and pursuit of the common good) or competencies (world religions, ethics, and dialogue) that requires a cultural and non-denominational approach. As the legislative and regulatory scheme demonstrates, the intention of the government was to allow religious schools to teach the ERC Program without sacrificing their own religious perspectives. This goal is entirely realistic. A program of purely denominational instruction designed primarily to indoctrinate students to the correctness of certain religious precepts would not achieve the objectives of the ERC Program; however, a balanced curriculum, taught from a religious perspective but with all viewpoints presented and respected, could serve as an equivalent to the ERC Program. To the extent Loyola's proposal meets these criteria, it should not have been rejected out of hand.

There is unquestionably a role for the Minister to examine proposed programs on a case-by-case basis to ensure that they adequately further the objectives and competencies of the ERC Program. In certain cases, the result may be that the religious freedoms of private schools are subject to justifiable limitations. Here, however, the Minister adopted a definition of equivalency that essentially read this meaningful individualized approach out of the legislative and regulatory scheme. By using as her starting point the premise that only a secular approach to teaching the ERC Program can suffice as equivalent, the protection contemplated by the exemption provision at issue was rendered illusory.

The legislative and regulatory scheme is designed to be flexible and to permit private schools to deviate from the generic ERC Program, so long as its objectives are met. The Minister's definition of equivalency casts this intended flexibility in the narrowest of terms, and limits deviation to a degree beyond that which is necessary to ensure the objectives of the ERC Program are met. This led to a substantial infringement on Loyola's religious freedom. In short, the Minister's decision was not minimally impairing. Therefore, it cannot be justified under s. 1 of the *Charter* as a reasonable limit on Loyola's s. 2(a) right to religious freedom.

Determining whether a proposed program is sufficiently equivalent to the generic ERC Program is a fact-based exercise. In the context of the present case, Loyola's teachers must be permitted to describe and explain Catholic doctrine and ethical beliefs from the Catholic perspective. Loyola's teachers must describe and

explain the ethical beliefs and doctrines of other religions in an objective and respectful way. Loyola's teachers must maintain a respectful tone of debate, but where the context of the classroom discussion requires it, they may identify what Catholic beliefs are, why Catholics follow those beliefs, and the ways in which other ethical or doctrinal propositions do not accord with those beliefs.

This Court is empowered by s. 24(1) of the *Charter* to craft an appropriate remedy in light of all of the circumstances. It is neither necessary nor just to send this matter back to the Minister for reconsideration, further delaying the relief Loyola has sought for nearly seven years. Based on the application judge's findings of fact, and considering the record and the submissions of the parties, the only constitutional response to Loyola's application for an exemption would be to grant it.

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By Abella J.

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(Village), 2004 SCC 48, [2004] 2 S.C.R. 650; Chamberlain v. Surrey School District No. 36, 2002 SCC 86, [2002] 4 S.C.R. 710; Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2, [2012] 1 S.C.R. 5; R. v. Oakes, [1986] 1 S.C.R. 103; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; Eur. Court H. R., Kokkinakis v. Greece, judgment of 25 May 1993, Series A No. 260-A; Metropolitan Church of Bessarabia v. Moldova, No. 45701/99, ECHR 2001-XII; Bruker v. Marcovitz, 2007 SCC 54, [2007] 3 S.C.R. 607; Adler v. Ontario, [1996] 3 S.C.R. 609; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 S.C.R. 698.

By McLachlin C.J. and Moldaver J.

Applied: Syndicat Northcrest v. Amselem, 2004 SCC 47, [2004] 2 S.C.R. 551; Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 S.C.R. 256; Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44, [2011] 3 S.C.R. 134; referred to: Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395; Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. CIP Inc., [1992] 1 S.C.R. 843; Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391; Sindicatul "Păstorul Cel Bun" v. Romania (2014), 58 E.H.R.R. 10; Metropolitan Church of Bessarabia v. Moldova,

No. 45701/99, ECHR 2001-XII; Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 132 S. Ct. 694 (2012); National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; S.L. v. Commission scolaire des Chênes, 2012 SCC 7, [2012] 1 S.C.R. 235.

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Act respecting private education, CQLR, c. E-9.1, ss. 10, 25, 32.

Act respecting the Ministère de l'Éducation, du Loisir et du Sport, CQLR, c. M-15, preamble, s. 2.

Basic school regulation for preschool, elementary and secondary education, CQLR, c. I-13.3, r. 8, ss. 23, 23.1.

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Mark Phillips and Jacques S. Darche, for the appellants.

Benoit Boucher, Dominique Legault, Amélie Pelletier-Desrosiers and Caroline Renaud, for the respondent.

Written submissions only by Barry W. Bussey and Derek Ross, for the intervener the Canadian Council of Christian Charities.

Albertos Polizogopoulos and Don Hutchinson, for the intervener the Evangelical Fellowship of Canada.

Robert E. Reynolds and Ruth Ross, for the intervener the Christian Legal Fellowship.

Palbinder K. Shergill, Q.C., and Balpreet Singh Boparai, for the intervener the World Sikh Organization of Canada.

Written submissions only by Ian C. Moes and André Schutten, for the intervener the Association of Christian Educators and Schools Canada.

Jean-Philippe Groleau, Guy Du Pont and Léon H. Moubayed, for the intervener the Canadian Civil Liberties Association.

Ranjan K. Agarwal and Jack R. Maslen, for the interveners the Catholic Civil Rights League, Association des parents catholiques du Québec, the Faith and Freedom Alliance and Association de la communauté copte orthodoxe du grand Montréal.

Written submissions only by *Blake Bromley*, for the intervener the Faith, Fealty and Creed Society.

Written submissions only by Jean-Yves Côté and Paul D. Faris, for the intervener the Home School Legal Defence Association of Canada.

Gerald D. Chipeur, Q.C., and Grace Mackintosh, for the interveners the Seventh-day Adventist Church in Canada and the Seventh-day Adventist Church — Quebec Conference.

Milton James Fernandes and Sergio G. Famularo, for the interveners Corporation archiépiscopale catholique romaine de Montréal and Archevêque catholique romain de Montréal.

The judgment of LeBel, Abella, Cromwell and Karakatsanis JJ. was delivered by ABELLA J.—

[1] Since September 2008, as part of the mandatory core curriculum in schools across Quebec, the Minister of Education, Recreation and Sports has required a Program on Ethics and Religious Culture (ERC), which teaches about the beliefs and ethics of different world religions from a neutral and objective perspective. Like all courses in the mandatory curriculum, the Minister may grant private schools an

exemption from the ERC Program if they offer an alternative program that the Minister deems to be equivalent.

- This appeal results from a judicial review of the Minister's decision to deny an exemption sought by a private, Catholic school. The Minister based her decision on the fact that the school's whole proposed program was to be taught from a Catholic perspective. It was not, as a result, "equivalent" to the ERC Program. The school submits that this is an interference with its religious freedom. The Minister submits that it is a necessary strategy to ensure that students are knowledgeable about and respectful of the differences of others. In a sense, they are both right...
- [3] This Court's decision in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, sets out the applicable framework for assessing whether the Minister has exercised her statutory discretion in accordance with the relevant *Canadian Charter of Rights and Freedoms* protections. *Doré* succeeded a line of conflicting jurisprudence which veered between cases like *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, that applied s. 1 (and a traditional *Oakes* analysis) to discretionary administrative decisions, and those, like *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, which applied an administrative law approach. The result in *Doré* was to eschew a literal s. 1 approach in favour of a *robust* proportionality analysis consistent with administrative law principles.

- [4] Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* both the *Charter*'s guarantees and the foundational values they reflect the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.
- [5] In this case, the Minister's decision reflected the fundamental assumption that any program taught from a religious perspective could not be an alternative to the ERC Program and that the religious school could not teach even its own religion from its own perspective.
- For the reasons that follow, in my view prescribing to Loyola how it is to explain Catholicism to its students seriously interferes with freedom of religion, while representing no significant benefit to the ERC Program's objectives. In a context like Quebec's, where private denominational schools are legal, this represents a disproportionate, and therefore unreasonable interference with the values underlying freedom of religion of those individuals who seek to offer and who wish to receive a Catholic education at Loyola. On the other hand, I see no significant impairment of freedom of religion in requiring Loyola to offer a course that explains the beliefs, ethics and practices of other religions in as objective and neutral a way as possible, rather than from the Catholic perspective.

Background

- [7] Loyola High School is a private, English-speaking Catholic high school for boys. It is highly respected, and has been administered by the Jesuit Order since the school's founding in the 1840s. Its mission, teaching, and characteristics are Jesuit. Most of the students at Loyola come from Catholic families.
- [8] Until relatively recently, public education in Quebec was entirely confessional in nature and public schools were organized along denominational lines, under the complete control of the Catholic and Protestant Committees of the Council of Public Instruction, who "ran their respective schools with little or no government interference": Spencer Boudreau, "From Confessional to Cultural: Religious Education in the Schools of Québec" (2011), 38 *Religion & Education* 212, at p. 213.
- [9] With the Quiet Revolution in the 1960s, the state took charge of educational institutions formerly controlled by religious communities. By 2000, public schools were fully secularized and denominational schools no longer had official status in the public system. They were, however, permitted to operate as private schools: see *S.L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235, at para. 12.
- The Ethics and Religious Culture (ERC) Program, which is the most recent step in the process of secularization of the school system, replaced all the remaining Catholic and Protestant religious programs with a secularized study of religion and ethics. It became mandatory for all schools, public and private, at the start of the 2008-2009 school year. At the secondary level, the program is required to

be taught in four of the five years of school: *Basic school regulation for preschool,* elementary and secondary education, CQLR, c. I-13.3, r. 8, ss. 23 and 23.1.

- [11] The ERC Program has two key stated objectives: the "recognition of others" and the "pursuit of the common good". The first objective is based on the principle that all people possess equal value and dignity. The second seeks to foster shared values of human rights and democracy. By imposing this program in its schools, Quebec seeks to inculcate in all students openness to diversity and respect for others.
- In order to fulfil these objectives, the ERC Program has three components which seek to develop three competencies among students: the ability to understand "religious culture", which includes the study of world religions; the ability to reflect on ethical questions; and the ability to engage in dialogue. The three competencies are intended to support and reinforce one another.
- The purpose of the religious culture component is to help students understand the main elements of religion by exploring the socio-cultural contexts in which different religions take root and develop. The program takes a cultural and phenomenological rather than a doctrinal approach to the study of religions. Because of their role in Quebec's history, it accords a prominent role to Catholicism and Protestantism, but teachers are also required to discuss Judaism, Islam, Hinduism, Buddhism, and Aboriginal belief systems.

- [14] The purpose of the ethics component is to encourage students to critically reflect on their own ethical conduct and that of others, as well as on the values and norms that different religious and social groups adopt to guide their behaviour.
- The purpose of the dialogue component, which is integrated with the ethics and religious culture components, is to help students develop the skills to interact respectfully with people of different beliefs in a diverse society, and to understand the impact of their behaviour on the broader community.
- [16] The ERC Program provides a framework that teachers must utilize to help students develop these competencies, but leaves teachers with considerable flexibility in developing their own lessons and structuring their course to convey this content.
- The major world religions are taught through themes. Students explore the elements of religious traditions, including different representations of divinity, creation stories, and religious rites, rules and duties. They also discuss Quebec's religious heritage. They then learn about the founding and development of different world religions, and examine the ways that different traditions and philosophical texts have approached questions about divinity, the meaning of life and death, and the human condition generally. And they draw on literature to explore different kinds of religious experiences, methodologies for transmitting religion, and ways religious experiences shape people and communities.

- [18] Students develop competency in ethics by exploring themes such as freedom, autonomy, and tolerance, among others. They develop competency in dialogue by learning about different forms of dialogue; strategies for developing, explaining or challenging a point of view; and processes and patterns of thought that can undermine dialogue, such as stereotyping and prejudice.
- The orientation of the ERC Program is strictly secular and cultural; it requires teachers to take a "professional stance" of objectivity and impartiality. That means that they are not to advance the truth of a particular belief system or attempt to influence their students' beliefs. Instead, their role is to foster awareness of diverse values, beliefs and cultures. Teachers in the program are therefore expected to act as mediators to help their students develop the critical capacity to understand, articulate and question different points of view.
- The ERC program has already been scrutinized and found to be constitutional by this Court in the context of the public school system. In S.L., a group of parents claimed that the program would confuse their children and interfere with their religious training because it exposed them to information about various world religions from a secular perspective. They argued that this amounted to a violation of s. 2(a) of the *Charter*.
- [21] The Court rejected their claim and affirmed the constitutionality of the ERC Program as a mandatory component of the curriculum in public schools. In her reasons, Justice Deschamps observed that

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

- The same Ethics and Religious Culture Program is now before us in the context of a private denominational school. Like their counterparts in the public school system, the core curriculum of private denominational schools is regulated by the province and is compulsory: *Education Act*, CQLR, c. I-13.3, ss. 447 and 459; *Basic school regulation for preschool, elementary and secondary education*, ss. 23 and 23.1; *An Act respecting private education*, CQLR, c. E-9.1, ss. 25 and 32.
- [23] A private school is entitled to provide an alternative but "equivalent" program if the Minister approves its content. Section 22 of the *Regulation respecting the application of the Act respecting private education*, CQLR, c. E-9.1, r. 1, sets out the Minister's authority to grant an exemption where the school in question proposes to teach an alternative program which the Minister decides is sufficiently similar to the compulsory curriculum. It states:
 - **22.** Every institution shall be exempt from the [compulsory curriculum] provided the institution dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent.

- On March 30, 2008, approximately five months before the ERC Program became mandatory across the Quebec school system, Loyola's Principal and Director wrote to the Minister to request an exemption from the program for the upcoming school year. They claimed that the program was incompatible with Loyola's Catholic mission and convictions and proposed an alternative program that placed greater emphasis on Catholic beliefs and ethics.
- [25] In response to the Minister's request for additional information, Loyola sent the Minister a document setting out a general description of its proposed alternative program. The document presents the religious and ethical teachings of the Catholic Church as a central component of the proposed alternative program and as the basis upon which students should learn about other religions. Although it provides an opportunity to discuss major world religions and different ethical positions, the normative core of Loyola's proposed curriculum is the doctrine and belief system of the Catholic Church. Catholic doctrine and ethics would be emphasized early and taught in great depth, and would frame the discussion of other religions and ethical approaches. The third year of the program, for example — a year in which Loyola's proposed program would focus primarily on teaching its students about ethics — is described as a course on "Catholic Moral Teaching" designed to "offer a Catholic vision for answering the question 'What kind of person am I becoming, and what kind of person do I want to become?' It centers on Jesus as the model of full humanness". In the fourth year of the program, which focuses on the world religions component,

[t]he course presents a concise history of the Catholic Church, covering the significant events and doctrines that have shaped the course of Catholic thought and action over the past millennia. Beginning with the Apostolic Age, it follows the rise of Christendom through the High Middle Ages to the Reformation and into the Twentieth Century. Topics include the early fathers of the Church, scholars, heresies, councils, popes and saints and concludes with an exploration of the current challenges that we face in the post-modern world. . . . As the course progresses through history, a variety of Religions are discussed in particular, the interaction between the Catholic Church and the various other religions is explored.

Loyola's proposed course description did not address the dialogue competency that is required as part of the ERC Program.

- In a letter dated August 7, 2008, the Minister denied Loyola's request for an exemption from teaching the ERC curriculum, seeing Loyola's proposed approach as essentially a request for a departure from teaching the ERC subject altogether, rather than for an exemption based on a proposed equivalent course.
- Loyola sent a follow-up request to the Minister on August 25, 2008, attempting to demonstrate how its proposed alternative program met the objectives of the ERC Program. In its view, the religious nature of the school prevented it from teaching Catholic beliefs or other religions from a "neutral" or detached perspective. Although its program would be taught from a Catholic perspective, it would offer its students a deeper and more thorough understanding of world religions by going beyond history and external customs to engage seriously with their fundamental beliefs. It also affirmed its commitment to teaching its students to "think critically, to

obtain information, to be aware of the principal ethical issues and to examine popular beliefs and practices", but from a Catholic perspective.

This second request was also denied by the Minister. In a letter dated November 13, 2008, a department official writing on the Minister's behalf, expressed concern that Loyola's proposed program was faith-based, rather than cultural. The letter also mentioned what were seen as defects in the development of competency in dialogue and in the role of the teacher. The letter set out the following six bases for the Minister's decision to deny Loyola's request for an exemption:

[TRANSLATION]

• The two main goals of the Ethics and Religious Culture program are recognition of others and pursuit of the common good. The approach to and the conception of the common good developed in the Ethics and Religious Culture program and those proposed by Loyola High School are very different. The approach advocated in the Ethics and Religious Culture program is cultural, not faith-based. According to the summary of the program [and those] proposed by Loyola High School and submitted to the department for evaluation, the program is based on the Catholic faith and its main goal is the transmission of Catholic beliefs and convictions. It encompasses a conception of others, but once again from a Christian Catholic perspective.

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• Again according to the summary of the program submitted to the department for evaluation, it appears that, contrary to the Ethics and Religious Culture program, the Loyola High School program does not lead the student to reflect on the common good, or on ethical issues, but rather to adopt the Jesuit perspective of Christian service.

• The ethics component of the Ethics and Religious Culture program does not offer the students moral education. It takes into consideration elements of religious culture, whereas, according to the information transmitted to the department, the ethics aspect of the program proposed by Loyola High School focuses on the teaching of moral reference points laid down by the Catholic Church.

- According to the summary of the program submitted to the department for evaluation, the program proposed by Loyola High School does not provide for the development of competence in the practice of dialogue within the meaning of the Ethics and Religious Culture program.
- The training in religious culture of the Ethics and Religious Culture program is aimed at an enlightened comprehension of the many expressions of the religious experience present in Québec culture and in the world. Each religious tradition is observed individually without comparison or reference to another tradition. According to the summary of the program proposed by Loyola High School and transmitted to the department for evaluation, the program does not meet the requirements for the Ethics and Religious Culture program in terms of religious culture, as religions are studied in connection with the Catholic religion.
- Again according to the summary of the program submitted to the department for evaluation, the program proposed by Loyola High School is distinguished from the Ethics and Religious Culture program in terms of the teacher's role. In the Ethics and Religious Culture program, the teacher's foremost responsibility is to assist and guide the students in their reflections, whereas according to the information provided the department, the teacher of the program proposed by Loyola High School seems to have to teach the foundations of the religion and universe of Jesuit Catholic beliefs.
- Loyola brought an application for judicial review of the Minister's decision. In its view, the "normative pluralism" that underpinned the entire ERC Program was a violation of freedom of religion because it was incompatible with Loyola's character as a Catholic institution. After hearing additional testimony from Loyola about its proposed alternative program, the application judge concluded that the Minister's decision was incorrect, and constituted an unjustified violation of Loyola's right to religious freedom.

- On appeal, the Quebec Court of Appeal unanimously overturned the decision. Applying this Court's decision in *Doré*, the Court of Appeal held that a reasonableness standard should be applied in assessing how the Minister balanced the *Charter* rights at stake. It concluded that the ERC Program did not interfere with religious freedom in any substantial manner, and that the Minister had therefore exercised her discretion in a reasonable manner.
- [31] Before this Court, Loyola took a different position than in the prior proceedings. Loyola had previously asserted that the *entire* orientation of the ERC Program represented an impairment of religious freedom on the basis that discussing any religion through a neutral lens would be incompatible with Catholic beliefs. Its revised position before us was that it did not object to teaching other world religions objectively in the first component which focuses on "understanding religious culture". But it still wanted to be able to teach the *ethics* of other religious traditions from the perspective of the Catholic religion rather than in an objective and neutral way. Moreover, it continued to assert the right to teach Catholic doctrine and ethics from a Catholic perspective. Loyola took no position on the perspective from which it would seek to teach the dialogue component, which would be integrated with the other two components of its proposed alternative program. The position of the Minister before this Court, however, remained the same as it had been in the prior proceedings, namely, that in no aspect of the ERC Program would Loyola be permitted to teach from a Catholic perspective. It follows that Loyola's change of position has little impact on the analysis. The question instead is whether the

Minister's unchanged position, as reflected in her decision concerning the equivalency of Loyola's proposed program, interferes with the relevant *Charter* protections no more than is necessary given the statutory objectives she was required to pursue.

Analysis

- Loyola does not challenge the Minister's statutory authority to impose curricular requirements, but rather her discretionary decision to deny Loyola an exemption from the ERC Program. The reasonableness of the Minister's decision depends on whether it reflected a proportionate balance between the statutory mandate to grant exemptions only when a proposed alternative program is "equivalent" to the prescribed curriculum, based on the ERC Program's goals of promoting tolerance and respect for difference, and the religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education.
- Loyola, a non-profit corporation constituted under Part III of the Quebec *Companies Act*, CQLR, c. C-38, also argued that its own religious freedom had been violated by the decision. I recognize that individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice, such as the transmission of their faith: *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, at para. 181; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine*

(Village), [2004] 2 S.C.R. 650. I do not believe it is necessary, however, to decide whether corporations enjoy religious freedom in their own right under s. 2(a) of the Charter or s. 3 of the Charter of human rights and freedoms, CQLR, c. C-12 (the Quebec Charter), in order to dispose of this appeal.

- In this case Loyola, as an entity lawfully created to give effect to religious belief and practice, was denied a statutory exemption from an otherwise mandatory regulatory scheme. As the subject of the administrative decision, Loyola is entitled to apply for judicial review and to argue that the Minister failed to respect the values underlying the grant of her discretion as part of its challenge of the merits of the decision. In my view, as a result, it is not necessary to decide whether Loyola itself, as a corporation, enjoys the benefit of s. 2(a) rights, since the Minister is bound in any event to exercise her discretion in a way that respects the values underlying the grant of her decision-making authority, including the *Charter*-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education: *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, at para. 71.
- [35] This case, as the Court of Appeal noted and as the parties before this Court accepted, squarely engages the framework set out in *Doré*, which applies to discretionary administrative decisions that engage the *Charter*. *Doré* requires administrative decision-makers to proportionately balance the *Charter* protections —

values and rights — at stake in their decisions with the relevant statutory mandate: Doré, at para. 55.

- As Aharon Barak explained, the purpose of a constitutional right is the realization of its constitutional values: *Human Dignity: The Constitutional Value and the Constitutional Right* (2015), at p. 144. In the *Doré* analysis, *Charter* values those values that underpin each right and give it meaning help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives: *Hutterian Brethren* at para. 88; Lorne Sossin and Mark Friedman, "Charter Values and Administrative Justice" (2014), 67 S.C.L.R. (2d) 391, at pp. 403-4.
- On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate: *Doré*, at para. 57. Reasonableness review is a contextual inquiry: *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18. In the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter*.
- [38] The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the *Charter* in contexts

where *Charter* rights are engaged, reasonableness requires proportionality: *Doré*, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality": "Proportionality (2)", in *The Oxford Handbook of Comparative Constitutional Law* (2012), Michel Rosenfeld and András Sajó, eds., 738, at p. 743.

- [39] The preliminary issue is whether the decision engages the *Charter* by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play": *Doré*, at para. 57. A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review: *Doré*, at paras. 43-45.
- [40] A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing. Both *R. v. Oakes*, [1986] 1 S.C.R. 103, and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-MacDonald Inc. v. Canada* (*Attorney General*), [1995] 3 S.C.R. 199, at para. 160. As such, *Doré*'s

proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test: *Doré*, at para. 5.

- [41] The *Doré* analysis is also a highly contextual exercise. As under the minimal impairment stage of the *Oakes* analysis, under *Doré* there may be more than one proportionate outcome that protects *Charter* values as fully as possible in light of the applicable statutory objectives and mandate: *RJR-MacDonald*, at para. 160.
- [42] Doré's approach to reviewing administrative decisions that implicate the Charter, including those of adjudicative tribunals, responds to the diverse set of statutory and procedural contexts in which administrative decision-makers operate, and respects the expertise that these decision-makers typically bring to the process of balancing the values and objectives at stake on the particular facts in their statutory decisions: para. 47; see also David Mullan, "Administrative Tribunals and Judicial Review of Charter Issues After Multani" (2006), 21 N.J.C.L. 127, at p. 149; and Stéphane Bernatchez, "Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel" (2010), 55 McGill L.J. 641. As Lorne Sossin and Mark Friedman have observed in their cogent article:

While the Charter jurisprudence can shed light on the scope of Charter values, it remains for each tribunal to determine . . . how to balance those values against its policy mandate. For example, while personal autonomy may be a broadly recognized Charter value, it will necessarily mean something different in the context of a privacy commission than in the context of a parole board. [p. 422]

- The context before us state regulation of religious schools poses the question of how to balance robust protection for the values underlying religious freedom with the values of a secular state. Part of secularism, however, is respect for religious differences. A secular state does not and cannot interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. Nor can a secular state support or prefer the practices of one group over those of another: Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012), 45 *U.B.C. L. Rev.* 497, at pp. 498-99. The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them.
- [44] Through this form of neutrality, the state affirms and recognizes the religious freedom of individuals and their communities. As Prof. Moon noted:

Underlying the [state] neutrality requirement, and the insulation of religious beliefs and practices from political decision making, is a conception of religious beliefs or commitment as deeply rooted, or commitment as an element of the individual's identity, rather than simply a choice or judgment she or he has made. Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as a "way of life". If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply

rejecting the individual's views and values, it is denying her or his equal worth. [Footnote omitted; p. 507.]

Because it allows communities with different values and practices to peacefully co-exist, a secular state also supports pluralism. The European Court of Human Rights recognized the relationship between religious freedom, secularism and pluralism in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A, a case about a Jehovah's Witness who had been repeatedly arrested for violating Greece's ban on proselytism. Concluding that the claimant's Article 9 rights to religious freedom had been violated, the court wrote:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. [p. 17]

See also Metropolitan Church of Bessarabia v. Moldova, No. 45701/99, ECHR 2001-XII.

[46] This does not mean that religious differences trump core national values. On the contrary, as this Court observed in *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607:

Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a

delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance. [para. 2].

Or, as the Bouchard-Taylor report observed:

A democratic, liberal State cannot be indifferent to certain core values, especially basic human rights, the equality of all citizens before the law, and popular sovereignty. These are the constituent values of our political system and they provide its foundation.

(Gérard Bouchard and Charles Taylor, Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, *Building the Future: A Time for Reconciliation* (2008), at p. 134)

- These shared values equality, human rights and democracy are values the state always has a legitimate interest in promoting and protecting. They enhance the conditions for integration and points of civic solidarity by helping connect us despite our differences: Jürgen Habermas, "Religion in the Public Sphere" (2006), 14 European Journal of Philosophy 1, at p. 5. This is what makes pluralism work. As McLachlin J. noted in Adler v. Ontario, [1996] 3 S.C.R. 609 (dissenting in part), "[a] multicultural multireligious society can only work . . . if people of all groups understand and tolerate each other": para. 212. Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.
- [48] The state, therefore, has a legitimate interest in ensuring that students in all schools are capable, as adults, of conducting themselves with openness and respect

as they confront cultural and religious differences. A pluralist, multicultural democracy depends on the capacity of its citizens "to engage in thoughtful and inclusive forms of deliberation amidst, and enriched by," different religious worldviews and practices: Benjamin L. Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality" (2014), 29 *C.J.L.S.* 103, at p. 115.

- [49] With this context in mind, we turn to assessing the Minister's decision in order to determine whether it proportionately balanced religious freedom with the statutory objectives of the ERC Program.
- I begin with an analysis of the statutory objectives at stake. Under s. 22 of the *Regulation respecting the application of the Act respecting private education*, the Minister is required to grant exemptions from the mandatory program when a school offers an "equivalent" program. The starting point for the analysis of the statutory objectives is interpreting the meaning of "equivalent", taking into account the words of the provision in this regulatory context, the scheme of the Act, the object of the Act, and the intention of Parliament: Elmer A. Driedger, *The Construction of Statutes* (1974), at p. 67; *Rizzo & Rizzo Shoes Ltd.* (*Re*), [1998] 1 S.C.R. 27, at para.
- [51] This regulatory context concerns the minimum educational attainments required of students in private and public schools across Quebec. Quebec seeks to ensure that students who graduate with a provincially approved secondary school diploma demonstrate the knowledge and competencies they need to be productive

members of society, and that schools granting secondary school diplomas facilitate the realization of these skills. In particular, the Minister has a statutory responsibility to adopt measures that will contribute to individuals' education and development, and to ensure that educational institutions offer services of sufficient quality: *An Act respecting the Ministère de l'Éducation, du Loisir et du Sport*, COLR, c. M-15, s. 2.

- To this end, under the *Basic school regulation for preschool, elementary* and secondary education, Quebec prescribes the compulsory subjects that must be taught each year and sets out minimum requirements for the instructional hours to be accorded to each subject: ss. 23 and 23.1. The Minister also has the power to set out core course objectives and content, establish curricula to teach these core subjects, as well as allow for optional content that can be customized according to the needs of students: *Education Act*, s. 461. The mandatory curricula must be taught in private as well as public schools: *An Act respecting private education*, ss. 25 and 32. Finally, the regulatory scheme also requires all private educational institutions to hold a permit to operate, which enables the Minister to ensure that all private schools are complying with the general regulatory framework it has set out: *An Act respecting private education*, s. 10.
- [53] The power to grant exemptions from the mandatory curriculum in cases where a school offers an "equivalent" program is part of the Minister's broader regulatory role of ensuring that basic educational standards are met by schools and students alike. As a result, in order to be consistent with the scheme as a whole, the

Minister's interpretation of which programs are "equivalent" should take into account the objectives each course seeks to meet and the competencies it seeks to inculcate in students.

- [54] At the same time, however, there would be little point in offering an exemption if, in order to receive it, the proposed alternative program had to be identical to the mandatory program in every way. The exemption exists in a regulatory scheme that anticipates and sanctions the existence of private denominational schools. And the preamble to An Act respecting the Ministère de l'Éducation, du Loisir et du Sport, which sets out the Minister's powers, recognizes that parents have the right to choose establishments that, according to their own convictions, best respect the rights of their children. In order to respect values of religious freedom in this context, as well as to cohere with the larger regulatory scheme, a reasonable interpretation of the process for granting exemptions from the mandatory curriculum would leave at least some room for the religious character of those schools. The regulation providing for such exemptions would otherwise operate to prevent what the Act respecting private education itself allows — a private school being denominational.
- [55] Although it prescribes some course content, the documentation describing the ERC Program does not set out detailed lesson plans that teachers are required to cover. The program is instead structured to be flexible and thematic, providing only a general framework to guide students in developing competencies in ethics, dialogue

and religious culture, in service of the two key objectives of the program: the recognition of others and the pursuit of the common good.

- Given the highly flexible nature of the ERC Program and its heavy [56] emphasis on these two objectives, as well as the context of the regulatory scheme as a whole, it is unreasonable to interpret equivalence as requiring a strict adherence to specific course content, rather than in terms of the ERC's program objectives Using the program's objectives as the marker for equivalence leaves the generally. flexibility for the possibility of acceptable differences between an necessary alternative program and the ERC Program, including differences accommodate religious freedom. As long as the alternative program substantially realizes the objectives of the ERC Program, it should be considered equivalent. The Minister's task was therefore to arrive at a decision that proportionately balanced the realization of the ERC Program's objectives of promoting respect for others and openness to diversity, with respect for *Charter*-protected religious freedom in this context.
- [57] The information that was before the Minister when she made her decision about Loyola's proposed alternative program consisted of two letters requesting the exemption and a three-page proposed curriculum document. Based on these documents, the Minister identified a number of key differences between the two programs. The crucial difference, however, was the religious nature of Loyola's program. Loyola proposed an alternative program that would focus on Catholic

precepts and ethics, and discuss other belief systems from a Catholic perspective. Its main goal, as the Minister's representative noted in her letter dated November 13, 2008, was the "transmission of Catholic beliefs and convictions". As this letter to Loyola makes clear, in the Minister's view, a program that departs in any way from the ERC Program's posture of strict neutrality, even partially, cannot achieve the state's objectives of promoting respect for others and openness to diversity. This was also the position that Quebec took before this Court.

The Minister's decision necessarily engages religious freedom. The starting point, and the inspiration for most of this Court's subsequent jurisprudence about religious freedom, is *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, where Dickson J. (as he then was), writing for the majority, articulated his visionary approach to freedom of religion:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. . . . Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority". [Emphasis added; pp. 336-37.]

- Justice Dickson's formulation of religious freedom is founded on the idea that no one can be forced to adhere to or refrain from a particular set of religious beliefs. This includes both the individual *and* collective aspects of religious belief: *Hutterian Brethren*, at paras. 31, 130 and 182; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 781. In the words of Justice LeBel: "Religion is about religious beliefs, but also about religious relationships" (*Hutterian Brethren*, at para. 182).
- Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions: Victor Muñiz-Fraticelli and Lawrence David, "Whence a nexus with religion? Religious institutionalism in a Canadian context", forthcoming, at p. 2; Dieter Grimm, "Conflicts Between General Laws and Religious Norms" (2009), 30 *Cardozo L. Rev.* 2369, at p. 2373. To fail to recognize this dimension of religious belief would be to "effectively denigrate those religions in which more emphasis is placed on communal worship or other communal religious activities": Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights held by Groups* (2011), at p.

- 78. See also Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995), at p. 105.
- [61] These collective aspects of religious freedom — in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school — are a crucial part of Loyola's claim. In S.L., this Court held that the imposition of the ERC Program in public schools did not impose limits on the religious freedom of individual students and parents. This case, however, can be distinguished from S.L. because Loyola is a private religious institution created to support the collective practice of Catholicism and the transmission of the Catholic faith. The question is not only how Loyola is required to teach about other religions, but also how it is asked to teach about the very faith that animates its character and the comparative relationship between Catholicism and other faiths. The Minister's decision therefore demonstrably interferes with the manner in which the members of an institution formed for the very purpose of transmitting Catholicism, can teach and learn about the Catholic faith. This engages religious freedom protected under s. 2(a) of the *Charter*.
- I agree with Loyola that the Minister's decision had a serious impact on religious freedom in this context. To tell a Catholic school how to explain its faith undermines the liberty of the members of its community who have chosen to give effect to the collective dimension of their religious beliefs by participating in a denominational school.

- [63] As Justice Dickson observed in *Big M Drug Mart*, "whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose" (p. 347). Although the state's purpose here is secular, requiring Loyola's teachers to take a neutral posture even about Catholicism means that the state is telling them how to teach the very religion that animates Loyola's identity. It amounts to requiring a Catholic institution to speak about Catholicism in terms defined by the state rather than by its own understanding of Catholicism.
- It also interferes with the rights of parents to transmit the Catholic faith to their children, not because it requires neutral discussion of other faiths and ethical systems, but because it prevents a Catholic discussion of Catholicism. This ignores the fact that an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children, whether through instruction in the home or participation in communal institutions.
- This principle has received wide recognition in international human rights instruments. Article 18(4) of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, for example, protects the rights of parents to guide their children's religious upbringing:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[66] Though not relied on by Loyola in this case, s. 41 of the *Quebec Charter*, also protects the rights of parents to guide their children's religious upbringing:

Parents or the persons acting in their stead have a right to give their children a religious and moral education in keeping with their convictions and with proper regard for their children's rights and interests.

- [67] Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.
- There is, on the other hand, insufficient demonstrable benefit to the furtherance of the state's objectives in requiring Loyola's teachers to teach Catholicism from a neutral perspective. In her letter dated November 13, 2008 explaining her decision to deny Loyola's exemption, the Minister sets out her reasons for rejecting Loyola's proposed alternative curriculum:

[TRANSLATION]

• The approach to and the conception of the common good developed in the Ethics and Religious Culture program [and those] proposed by Loyola High School are very different. . . . the program proposed by Loyola . . . is based on the Catholic faith and its main goal is the transmission of Catholic beliefs and convictions.

- . . . The ethics aspect of the program proposed by Loyola...focuses on the teaching of moral reference points laid down by the Catholic Church
- . . . the program does not meet the requirements for the Ethics and Religious Culture program in terms of religious culture, as religions are studied in connection with the Catholic religion.
- . . . the . . . program does not lead the student to reflect on the common good, or on ethical issues, but rather to adopt the Jesuit perspective of Christian service.

These passages reflect the central problems with the Minister's decision: it treats teaching any part of the proposed alternative program from a Catholic perspective as necessarily inimical to the state's core objectives in imposing the ERC Program and it gives no weight to the values of religious freedom engaged by the decision. There is, in short, no balancing of freedom of religion in relation to the statutory objectives. The result is a disproportionate outcome that does not protect *Charter* values as fully as possible in light of those statutory objectives.

[69] In the Quebec context, where private denominational schools are authorized, forcing a religious school to teach its own religion from a non-religious perspective does not assist in realizing the ERC Program's basic curricular goals of encouraging among students respect for others and openness to others. The Minister's decision suggests that engagement with an individual's own religion on his or her own terms can simply be presumed to impair respect for others. This assumption runs counter to the objectives of the regulatory scheme as a whole and it has a disproportionate impact on the values underlying religious freedom in this context. This necessarily renders the Minister's decision unreasonable.

The disproportionate nature of this decision is reinforced by the fact that the Minister's decision effectively prohibits Loyola from teaching about Catholic ethics from a Catholic perspective. Catholic doctrine and Catholic ethics are simply too intertwined to make it possible to teach one from a religious perspective and the other neutrally. More to the point, there is no reason to distinguish between the two when it comes to religious freedom. In both cases, preventing Loyola from teaching Catholicism seriously impairs its Catholic identity.

[71] Loyola, as previously noted, conceded before this Court that it was prepared to teach the first competency — world religions other than Catholicism from a neutral perspective. It sought, however, to be exempt from teaching the ethics of other religions from a neutral perspective, and proposed instead to do so from a Unlike my colleagues in their concurring opinion, however, I Catholic perspective. agree with the Court of Appeal that requiring Loyola to teach about the ethics of other religions in a neutral, historical and phenomenological way would not interfere disproportionately with the relevant *Charter* protections implicated by the decision. Justice Deschamps's admonition that exposing children to a variety of religious facts does not, in itself, infringe on their parents' religious freedom remains compelling in a denominational school: S.L., at para. 40. I agree with her that in a multicultural society, it is not a breach of anyone's freedom of religion to be required to learn (or teach) about the doctrines and ethics of other world religions in a neutral and respectful way. See Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, at paras. 46 and 48.

- But what does it mean to teach about the ethics of other religions in a "neutral" and "objective" way in the context of a religious school that is permitted to teach its own religion and ethics from a religious perspective? My starting point is that in a religious high school, where students are learning about the precepts of one particular faith throughout their education, it is arguably even more important that they learn, in as objective a way as possible, about other belief systems and the reasons underlying those beliefs.
- I quickly acknowledge that in a religious school, teaching other ethical frameworks in a neutral way may be a delicate exercise. A school like Loyola must be allowed some flexibility as it navigates these difficult moments. Catholicism's answer to ethical questions, for instance, will sometimes conflict with the approach taken by the ethics of other religions. It would be surprising if, in classes discussing other belief systems, students did not ask for comparative explanations, questions Loyola's teachers are clearly free to answer. A comparative approach that explains the Catholic ethical perspective and responds to questions about it is of course legitimate.
- But the fact that there are difficulties in implementation does not mean the state should be required to throw up its hands and abandon its objectives. Those objectives are not only of immense public importance, they are also, as this Court confirmed in *S.L.*, constitutional. Pursuing them in a religious school may require the Minister to accept some adjustments to the program to make it align with the school's

religious character, but these adjustments need not mean the wholesale replacement of objective explications of other religions' ethical systems with a program that frames its discussion of ethics primarily through the moral lens of a school's religious perspective.

- The alternative program that Loyola submitted to the Minister would teach other ethical frameworks primarily through the lens of Catholic ethics and morality. Even if Loyola's teachers do so respectfully, this fundamentally transforms the ethics component of the ERC Program from a study of different ethical approaches into a class on Catholicism. The resulting risk is that other religions would necessarily be seen not as differently legitimate belief systems, but as worthy of respect only to the extent that they aligned with the tenets of Catholicism. This contradicts the ERC Program's goals of ensuring respect for those whose religious beliefs are different, a goal no less worthy in a religious school than in a public one.
- The key is in how the discussion is framed. An emphasis on objective instruction insofar as possible, and on teaching other ethical positions in their own right, does not mean stifling debate or denying Loyola's Catholic identity. On the contrary, the framework of the discussions would be wider because they are not based solely on a particular religion's perspective. That religion's own ethical framework would necessarily be part of the discussion, but the role will be one of significant participant rather than hegemonic tutor.

- There is no doubt that this will not always be easy. The question is, given the undisputed significance of the ERC Program's objectives, can requiring Loyola's teachers to teach and discuss other religions and their ethical positions as objectively as possible really be seen as a serious interference with freedom of religion merely because it may be difficult to execute neatly?
- I have difficulty seeing how this can undermine the values of religious freedom. I do not dispute that the belief systems Loyola's teachers are required to explain to their students may not reflect their personal beliefs, or Loyola's institutional allegiances. But teaching about the ethics of other religions is largely a factual exercise. It need not be a clash of values. Nor is asking Loyola's teachers to teach other religions and ethical positions as objectively as possible a requirement that they shed their own beliefs. It is, instead, a pedagogical tool utilized by good teachers for centuries let the information, not the personal views of the teacher, guide the discussion. The fact that those personal principles are not central when discussing the ethical principles of other religions does not mean that the Loyola teacher is silenced, or forced to forego his own beliefs, or even appears to be doing so. It also does not mean that Loyola's teachers are foreclosed from explaining the Catholic perspective and its differences from other faiths.
- [79] In any event, it is the Minister's decision as a whole that must reflect a proportionate and therefore reasonable balancing of the *Charter* protections and statutory objectives in issue. It does not, in my respectful view, because it rests on

the assumption that a confessional program cannot achieve the objectives of the ERC Program. This assumption led the Minister to a decision that does not, overall, strike a proportionate balance between the *Charter* protections and statutory objectives at stake in this case. It is, with respect, unreasonable as a result.

- This is not to suggest, however, that in a religious school, the Minister is required to allow the ERC Program a program that is framed as a tool to teach students about different world religions and ethical beliefs to be replaced by a program that focuses on that religion's doctrine and morality. To ask a religious school's teachers to discuss other religions and their ethical beliefs as objectively as possible does not seriously harm the values underlying religious freedom. These features of the ERC Program are essential to achieving its objectives. But preventing a school like Loyola from teaching and discussing Catholicism in any part of the program from its own perspective does little to further those objectives while at the same time seriously interfering with the values underlying religious freedom.
- I would therefore allow the appeal, set aside the Minister's decision, and remit the matter to the Minister for reconsideration in light of these reasons. An exemption cannot be withheld on the basis that Loyola must teach Catholicism and Catholic ethics from a neutral perspective. In the circumstances, I would make no order for costs.

The reasons of McLachlin C.J. and Rothstein and Moldaver JJ.were delivered by

THE CHIEF JUSTICE AND MOLDAVER J. —

I. Overview

[82] Loyola, a private Catholic high school, challenges the decision of the Minister of Education, Recreation and Sports ("Minister") refusing to grant it an exemption from the Ethics and Religious Culture course ("ERC Program"), a compulsory program requiring the teaching of world religions, ethics and dialogue in a neutral way. The application judge set aside the Minister's decision, holding that it violated Loyola's constitutional right to freedom of religion. The Quebec Court of Appeal reversed that decision. Loyola now appeals with leave to this Court.

[83] Like our colleague Abella J., we would allow the appeal. In our view, the Minister's decision cannot be upheld because it failed to protect Loyola's right to religious freedom. In reaching that conclusion, we respectfully differ from our colleague on a number of points, including her choice of remedy.

II. Background Facts

The government of Quebec, as part of a plan of progressive secularization of the public school system, incorporated the ERC Program into its core curriculum. Beginning in 2008, all schools were required to deliver a program teaching world religions, ethics and dialogue from a secular, morally neutral perspective. The

legislative and regulatory scheme provided exemptions for private schools to teach an equivalent program, with requests for exemptions to be assessed by the Minister.

Loyola High School is a respected Catholic private school, founded in 1848 as part of the Collège Sainte-Marie, administered by the Jesuit Order and serving the Catholic community of Montréal. It applied for an exemption to teach a program that, in its view, achieved the same educational objectives of the ERC Program, but in harmony with its religious convictions. The Minister refused, on the basis that Loyola's proposed program had a religious perspective that was unacceptable, and that it amounted to a program of moral education that did not follow the required neutral and cultural approach to religion and ethics.

III. Procedural History

- [86] The application judge heard evidence from several expert and lay witnesses, and made extensive findings of fact which we address in greater detail in our analysis. He found that the Minister's refusal constituted a serious infringement of Loyola's right to religious freedom. In the result, he granted Loyola's application, quashed the Minister's decision, and ordered an exemption (2010 QCCS 2631).
- [87] On appeal by the Minister, the Quebec Court of Appeal applied the administrative law framework from *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, and concluded that the Minister's decision was reasonable. The Court of Appeal expressed skepticism that denying an exemption to teach a modified

version of the ERC Program posed *any* infringement on Loyola's freedom to teach the Catholic religion. Furthermore, it concluded that even if there were an infringement, it would be [TRANSLATION] "trivial because [the ERC Program] is only one class among many" and "the program does not require teachers to refute the precepts of the Catholic religion, but only to abstain from expressing their opinions or convictions" (2012 QCCA 2139, at para. 174). In consequence, the Court of Appeal overturned the application judge, and reinstated the decision of the Minister. As we explain, we respectfully disagree with the Court of Appeal's conclusion that the infringement was trivial. Indeed, for reasons that will become apparent, we are satisfied that the infringement had a substantial impact on Loyola's right to religious freedom.

IV. Analysis

We are required to address several issues in deciding this appeal. First, we must decide whether Loyola as a religious organization is entitled to the constitutional protection of freedom of religion. Concluding that it is, we analyze the proper interpretation of the legislative and regulatory scheme at issue in this appeal, including the ERC Program and the exemption provision. We review the content of Loyola's proposed equivalent program, and then evaluate the Minister's decision in light of Loyola's constitutional right to religious freedom — first, determining whether Loyola's freedom of religion was breached, and second, determining whether that breach was minimally impairing and therefore justified under s. 1 of the

Canadian Charter of Rights and Freedoms (the "Canadian Charter" or "Charter"). Finding that Loyola's freedom of religion was infringed, and that the infringement was not minimally impairing, we offer guidelines on the appropriate scope of an equivalent program that would comply with the *Charter* while meeting the objectives of the ERC Program. Finally, we determine that the appropriate remedy is an order of mandamus granting an exemption to Loyola to teach such a program.

- A. Does Loyola as a Religious Organization Enjoy Freedom of Religion Under Section 2(a) of the Canadian Charter and Section 3 of the Quebec Charter?
- [89] Loyola is a religious non-profit corporation constituted under Part III of Quebec's *Companies Act*, CQLR, c. C-38. For over a century, it has pursued a vocation of providing Catholic religious education for young men. Loyola asserts that, as a religious organization, it is protected by the guarantee of freedom of religion in the *Canadian Charter* and the *Charter of human rights and freedoms* (the "Quebec Charter").
- [90] The Attorney General of Quebec contends that Loyola enjoys no such constitutional protection because it is not a natural person, but merely a legal person: religious freedom protects sincerely held beliefs, and a corporation is capable of neither sincerity nor belief. This raises the question of whether religious organizations are protected by the guarantee of freedom of religion.

- [91] In our view, Loyola may rely on the guarantee of freedom of religion found in s. 2(a) of the *Canadian Charter*. The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola. Canadian and international jurisprudence supports this conclusion.
- [92] This Court has affirmed that freedom of religion under s. 2(a) of the *Canadian Charter* has both an individual and a collective dimension. In *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, Bastarache J., writing in dissent but not on this point, quoted Professor Timothy Macklem for the proposition that

religions are necessarily collective endeavours. . . . It follows that any genuine freedom of religion must protect, not only individual belief, but the institutions and practices that permit the collective development and expression of that belief.

(Para. 137, quoting "Faith as a Secular Value" (2000), 45 McGill L.J. 1, at p. 25.)

[93] In *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, Justice Abella and Justice LeBel, both writing in dissent but not on this point, emphasized the collective dimension of religious freedom. Justice Abella noted the "group, or 'community', aspect of religious freedom' (para. 131), while Justice LeBel observed:

Religion is about religious beliefs, but also about religious relationships. . . . [This appeal] raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate . . . of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations. [Emphasis added; para. 182.]

- [94] The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.
- In this respect, the guarantee of freedom of religion resembles the guarantees of freedom of expression, freedom from unreasonable search and seizure and trial within a reasonable time, all of which have been held to apply to corporations: see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. CIP Inc.*, [1992] 1 S.C.R. 843. As with s. 2(a), the text of these rights refers not to "individuals" but to "everyone" or "any person", which has been interpreted as including corporations: see D. Gibson, *The Law of the Charter: Equality Rights* (1990, at pp. 53-54).
- [96] International human rights instruments recognize the communal character of religion and support the extension of constitutional protection to the organizations through which congregants worship and teach their faith. Article 18 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 9 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, contains a virtually identical provision. Similarly, the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, to which Canada is a signatory, provides:

Article 18. 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

. . .

- 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
- [97] The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified: *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70. It follows that the collective aspect of freedom of religion should find protection under the *Charter*.
- [98] Foreign jurisprudence supports Loyola's claim to freedom of religion: see *Sindicatul "Păstorul Cel Bun" v. Romania* (2014), 58 E.H.R.R. 10, at para. 136;

Metropolitan Church of Bessarabia v. Moldova, No. 45701/99, ECHR 2001-XII; Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 132 S. Ct. 694 (2012); National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

- The Attorney General of Quebec points out that in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Dickson C.J. commented that "a business corporation cannot possess religious beliefs" (p. 784). However, a religious organization may in a very real sense have religious beliefs and rights. Thus, Dickson C.J. referred to the s. 2(a) freedom of "individuals <u>and groups</u>" (p. 759 (emphasis added)), describing that freedom using language from *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336, as "the right to manifest religious belief by worship and practice or by teaching and dissemination" (p. 757).
- [100] On the submissions before us, and given the collective aspect of religious freedom long established in our jurisprudence, we conclude that an organization meets the requirements for s. 2(a) protection if (1) it is constituted primarily for religious purposes, and (2) its operation accords with these religious purposes.
- [101] The precise scope of these requirements may require clarification in future cases which test their boundaries, but it is evident that Loyola falls within their ambit. It is a non-profit religious corporation constituted for the purpose of offering a Jesuit education to children within Quebec's Catholic religious community. It has operated for over a century in accordance with this religious educational purpose.

We note that the same result is reached under s. 3 of the *Quebec Charter*. If anything, the conclusion is clearer, because the *Quebec Charter* accords freedom of religion to "[e]very person", unlike the *Canadian Charter* which uses the more ambiguous "[e]veryone". Under Quebec's *Interpretation Act*, CQLR, c. I-16, "the word 'person' includes natural or legal persons, . . . unless inconsistent with the statute or with the special circumstances of the case": s. 61(16). No inconsistency arises here; on the contrary, for the reasons just discussed, the circumstances favour recognition of the right of freedom of religion for religious organizations.

B. The Interpretation of the Legislative and Regulatory Scheme at Issue

[103] To understand and evaluate the Minister's decision, it is necessary to understand the legislative and regulatory scheme under which it was made.

[104] The starting point is the legislation. As of 2000, religious schools in Quebec can exist only as private schools. The compulsory curriculum set by the Minister applies to all schools, including private schools: *An Act respecting private education*, CQLR, c. E-9.1, s. 25. As of the 2008-2009 school year, the ERC Program formed part of the compulsory curriculum for all schools in the province.

[105] The legislation imposing the compulsory curriculum on public and private schools contains a provision authorizing the government to adopt regulations to provide exemptions to particular institutions. Section 111 of the *Act respecting private education* states:

111. The Government may, by regulation . . . ,

. . .

(7) . . . authorize . . . the Minister to exclude, on the conditions he may determine, persons, bodies, institutions or educational services from all or some of the provisions of this Act . . .;

[106] Pursuant to this power, the government of Quebec adopted s. 22 of the *Regulation respecting the application of the Act respecting private education*, CQLR, c. E-9.1, r. 1, which allows private schools to obtain exemptions from teaching the compulsory curriculum:

22. Every institution shall be exempt from the [requirement to teach the compulsory curriculum] provided the institution dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent.

[107] When the government inserted the ERC Program into the compulsory curriculum, it did not exclude it from the s. 22 exemption provision. It is therefore open to private religious schools to apply for an exemption from the requirement to teach the ERC Program. Loyola did so, and the Minister refused the exemption, giving rise to this litigation.

[108] The legislative and regulatory scheme imposes a compulsory curriculum, but modifies this by allowing individual schools to obtain exemptions. This allows Quebec to satisfy the educational objectives of the compulsory curriculum, while permitting accommodations for particular schools on the basis of their circumstances

or needs. Applied to the ERC Program, this scheme allows Quebec to require that religion be taught from a secular, cultural and phenomenological viewpoint in public schools, while allowing private religious schools to adopt an alternative but equivalent approach that meets the basic objectives of the program but preserves the school's freedom of religion.

[109] The preamble of the Act specifying the Minister's powers and obligations (An Act respecting the Ministère de l'Éducation, du Loisir et du Sport, CQLR, c. M-15) confirms that the reliance on the Minister's discretion to approve exemptions is intended to ensure respect for the religious freedoms of individuals and groups. It states:

WHEREAS every child is entitled to the advantage of a system of education conducive to the full development of his personality;

Whereas parents have the right to choose the institutions which, according to their convictions, ensure the greatest respect for the rights of their children;

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;

[110] The department's own publications support the conclusion that the legislative and regulatory scheme is intended to operate in a way that respects the religious freedoms of individuals and groups in the school system. In a 2005 ministerial proposal, the Minister stated that "[r]especting the fundamental right to the freedom of conscience and religion is the basis of all ethics and religious education"

(Establishment of an ethics and religious culture program: Providing future direction for all Québec youth, (2005), at p. 6. To similar effect, the Ethics and Religious Culture Program section of the department's website promises that the legislative and regulatory scheme — the generic ERC Program supplemented by the s. 22 exemption provision, which replaced a prior diversity of moral education programs including denominational programs — will "respec[t] the freedom of conscience and religion of parents, students and teachers" ("Ethics and Religious Culture Program: Contributing to harmonious social relations in Québec society today" (online)).

- [111] Indeed, the department's website notes that among the pre-existing programs was a "Catholic Religious and Moral Instruction" program, and states that the ERC Program will replace such programs in order to "offer the same education to all Québec students".
- [112] Section 22 functions to ensure the legislative and regulatory scheme's compliance with the freedom of religion guaranteed by s. 2(a) of the *Charter*. It guards against the possibility that, in certain situations, the mandatory imposition of a purely secular curriculum may violate the *Charter* rights of a private religious school. This safeguard is consistent with the obligations of the state in a multicultural society. As LeBel J. observed in his concurring reasons in *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, in the context of the public school system, "[u]nder the constitutional principles governing state action, the state has neither an obligation to promote religious faith nor a right to discourage religious faith in its

public education system" (para. 54). The state may not discourage religious faith in the public education system; this obligation has even more resonance in the context of a private religious school.

C. Analytical Approach Under the Charter

- [113] Section 2(a) of the *Charter* protects the right to freedom of religion. The state can limit this right, but only if it can show that the limitation is "reasonable" and "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*. The *Charter* requirement that limits on rights be reasonable and demonstrably justified may be expressed in different ways in different contexts, but the basic constitutional requirement remains the same.
- The first issue is whether Loyola's freedom of religion was infringed by the Minister's decision. The second issue is whether the Minister's decision that only a purely secular course of study may serve as an equivalent to the ERC Program limits Loyola's freedom of religion more than reasonably necessary to achieve the goals of the program. However one describes the precise analytic approach taken, the essential question is this: did the Minister's decision limit Loyola's right to freedom of religion proportionately that is, no more than was reasonably necessary?
- [115] For reasons that follow, we conclude that both of these issues must be answered in the affirmative.

D. Loyola's Proposed Equivalent Program

- [116] The nature of Loyola's proposed equivalent program lies at the heart of this appeal. As such, it is worth examining in some detail.
- The ERC Program has two core objectives: recognition of others and the pursuit of the common good. Furthering these objectives, the program teaches students to develop competencies in understanding religion (the "world religions competency"), reflecting on ethical questions (the "ethics competency"), and engaging in dialogue (the "dialogue competency").
- [118] Several sources of information shed light on exactly how Loyola proposes to teach these competencies in its alternative to the ERC Program. On March 30, 2008, Loyola sent its first letter to the Minister requesting an exemption from the ERC Program, which gave a broad overview of the objectives of its proposed equivalent program. Following a request to submit further information, Loyola provided a three-page document with a more detailed summary of its proposed program. After receiving an initial negative response, but before the Minister's final decision to deny an exemption, Loyola sent a further, three-page letter to the Minister on August 25, 2008, containing more details about its proposal.
- [119] The precise nature of the proposed equivalent program was further clarified in testimony heard by the application judge, and Loyola's written and oral submissions to this Court. In fairness, these clarifications were not available to the

Minister when she rendered her decision. Nevertheless, they are helpful in determining the form and substance of the program Loyola is proposing.

Loyola describes a program of study that achieves the ERC Program's objective of [TRANSLATION] "promot[ing] . . . tolerance and respect for all", but that is delivered "in a manner respectful of the Catholic faith and the moral values that form the cornerstone of our school" (application judge's reasons, at para. 35). The three-page program summary outlines a diverse mix of content that includes doctrinal instruction on Catholic history and dogma, comparative study of various world religions, and consideration of an array of ethical and moral issues.

(1) <u>How Loyola's Proposed Program Approaches the World Religions</u> <u>Competency</u>

[121] The world religions aspect of Loyola's program includes content on Judaism, Islam, Buddhism, Hinduism, and North American native spirituality, and teaches students to examine "religious praxis, sacred stories, myths, and rituals found in religious cultures". In correspondence with the Minister, Loyola asserted that its program is actually [TRANSLATION] "much more thorough" than the ERC Program in its approach to understanding religion (application judge's reasons, at para. 38). To ensure that the program achieves the goal of [TRANSLATION] "promoting tolerance and acceptance of others", it goes beyond a "simple explanation" of other religions' external customs to include an examination of their fundamental beliefs (*ibid.*).

Loyola's program also "devotes a significant amount of study to Roman Catholic Christianity" (A.F., at para. 13).

- Paul Donovan, Loyola's Principal, testified about Loyola's in-depth approach to teaching other religions, giving examples of having a rabbi visit to discuss Judaism or an imam to discuss Islam, to aid students in "getting to know what that faith is really about". Mr. Donovan stated "that's something that we do quite regularly". Loyola's program approaches other religions by reference to the concepts of God and faith "as understood by the tradition under study itself", and to this extent Loyola takes no issue with the professional posture of objectivity that the ERC Program requires of teachers (A.F., at para. 13). As noted by Loyola's counsel in his oral submissions to this Court, "[y]ou can't teach Buddhism from the Catholic point of view" and "there is no issue with the way the program requires world religions to be taught" (transcript, at p. 4).
- Unlike its approach to teaching other religions, Loyola's method of teaching Catholicism is neither neutral nor objective, but rather takes a denominational approach. This approach aims to "provide the students with a sound formation in the basic beliefs, rituals and practices of our Faith", including "the realization that Christianity cannot remain something purely internal, but must express itself in our relationships with others and the world around us". Loyola's program "present[s] 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" (A.F., at

para. 25), premised on the belief that in "teaching its own faith . . . it must do so from the Catholic perspective" (transcript, at p. 6).

(2) How Loyola's Proposed Program Approaches the Ethics Competency

[124] Loyola readily concedes that, as with its teaching of Catholicism within the world religions competency, the ethics competency is also taught from the Catholic perspective:

With respect to the ethics component, its central focus is the social teaching of the Roman Catholic Church. . . . [A]s 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. [A.F., at para. 13]

Loyola's program imparts a "Catholic vision" on topics such as "moral decision making, good conscience-in-action, justice, honesty, respect for persons, respect for creation, reverence for human life, compassion, sexuality, and peacemaking".

However, while the Catholic perspective on ethical issues is given prominence, Loyola's program also includes "[e]xploration of ethical systems as understood by various religions and nonreligious value systems". Described in its August 25 submission to the Minister, Loyola's program would have students [TRANSLATION] "explor[e] a range of ethical systems, beliefs and practices", and would encourage them "to think critically" (application judge's reasons, at para. 38). As further clarified in this appeal:

. . . 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. . . .

[T]hey 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. [A.F., at para. 13]

In all aspects of Loyola's program, including the ethics competency, [TRANSLATION] "the goal of teaching respect for all, regardless of our individual beliefs or customs, is of crucial importance", informed by "our ethical ideal . . . not simply to 'tolerate' others but indeed to 'love' others, as our Christian faith teaches us" (application judge's reasons, at para. 38).

(3) How Loyola's Proposed Program Approaches the Dialogue Competency

None of Loyola's submissions to the Minister explicitly include the word "dialogue", and this was one of the justifications cited by the Minister in denying Loyola's request for an exemption. However, looking at the materials in context and in their entirety, it is evident that the proposed program contemplates more than students passively listening to a teacher's lecture. The program summary uses active verbs like "students explore" and "[s]tudents examine". Loyola's second letter to the Minister stated that [TRANSLATION] "[w]e have always encouraged our students to think critically, to obtain information, to be aware of the principal ethical issues and to examine popular beliefs and practices" (application judge's reasons, at para. 38). The application judge had no difficulty making the following finding of fact:

[TRANSLATION] In the ERC program, dialogue is defined as consisting of two interactive dimensions, that is, individual deliberation and the exchange of ideas with others.

A simple reading of [Loyola's program summary], supplemented by [Loyola's correspondence with the Minister], <u>unequivocally confirms that the program dispensed by Loyola contains these two dimensions</u>. [Emphasis added; paras. 150-51.]

(4) <u>Does Loyola's Proposed Program Conform to the Objectives of the ERC Program?</u>

[127] In his reasons for judgment, the application judge concluded that

[TRANSLATION] Loyola's program is comparable to the ERC program established by the Minister. . . . [T]eaching . . . Loyola's program in accordance with the Catholic faith does not change its nature or make it lose its status as an equivalent program.

The cultural approach advocated in the ERC program is in no way incompatible or irreconcilable with the denominational approach required by Loyola's religious precepts. [paras. 182-83]

In our view, this finding was open to the application judge, and we see no reason to interfere with it. While Loyola's alternative could perhaps have been more clearly presented in the initial submissions to the Minister, the contours of the program have been fleshed out more fully in testimony heard before the application judge and in Loyola's submissions on appeal. At its most general level, the program takes the following form: (1) regarding the world religions competency, Loyola will teach Catholicism from the Catholic perspective, but will teach other religions objectively, respectfully and with reference to religious precepts as understood by those other

faiths themselves; (2) regarding the ethics competency, Loyola will emphasize the Catholic point of view on ethical questions, but will ensure all ethical points are presented on any given issue, and will welcome disagreement from students on Catholic moral teachings; and (3) regarding the dialogue competency, Loyola will encourage students to think critically and engage with their teachers and with each other in exploring the topics covered in the program.

As is apparent, Loyola's program departs from the generic ERC Program in two key respects. First, Loyola proposes to teach Catholicism from the Catholic perspective. Second, while ensuring that all ethical points are presented and encouraging students to think critically, Loyola proposes an approach that emphasizes the Catholic point of view when discussing ethical questions. In both respects, Loyola's teachers would depart from the strict neutrality required under the ERC Program.

Justice Abella notes in her reasons that "the normative core of Loyola's proposed curriculum is the doctrine and belief system of the Catholic Church" (para. 25). This may be true, but it doesn't tell the whole story. Surrounding that normative core is a rich and full exploration of non-Christian religious beliefs, and of ethical perspectives that do not mirror Catholic moral teachings. Leaders from other religious communities are welcomed into the classroom to ensure a robust understanding of other faiths and traditions, beyond the neutral description of religious customs and practices envisioned by the ERC Program. Students are

allowed, even encouraged, to critique Catholic moral teachings. There is nothing to suggest Loyola's proposal is in any way ill suited to achieve the two key objectives of the ERC Program: recognition of others and the pursuit of the common good. Nor does it fail to address the competencies of understanding religion, reflecting on ethical questions, and engaging in dialogue.

E. Analysis of Loyola's Religious Freedom Claim

Loyola challenges the Minister's denial of an exemption from the ERC Program as an infringement of its religious freedom. As we have explained, Loyola is entitled to the freedom of religion protected by s. 2(a) of the *Charter*. This is not to say that the religious freedoms of other actors are not implicated by the Minister's denial. To the extent that the ERC Program would require Loyola's teachers to express a neutral viewpoint on religious matters, their religious freedoms may be at issue. The religious freedom of the parents of Loyola's students may be implicated, as they have the right to seek moral and religious education for their children. Perhaps even the religious freedom of Loyola's students themselves is raised by the denial of an exemption for Loyola to implement its alternative program.

[131] It is not necessary to conclusively decide these matters. Deciding the case on the basis of the religious freedom of Loyola itself is sufficient to dispose of this appeal. Similarly, it is not necessary to consider whether any different analysis or result would arise under s. 3 of the *Quebec Charter*.

(1) The Extent of Religious Freedom Under Section 2(a) of the Charter

The freedom of religion protected by s. 2(a) of the *Charter* is not limited to religious belief, worship and the practice of religious customs. Rather, it extends to conduct more readily characterized as the propagation of, rather than the practice of, religion. As this Court held in $Big\ M$, "[t]he essence of the concept of freedom of religion" includes "the right to manifest religious belief . . . by teaching and dissemination" (p. 336). Thus, Loyola's expressed desire to teach its curriculum in accordance with Catholic beliefs falls within the scope of s. 2(a)'s protection.

[133] $Big\ M$ also affirms that the interpretation of the religious freedom guarantee should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection" (p. 344).

(2) <u>Did the Minister's Decision Infringe Loyola's Rights Under Section 2(a)</u> of the *Charter*?

In *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, — another case involving religious freedom in the education context — this Court restated the test for determining whether the rights guaranteed by s. 2(*a*) have been infringed:

. . . in order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely

believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief. [para. 34]

(a) Applying the Legal Test to an Organizational Claimant

As we have explained, the religious freedom guarantee contained in the *Charter* protects not only natural persons but also certain legal persons such as Loyola. The Attorney General of Quebec argued against this result, in part because an organization lacks the capacity for abstract thought and emotion and therefore cannot *believe* in something. While we are not persuaded that this precludes extending s. 2(a) to cover certain categories of organizations, we recognize that where the claimant is an organization rather than an individual, the "sincerity of belief" inquiry required by our jurisprudence poses some difficulties. The existing test need not be abandoned, but a few clarifications are warranted.

[136] The two-part test for determining whether a claimant's freedom of religion under s. 2(a) has been infringed was first set down in *Amselem*. That case offers considerable guidance on how to determine a claimant's sincerity of belief:

Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony . . ., as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a

lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. [Emphasis added; para. 53.]

In brief compass, courts are counseled to determine sincerity of belief based on the credibility of a claimant's testimony, and whether the claimed belief is consistent with his or her current religious practices, while being mindful that these criteria are non-exhaustive. In the context of an individual, a rigorous scrutiny of *past* practices is disfavoured, because religious beliefs frequently evolve over time.

Determining which indicators are relevant is necessarily influenced by the facts of each case, and will depend on the specific claimant and the specific religious practice or belief that is at issue. Ultimately, a court's inquiry is not aimed at exposing the breadth and depth of a person's religious convictions to judicial scrutiny. The goal is more practical and limited: ". . . the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice" (*Amselem*, at para. 52).

There is no reason why the expressed belief of an organization cannot be examined to ensure it is made in good faith and is neither a fiction nor an artifice. We have already concluded that, as a threshold matter, an organization seeking to assert a religious freedom claim under the *Charter* must at a minimum demonstrate that its purpose is primarily religious, and that it operates in accordance with this purpose. Rather than demonstrating a sincere belief — which we readily concede a mere *legal*

person is incapable of doing — an organizational claimant must show that the claimed belief or practice is consistent with both the purpose and operation of the organization.

In evaluating this consistency between the claimed belief or practice and the organization's purpose and operation, the same non-exhaustive criteria from *Amselem* can be relied on. While an organization itself cannot testify, the credibility of officials and representatives who give testimony on the organization's behalf will form part of the assessment. Objective indicators will perhaps play a more prominent role. It is proper to assess the claimed belief or practice in light of objective facts such as the organization's other practices, policies and governing documents. The beliefs and practices of an organization may also reasonably be expected to be more static and less fluid than those of an individual. Therefore, inquiry into past practices and consistency of position would be more relevant than in the context of a claimant who is a natural person.

The two-part test from *Amselem* and *Multani*, modified to apply to an organization, yields the following questions: (1) Is Loyola's claimed belief that it must teach ethics and its own religion from the Catholic perspective consistent with its organizational purpose and operation?; and (2) Does the Minister's decision to deny Loyola an exemption from the ERC Program interfere with Loyola's ability to act in accordance with this belief, in a manner that is more than trivial or

insubstantial? We are guided by the extensive findings of fact made by the application judge in answering both of these questions.

(b) Loyola's Religious Beliefs Are Consistent With Its Organizational Purpose and Operation

[141] This is not a case where the assessment of consistency is difficult, or where there is a reasonable concern that the expressed belief is made in bad faith or for an ulterior purpose. The application judge made strong findings of fact, amply supported by the record before him:

[TRANSLATION] In the present case, the evidence is clear and uncontradicted. Loyola and its members, including Principal Donovan and President Fr. Brennan, are sincerely convinced that, to accomplish their mission as a Catholic educational institution, Loyola must teach ERC with its own program and according to the precepts of the Catholic religion.

The testimony of Loyola's principal, Mr. Donovan, was unequivocal. The ten principles explained in the booklet "What makes a Jesuit High School Jesuit?" are present in all the activities of the school and in the teaching of all the courses, not only the religion course. The precepts of the Catholic religion are omnipresent at Loyola. [paras. 265-66]

The application judge heard testimony from senior officials within Loyola's organization, and found it to be credible. He also considered objective evidence, including a comparison of Loyola's present classroom practices with the underlying principles of Jesuit education. Loyola's claimed belief was not contested by the Attorney General of Quebec. Accordingly, we see no reason to disturb the application judge's factual findings.

- (c) The Minister's Decision Substantially Interferes With Loyola's Ability to Act in Accordance With Its Religious Beliefs
- Having found that Loyola's belief in its religious obligation to teach Catholicism and ethics from a Catholic perspective is consistent with its organizational purpose and operation, it is evident that the Minister's denial of an exemption from the ERC Program which has the effect of requiring Loyola to teach its entire ethics and religion program from a neutral, secular perspective infringes Loyola's freedom of religion in violation of s. 2(a) of the *Charter*.
- Again, this conclusion is compelled by the application judge's extensive findings of fact. After hearing testimony from Loyola's principal, as well as experts in theology, religion, and philosophy, he determined that [TRANSLATION] "the ERC program is incompatible with a Catholic education", and that "Loyola would violate the fundamental and mandatory laws of the Catholic Church that govern it by teaching the ERC subject with the program established by the Minister" (paras. 55 and 61). The application judge concluded that "the Minister's decision, both intrinsically and through its effects, interferes with the freedom of religion guaranteed to Loyola" (para. 289). These findings are in accordance with the evidence presented, much of which was not contested by the Attorney General of Quebec.
- [145] We conclude that the Minister's decision limited Loyola's freedom of religion in violation of s. 2(a) of the *Charter*.

(1) <u>Is the Minister's Decision Justified by Section 1 as a Reasonable Limit on Loyola's Religious Freedom?</u>

As discussed earlier, the core issue on this appeal is whether the Minister's insistence on a purely secular program of study to qualify for an exemption limited Loyola's right to religious freedom no more than reasonably necessary to achieve the ERC Program's goals. The government bears the burden of showing this. If it fails to do so, the Minister's decision is unconstitutional and must be set aside.

The Minister denied Loyola's request for an exemption from the generic ERC Program after department staff conducted an analysis of Loyola's proposed program to determine whether it was equivalent. This analysis was conducted in accordance with a direction from Jacques Pettigrew, a senior civil servant, that for a course to have an equivalent approach to the ERC Program it must be [TRANSLATION] "cultural and non-denominational" (application judge's reasons, at para. 94). Although the refusal letter to Loyola cited a variety of justifications, it is apparent that, at its core, the Minister's denial flowed from this definition of "equivalent".

In our view, there is nothing inherent in the ERC Program's objectives (recognition of others and pursuit of the common good) or competencies (world religions, ethics, and dialogue) that requires a cultural and non-denominational approach. As we noted earlier in discussing the legislative and regulatory scheme, the intention of the government was to allow religious schools to teach the ERC Program without sacrificing their own religious perspectives. This goal is entirely

realistic. A program of purely denominational instruction designed primarily to indoctrinate students to the correctness of certain religious precepts would not achieve the objectives of the ERC Program; however, a balanced curriculum, taught from a religious perspective but with all viewpoints presented and respected could, in our view, serve as an equivalent to the ERC Program. To the extent Loyola's proposal meets these criteria, it should not have been rejected out of hand.

And yet it was, because the Minister premised her denial on the flawed determination that only a cultural and non-denominational approach could serve as equivalent. This effectively negated the flexible approach contemplated by the legislative and regulatory scheme, and set a standard that would tolerate no more than a minimal deviation from the generic ERC Program. The application judge summarized the impossible position in which Loyola was placed:

[TRANSLATION] Loyola is placed in an untenable position because of the Minister's decision. Either Loyola dispenses the ERC course according to the Minister's program and . . . violates the supreme principles governing its freedom of religion, or it teaches the subject with its Catholic program and violates the Act. [para. 271]

There is unquestionably a role for the Minister to examine proposed programs on a case-by-case basis to ensure that they adequately further the objectives and competencies of the ERC Program. In certain cases, the result may be that the religious freedoms of private schools are subject to justifiable limitations. Here, however, the Minister adopted a definition of equivalency that essentially read this meaningful individualized approach out of the legislative and regulatory scheme. By

using as her starting point the premise that only a secular approach to teaching the ERC Program can suffice as equivalent, the protection contemplated by the s. 22 exemption provision was rendered illusory.

The legislative and regulatory scheme is designed to be flexible and to permit private schools to deviate from the generic ERC Program, so long as its objectives are met. The Minister's definition of equivalency casts this intended flexibility in the narrowest of terms, and limits deviation to a degree beyond that which is necessary to ensure the objectives of the ERC Program are met. This led to a substantial infringement on the religious freedom of Loyola. In short, the Minister's decision was not minimally impairing. Therefore, it cannot be justified under s. 1 of the *Charter* as a reasonable limit on Loyola's s. 2(a) right to religious freedom.

F. The Appropriate Scope of an Equivalent Program

The content and approach of Loyola's proposed program were not precisely framed in its initial proposal to the Minister. Rather, they have been fleshed out over the course of this litigation. Given our conclusion that the Minister's construction of the exemption provision was too narrow, we think it would be useful to outline the appropriate limits that could be placed on an equivalent program. We do so not to obviate the Minister's appropriate use of case-by-case discretion in future cases, but to guide the exercise of that discretion, while also providing finality to resolve the protracted dispute between the parties in this case.

Determining whether a proposed program is sufficiently equivalent to the generic ERC Program is a fact-based exercise, and the Minister may, in the exercise of his or her discretion, make this determination on a case-by-case basis. However, this case illustrates the difficulty that making such a determination can pose. In the course of this protracted litigation between Loyola and the government of Quebec, this Court and courts below have received extensive testimony, documentary evidence and oral submissions regarding Loyola's proposal and the objectives of the ERC Program. It is therefore appropriate to delineate rough boundaries within which Loyola's proposed alternative program must be delivered, in order to strike the balance required between Loyola's right to religious freedom under s. 2(a) of the *Charter*, and the need to meet the objectives of the ERC Program. These boundaries should also serve as general principles to guide future exercises of ministerial discretion, while recognizing that each request for an exemption must be considered individually and with regard to all of the particular circumstances.

In assuring compliance with the *Charter*, an exemption must take into account the practical classroom realities posed by the ERC Program's topics. While Loyola's complaint rests on its Catholic identity, this identity has implications throughout the ERC Program. In our view, it would be insufficient to merely grant an exemption for Loyola to teach Catholicism from a Catholic perspective, while requiring an unmodified curriculum and a neutral posture in all other aspects of the program. Binding Loyola to a secular perspective at all times, other than during their

discussion of the Catholic religion, offers scant protection to Loyola's freedom of religion, and would be unworkable in practice.

- Loyola proposes to teach the ethics competency in a way that recognizes its Catholic perspective. It does not want its teachers to be forced to remain neutral or more realistically, mum in the face of ethical positions that do not accord with the Catholic faith. Rather, Loyola proposes to have its teachers facilitate respectful and open-minded debate, where all positions are presented, but where students evaluate ethics and morals not in a vacuum but with knowledge of the Catholic perspective.
- Requiring Loyola's teachers to maintain a neutral posture on ethical questions poses serious practical difficulties and represents a significant infringement on how Loyola transmits an understanding of the Catholic faith. It is inevitable that ethical standards that do not comport with Catholic beliefs will be raised for discussion. Faced with a position that is fundamentally at odds with the Catholic faith, Loyola's teachers would be coerced into adopting a false and facile posture of neutrality. The net effect would be to render them mute during large portions of the ethics discussion a discussion that is, as the ERC Program presupposes, crucial to developing a civilized and tolerant society.
- [157] As an example, one can anticipate that students may wish to debate the appropriate expressions of intimacy between young people, and discuss the topic of premarital sex. It is inconceivable that a Catholic teacher could sincerely express a

neutral viewpoint on this subject — nor, in our view, should he or she be required to do so. The practical effect would be the teacher's coerced silence. This silence would, however, extend only until the teacher turned to the discussion of Catholicism under the world religions competency, at which point he or she would be free to engage in an uninhibited dialogue — respectful and open to disagreement, but able to explain why such a life choice does not comport with Catholic morality. This delayed ability to express honest beliefs and actively moderate the classroom discussion does not illustrate a tolerable compromise between the state's interest in furthering the objectives of the ERC Program and Loyola's freedom of religion. Rather, it illustrates the unsuitability and unworkability of such a framework.

As we understand Loyola's proposal, on a topic such as premarital sex, Loyola wishes to present the moral and ethical implications from a Catholic point of view. Presumably, the teacher would present a modern Catholic understanding of the subject, informed by its biblical underpinnings and supplemented by more recent theological and philosophical consideration. Loyola has also committed, however, to ensure that on every major ethical topic, students "understand not only the position of the Roman Catholic Church, but also those of all major thinkers and viewpoints" (A.F., at para. 13). In the context of this topic, Loyola's teachers would discuss with students the fact that some other religions — in fact, some strands of Christianity — do not strictly proscribe sexual intimacy between unmarried individuals. They would discuss with the students that, outside of the religious context, the dominant secular viewpoint in Western society tolerates, and even encourages sex outside of marriage.

Students would be encouraged to think critically about the different views. Teachers would clearly identify the Catholic position, and the justifications for it, while respectfully considering the other points of view. If asked a question challenging the Catholic point of view, teachers would be free to answer and defend that position — again, in the context of an open-minded and respectful conversation, but one that is grounded in the inescapable reality that Loyola is a Catholic high school whose students and parents have voluntarily selected an education infused with Catholic beliefs and values.

[159] Rejecting this framework and imposing a neutrality requirement on Loyola's teachers would not only prove undesirable from the perspective of religious freedom, it would also diminish the attainment of the ERC Program's own objectives. The dialogue competency requires teachers to honestly and actively participate in the classroom conversation. For Catholic teachers at a Catholic school, the forced neutral posture poses an unenviable choice: they can express a neutral (and therefore insincere) viewpoint on an ethical question that touches on a precept of the Catholic faith, or they can simply remain silent. Neither insincerity nor silence is conducive to the ERC Program's objectives of promoting individual deliberation and the exchange of ideas.

[160] There are subtle but important distinctions to make between the respectful treatment of differing viewpoints that Loyola proposes, and the strict neutrality required under the generic ERC Program, unalleviated by a s. 22

The ERC Program compels teachers to adopt a professional posture of strict neutrality, such that all points of view and all religious perspectives are presented as equally valid. The Minister's denial appears to be rooted in the assumption that this posture is vital to attaining the objectives of the ERC Program. If a religious perspective is offered, then all other viewpoints that do not conform to it will necessarily be derogated and disrespected. This position presents a false Loyola has strongly and repeatedly expressed that its proposed dichotomy. alternative program would treat other religious viewpoints with respect — going to the extent of inviting religious leaders from other faiths into the classroom to ensure students have a rich and full understanding of differing perspectives. However. requiring a religious school to present the viewpoints of other religions as equally legitimate and equally credible is incompatible with religious freedom. presenting fundamentally incompatible religious doctrines as equally legitimate and equally credible could imply that they are both equally false. Surely this cannot be a perspective that a religious school can be compelled to adopt.

[161] Additionally, this dichotomy does not accord with principles of interfaith cooperation and collaboration, which brings together people with deeply held commitments to their own faiths (and who therefore, by implication, have rejected other religious doctrines as "equally legitimate" or "equally credible") but who are nonetheless able to foster deep ties based on sincere mutual respect. As Loyola submitted in its letter to the Minister, [TRANSLATION] "our ethical ideal is not simply

to 'tolerate' others but indeed to 'love' others, as our Christian faith teaches us" (application judge's reasons, at para. 38).

- [162] With the foregoing in mind, we offer the following guidelines to delineate the boundaries of a s. 22 exemption in this case, and to inform the Minister's evaluation of future exemption applications:
 - Loyola's teachers must be permitted to describe and explain Catholic doctrine
 and ethical beliefs from the Catholic perspective, and cannot be required to
 adopt a neutral position.
 - Loyola's teachers must describe and explain the ethical beliefs and doctrines
 of other religions in an objective and respectful way.
 - Loyola's teachers must maintain a respectful tone of debate both by conveying their own contributions in a respectful way, and by ensuring the classroom dialogue proceeds in accordance with respect, tolerance and understanding for those with different beliefs and practices.
 - Where the context of the classroom discussion requires it, Loyola's teachers may identify what Catholic beliefs are, why Catholics follow those beliefs, and the ways in which another specific ethical or doctrinal proposition does not accord with those beliefs, be it in the context of a particular different religion or an ethical position considered in the abstract.

• Loyola's teachers cannot be expected to teach ethics or religious doctrines that are contrary to the Catholic faith in a way that portrays them as equally credible or worthy of belief. Respect, tolerance, and understanding are all properly required, and the highlighting of differences must not give rise to denigration or derision. However, ensuring that all viewpoints are regarded as equally credible or worthy of belief would require a degree of disconnect from, and suppression of, Loyola's own religious perspective that is incompatible with freedom of religion.

G. Remedy

[163] We have concluded that the Minister's decision infringes Loyola's right to religious freedom under s. 2(a) of the *Charter*, in a manner that cannot be justified under s. 1. The Court is empowered by s. 24(1) of the *Charter* to craft an appropriate remedy in light of all of the circumstances.

In Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44, [2011] 3 S.C.R. 134, this Court was presented with a similar situation — an exercise of a minister's statutory discretion in declining to grant an exemption, resulting in a violation of the *Charter* rights of the claimants. In that case, the Court declined to send the matter back for reconsideration by the Minister, but rather granted an order in the nature of mandamus, compelling the Minister to grant the exemption: *PHS*, at para. 150.

We find it neither necessary nor just to send this matter back to the [165]

Minister for reconsideration, further delaying the relief Loyola has sought for nearly

Based on the application judge's findings of fact, and considering the

record and the submissions of the parties, we conclude that the only constitutional

response to Loyola's application for an exemption would be to grant it. Accordingly,

we would order the Minister to grant an exemption to Loyola, as contemplated under

s. 22 of the regulation at issue, to offer an equivalent course to the ERC Program in

line with Loyola's proposal and the guidelines we have outlined.

Appeal allowed.

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Solicitors for the intervener the Canadian Council of Christian

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Solicitors for the intervener the Christian Legal Fellowship: Robert E. Reynolds, Montréal; Christian Legal Fellowship, Burlington, Ontario.

Solicitors for the intervener the World Sikh Organization of Canada: Shergill & Company, Surrey.

Solicitors for the intervener the Association of Christian Educators and Schools Canada: Kuhn, Abbotsford.

Solicitors for the intervener the Canadian Civil Liberties
Association: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the interveners the Catholic Civil Rights League,
Association des parents catholiques du Québec, the Faith and Freedom Alliance and
Association de la communauté copte orthodoxe du grand Montréal: Bennett Jones,
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Solicitors for the intervener the Faith, Fealty and Creed Society: Benefic, Vancouver.

Solicitors for the intervener the Home School Legal Defence Association of Canada: Côté Avocats Inc., Sainte-Julie, Quebec; Home School Legal Defence Association of Canada, London, Ontario.

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