SCC No. 35201

SUPREME COURT OF CANADA

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

BETWEEN:

LOYOLA HIGH SCHOOL

and

JOHN ZUCCHI

APPELLANTS
(Respondents)

- and –

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant)

INTERVENERS' FACTUM, SEVENTH-DAY ADVENTIST CHURCH IN CANADA AND SEVENTH-DAY ADVENTIST CHURCH – QUEBEC CONFERENCE

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

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PART I – FACTS IN ISSUE

1. On July 1, 2008, the Minister of Education for Quebec ("Minister") implemented the Ethics and Religious Culture program ("ERC").[1]

2. On August 25, 2008, Loyola High School ("Loyola") requested an accommodation from the Minister regarding the ERC so that the religious beliefs, practices and speech of Loyola staff and students would not be restricted.[2] Loyola's request included a proposed equivalent to the ERC as an accommodation alternative ("Loyola Alternative").[3]

3. On October 24, 2008, the Minister's official responsible for the ERC directed a review of Loyola's request and directed that one criterion in the review be whether the Loyola Alternative to the ERC was "confessional."[4]

4. A memorandum of assessment ("Assessment") was prepared and delivered to the Minister. In the Assessment, the Minister was advised that the Loyola Alternative to the ERC was "confessional" and, therefore, not equivalent to the ERC.[5]

5. On November 13, 2008, the Minister's Associate Deputy Minister advised Loyola that Loyola's request for accommodation would not be approved ("Ministerial Decision").[6]

6. The only basis for the Ministerial Decision was the "confessional" nature of the Loyola Alternative to the ERC.

7. The Respondent claims that there was another reason for the denial of an accommodation. The Respondent alleges that the Loyola Alternative did not include "dialogue" and that this fact played a part in the Ministerial Decision. While the desire for

[1] Appellants' Factum, **Vol I**, at para 12.

[2] Exhibit P-4: Appellants' Record, **Vol. V, p. 169.**

[3] Exhibit P-4: Appellants' Record, **Vol. V, p. 169.**

[4] Natalie Knott's Undertaking 1, Appellants' Record, **Vol. III, p. 9.** Testimony of Mr. Jacques Pettigrew: Appellants' Record, **Vol. V, p. 154-59.**

[5] Exhibit NK-1: Appellants' Record, **Vol. II, p. 126.**

[6] Exhibit P-5: Appellants' Record, **Vol. V, p. 172.**

dialogue was mentioned in the Assessment, it was not fundamental to the recommendation. On the "two main objectives of the Ethics and Religious Culture Program" there was an acknowledged equivalency.

8. In any event, it is not dialogue per se that is important to the ERC. Instead, it is the requirement that the teacher promote dialogue and "adopt a professional stance of objectivity and impartiality."[7] Of course, this is the very heart of the objection of Loyola to the ERC. When it comes to matters of faith, Loyola staff will not abandon their faith during the ERC class. They cannot and will not deny their faith, even if it is only for one class at a time.

PART II – THE QUESTION IN ISSUE

9. Did the Minister refuse to accommodate Loyola because of the "confessional" nature of the Loyola Alternative and thus violate section 2(a) of the *Canadian Charter of Rights and Freedoms* ("Charter")?

PART III – STATEMENT OF ARGUMENT

A. <u>INTRODUCTION</u>

10. This is just the second time since *Big M Drug Mart*[8] that this Court has had before it government action with an unconstitutional religious purpose. Like the Lord's Day Act, the Ministerial Decision had a religious motivation and must be declared of no force or effect under the first part of the section 1 analysis.

11. The motivation for the Ministerial Decision is clear and obvious. It is the same motivation that drives any jurisdiction to enact anti-blasphemy laws: the protection of religion. The protection of religion is a laudable objective, if done right. Unfortunately for Loyola, it was done wrong in this case and has led to limits on the religious speech of Loyola staff and students simply because the speech is religious. Unfortunately for Quebec, the Ministerial Decision places the government of Quebec with governments in Saudi Arabia, Egypt,

[7] Exhibit NK-1: Appellants' Record, **Vol. II, p. 128.**

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

Indonesia and Pakistan, where Catholics daily face limitations on what they can say for fear of being charged with the violation of anti-blasphemy laws.[9]

12. The Minister did not consider the decision of the Supreme Court of Canada in *Big M Drug Mart* when making the Ministerial Decision.[10] If she had, she would have realized that government is not entitled to act for a religious purpose.

13. By considering the confessional nature of the Loyola Alternative, the Minister crossed the bright line established by section 2(a) of the Charter. The Minister acted, at least in part, for a purpose that was religious and thus deprived the Ministerial Decision of any validity under the Charter. An unconstitutional purpose renders a government action of no force or effect, without the need for further analysis or inquiry.

14. This case is little more than a relitigation of the *Trinity Western University*[11] appeal, only this time at the high school level. In *Trinity Western University*,[12] the Supreme Court of Canada said that government may not pre-judge the religious teachings of a faith group and assume that such teachings will lead to discrimination. Evidence is required before judgment may be exercised. The government of Quebec had no evidence of discrimination on the part of Loyola at the time of the Ministerial Decision and has submitted none to this Court.

B. DISCUSSION

(i) Religious Purpose of the Government

15. This is a very rare case. Governments rarely act for a religious purpose. In fact, only two other examples have reached the Supreme Court of Canada in the thirty two year history of

[9] Reference discussion under heading "Blasphemy Laws are Unconstitutional" on pages 7 and 8 of this factum.

[10] Exhibits P-1 and P-4: Appellants' Record, **Vol. V, p. 163 and 169**

[11] *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772: Appellants' Authorities, **Vol. II, Tab 40.**

[12] *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772: Appellants' Authorities, **Vol. II, Tab 40.**

the Charter. The first was *Big M Drug Mart*, in 1985. The second was *Trinity Western University* in 2001.[13]

16. In *Big M Drug Mart*, the Supreme Court determined that the first part of the section 1 test required a court to ask whether there is a religious motivation or purpose for the government action in question. If there is, then the inquiry is at an end and the action of government is declared unconstitutional, with no consideration of whether the action is justified in a free and democratic society.[14] This is what the Supreme Court of Canada did in *Big M Drug Mart*.[15] It is also what this Court did in *Trinity Western University*.[16]

17. Ideally, all religious inquiries by government should be avoided. The Minister should not have inquired into the confessional nature of the Loyola Alternative. The Supreme Court of Canada has given direction on how religious inquiries should be handled under the Charter. Chief Justice Dickson wrote this in *R. v. Edwards Books & Art Ltd.*:

> In my view, state-sponsored inquiries into any person's religion should be avoided wherever reasonably possible, since they expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting. The inquiry is all the worse when it is demanded only of members of a non-majoritarian faith, who may have good reason for reluctance about so exposing or articulating their non-conformity.[17]

18. The actions of the Minister had a religious purpose. We know this because the Assessment says so: "The approach taken in the ERC program is a cultural one as opposed to

[13] *R. v. Big M Drug Mart Ltd.,* [1985] 1 R.C.S. 295: Appellants' Authorities, **Vol. II, Tab 32**; *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772: Appellants' Authorities, **Vol. II, Tab 40**.

[14] *R. v. Big M Drug Mart Ltd.,* [1985] 1 R.C.S. 295 at para 85: Appellants' Authorities, **Vol. II, Tab 32.**

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

[16] *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772: Appellants' Authorities, **Vol. II, Tab 40.**

[17] *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 781: Interveners' Authorities, **Tab 1.**

faith-based. It is called "cultural" because, not being confessional, it no longer offers students a particular set of beliefs or moral reference points … ."[18]

19. In many respects, the Assessment is just like the law under review in *Big M Drug Mart*. Both required non-action on the part of the governed. According to the Lord's Day Act, individuals were required to abstain from work for religious reasons. According to the Assessment, teachers were expected to refrain from confessional interaction with students, precisely because of the religious nature of the interaction. Both requirements fail the Charter test for constitutionality. Here is what Justice Dickson said about such compulsion:

> In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to.[19]

20. Justice Dickson's words in *Big M Drug Mart* about "collective responsibility" and "conformity" strike at the heart of the problem with the Assessment:

> In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the *Charter*, it is no longer legitimate.[20]

[18] Exhibit NK-1: Appellants' Record, **Vol. II, p. 126.**

[19] *R. v. Big M Drug Mart Ltd.,* [1985] 1 R.C.S. 295 at para 133: Appellants' Authorities, **Vol. II, Tab 32.**

[20] *R. v. Big M Drug Mart Ltd.,* [1985] 1 R.C.S. 295 at para 135: Appellants' Authorities, **Vol. II, Tab 32.**

21. The test applied in the Assessment and by the Minister for coercing silence on religious questions does not come close to meeting the requirements in *Big M Drug Mart* for valid government action that forces a person to act contrary to conscience or belief:

> 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.[21]

22. Professor Benjamin Berger explored the neutrality required of government under the Charter in two recent articles on diversity and tolerance.[22] Professor Berger concluded that for the state to "disparage a non-harmful religious practice or tradition is inconsistent with" the objectives of education.[23] This is, unfortunately, exactly what the Assessment did.

23. Professor Janet Epp Buckingham pinpointed the problem with the Assessment in her book Fighting Over God, where she noted that: "Some view 'freedom from religion' as 'progress' in society."[24] She challenged this view in her conclusion:

> Peter Lauwers argues that the notion that people will naturally gravitate to some form of Rawlsian rational consensus is a false one; rather, law must accept that diversity is a permanent feature of our pluralistic society. Religion is deeply important to many in Canada, providing identity, succour, community, and mutual aid. By substituting the secular majoritarianism for the Christian majoritarianism, all religions are undermined.[25]

[21] *R. v. Big M Drug Mart Ltd.,* [1985] 1 R.C.S. 295 at para 95: Appellants' Authorities, **Vol. II, Tab 32.**

[22] Benjamin L. Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality" (2013) Can. J.L. & Society, forthcoming: Interveners' Authorities, **Tab 3**; Benjamin L. Berger, "Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed" (2001) 19:2 Constit.Forum 41: Interveners' Authorities, **Tab 2**.

[23] Benjamin L. Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality" (2013) Can. J.L. & Society, forthcoming **at 18**: Interveners' Authorities, **Tab 3**; see also: Benjamin L. Berger, "Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed" (2001) 19:2 Constit. Forum 41 **at 45**: Interveners' Authorities, **Tab 2**.

[24] Janet Epp Buckingham, Fighting over God: A Legal and Political History of Religious Freedom in Canada, (Montreal: McGill-Queen's University Press, 2014) **at 211**: Interveners' Authorities, **Tab 4**.

[25] Janet Epp Buckingham, Fighting over God: A Legal and Political History of Religious Freedom in Canada, (Montreal: McGill-Queen's University Press, 2014) **at 212**: Interveners' Authorities, **Tab 4**.

24. The Respondent has tried to make something of the lack of dialogue in the Loyola Alternative. There is a significant problem for the Respondent in this line of argument, as the onus is on the government, not the governed, to find a reasonable accommodation.[26] The Minister had a duty, once informed of Loyola's religious objections, to consider all alternatives to the ERC that were reasonable.

25. In any event, the most important consideration in this appeal is the nature of a religious school. That nature precludes teachers and administrators from abandoning their faith for one class or one hour during the school day, without fundamentally changing the character of the school. The Supreme Court of Canada has specifically recognized this reality in connection with Catholic schools. In *Caldwell v. Stuart*,[27] this Court found that maintenance of the religious nature of a Catholic school is necessary to achieve the objects of the school:

> The Board found that the Catholic school differed from the public school. This difference does not consist in the mere addition of religious training to the academic curriculum. The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in the academic. It is my opinion that objectively viewed, having in mind the special nature and objectives of the school, the requirement of religious conformance … is reasonably necessary to assure the achievement of the objects of the school.[28]

(ii) <u>Blasphemy Laws are Unconstitutional</u>

26. In nations of the world where blasphemy laws are enforced, human rights rarely receive protection. Blasphemy laws are not the hallmark of a free and democratic society. However, there is no other way to describe the Ministerial Decision. The Assessment upon which the Ministerial Decision was based insisted upon a program that did not include any opinion from teachers on the subject of religion. Blasphemy laws are characterized by their prohibition

[26] *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 256 at paras 51-53: Appellants' Authorities, **Vol. II, Tab 26.**

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

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

against religious opinions offensive to the government of the day. In the context of a discussion of the Ministerial Decision, it is striking how many times blasphemy laws have been utilized in non-free societies to repress free speech in the classroom.[29] This is why free countries of the world have rejected blasphemy laws as inconsistent with religious liberty.[30]

27. The Ministerial Decision is not like blasphemy laws, in that blasphemy laws usually impose prison sentences or even death. However, the Ministerial Decision is like blasphemy laws, in that both prohibit expressions of religious opinion in the classroom.

(iii) Reasonable Accommodation Required

28. It is important to appreciate that the action of the government of Quebec under Charter review in this appeal is not the creation of the ERC. Instead, it is the Ministerial Decision to reject the Loyola Alternative. Under the Charter, government has a duty to accommodate religion, unless, for valid governmental reasons, such an accommodation would be unreasonable.[31] The Ministerial Decision did not fulfill the duty of the Minister to make a reasonable accommodation for Loyola.

29. In this case, the Minister failed twice. First, she failed to make a reasonable accommodation. Second, in making the decision to refuse accommodation, she acted for a religious reason or purpose, instead of restricting her analysis to the question of whether it was

[29] "Saudi Arabia: Teachers Silenced on Blasphemy Charges," *Human Rights Watch,* November 17, 2005 <http://www.hrw.org/news/2005/11/16/saudi-arabia-teachers-silenced-blasphemy-charges> (Muhammad Al-Harbi, a chemistry teacher, was sentenced to forty months in prison and 750 lashes for talking to his pupils about his views on Christianity, Judaism, and the causes of terrorism); "Pakistan Police Probe Lahore School Attack," *BBC News,* November 1, 2012 <http://www.bbc.com/news/world-asia-20167390> (Arfa Iftikhar was forced into hiding after being accused of giving students homework which insulted Prophet Mohammad); "International Religious Freedom Report 2012," Indonesia, *U.S. Department of State,* <http://www.state.gov/j/drl/rls/irf/2010/148869.htm> (In 2009, Indonesian teacher Wihelmina Holle was sentenced to one year in prison for allegedly insulting Islam in front of her students): Interveners' Authorities, **Tab 5**. "International Religious Freedom Report for 2012," Executive Summary, *U.S. Department of State,* <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dlid#wrapper>: Interveners' Authorities, **Tab 6**.

[30] *Criminal Justice and Immigration Act 2008* [United Kingdom of Great Britain and Northern Ireland] c. 4, s. 79.

[31] *Multani v. Commission Scolaire Marguerite-Bourgeoys,* [2006] S.C.R. 256 at para 51: Appellants' Authorities, **Vol. II, Tab 26** ("The approach to the question must be the same where what is in issue is not legislation, but a decision rendered pursuant to a statutory discretion.")

necessary to reject the Loyola Alternative to "protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[32]

(iv) Trinity Western University

30. The Minister also failed to appreciate that the principles found in *Trinity Western University* prohibit the Minister from speculating about the impact of religious instruction upon students and staff. Before limiting the ability of Loyola students and staff to have and to practice the Catholic faith, the Minister must first possess evidence that the beliefs and practices in question cause harm that the government of Quebec is entitled to ameliorate.

31. The Minister had no such evidence at the time of her decision and has tendered no such evidence in appeal. This is fatal to the Ministerial Decision.

32. Lack of evidence was also fatal to the decision under review in *Trinity Western University*.[33] In that case, the Supreme Court of Canada made three important points on the subject of religious freedom. First, the Supreme Court of Canada refused to accept mere speculation based on a review of documents published by Trinity Western University.[34] The Assessment completed for the Minister falls under the same class of evidence. It does not justify the denial of religious freedom represented by the Ministerial Decision.

33. Second, the Supreme Court of Canada expected government decision makers to respect the views of religious organizations:

> The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected. The BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU by not taking into account the impact of its decision on the right to freedom of

[32] *R. v. Big M Drug Mart Ltd.,* [1985] 1 R.C.S. 295 at para 95: Appellants' Authorities, **Vol. II, Tab 32.**

[33] *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772: Appellants' Authorities, **Vol. II, Tab 40**.

[34] *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772 at para 33: Appellants' Authorities, **Vol. II, Tab 40**.

> religion of the members of TWU. Accordingly, this Court must.[35]

34. Finally, the Supreme Court of Canada emphasized repeatedly that government should not consider the sectarian nature of a religious school or its classes when making decisions regarding the regulatory interests of government:

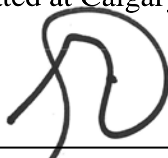
> We would add that the continuing focus of the BCCT on the sectarian nature of TWU is disturbing.
>
> …
>
> It is not open to the BCCT to consider the sectarian nature of TWU in determining whether its graduates will provide an appropriate learning environment for public school students as long as there is no evidence that the particularities of TWU pose a real risk to the public education system.[36]

PARTS IV & V

35. The Interveners request leave to make oral submissions not exceeding 15 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Calgary this 6th day of March, 2014



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[35] *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772 at para 33: Appellants' Authorities, **Vol. II, Tab 40**.

[36] *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772 at para 42: Appellants' Authorities, **Vol. II, Tab 40**.

PART VI – ALPHABETICAL TABLE OF AUTHORITIES

CASES **Paragraph(s)**

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<http://www.bbc.com/news/world-asia-20167390> 1, 2, 3, 4

“Saudi Arabia: Teachers Silenced on Blasphemy Charges,” *Human Rights Watch,* November 17, 2005 <http://www.hrw.org/news/2005/11/16/saudi-arabia-teachers-silenced-blasphemy-charges>...15, 16

PART VII – CONSTITUTION, STATUTES AND REGULATION

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

	Criminal Justice and Immigration Act 2008 [United Kingdom of Great Britain and Northern Ireland] c. 4
	79. Abolition of common law offences of blasphemy and blasphemous libel. (1) The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished.