

April 2, 2015

Loyola v. Québec and Alberta's Bill 10 – A Brief Legal Analysis

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On March 19th, 2015, the Supreme Court of Canada released its decision in the Loyola case, ruling unanimously that it was unreasonable for a provincial government to insist that an independent Catholic school could not teach ethics, culture and religion from its own worldview. The case has implications not only for Québec's religion, culture and ethics curriculum, but also for Ontario's sex-ed curriculum, Manitoba's Bill 18 and Alberta's Bill 10.

These governments are encouraged to rethink their one-size-fits-all approach to religion, ethics and secularism. Over the past two years, these provinces have imposed a particular religious – that is, secular – worldview on all schools, while ignoring or suppressing the freedom of religious institutions and families. This analysis will focus on Bill 10, but the principles apply to the other provinces as well.

Parents ought to have the first and final say on the religious and moral instruction of their children. While the State may assist parents in educating children, they may not override parental decisions relating to ethical and religious instruction. There has been a trend towards Statism in education in Canada. This decision gives hope to parents in stopping that slide.

The *Charter* describes freedom of religion and conscience as a "fundamental freedom" because it lies at the heart of Canada's free and democratic society. The Supreme Court of Canada has held that the *Charter* requires government to accommodate varying beliefs. The *Charter* also protects freedom of association, the fundamental right of individuals of like mind to gather together for common cause, like many communities do when creating an independent school. Both of these fundamental freedoms are undermined by Bill 10. However, the Loyola case focuses on the freedom of religion; thus, this analysis will also only focus on the freedom of religion.

Context of the Loyola decision

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.

How the ERC program is similar to Bill 10

In both Bill 10 and the ERC program, we see a government attempting to impose a one-size-fits-all approach on a subject or issue on all schools with no regard for the religious make up of a particular school community. In the context of the ERC program, the State chose to enforce a very particular secular approach to the teaching of ethics and religion on all schools. In Bill 10, the State chose to mandate a particular secular approach (informed by post-modern feminist and queer theory) to the issue of bullying, student safety, and sexual ethics on all schools.

Neither the Alberta nor the Quebec government made room for the possibility that their end goals might be accomplished by another means (and possibly with better effect!). The State is obliged to demonstrate why it is necessary for a confessional school to teach the curriculum devoid from a Christian confessional perspective in order to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. This applies even more so for a course or program about ethics.

The State's role in education is to see that a certain quality of education is achieved. It is interested in the ends (literacy, numeracy, civic competency, etc.), not the means to that end.¹ It does not have the power to preclude or prevent a confessional means to this end, except in very limited circumstances and then only when demonstrated to be necessary.

The requirement that a course be taught from a secular perspective (Quebec) or that a certain type of student club be mandated to promote safe space (Alberta) is coercive. It requires confessional schools to teach from a competing worldview, purporting to be "neutral".² As explained in the expert evidence before the trial court in the Loyola case, in this case the ERC program "does not intend to leave empty the place for the religious and the symbolic, but to fill it another way."³ Likewise, the imposition of GSAs on all schools is not a "neutral" approach to sexual ethics or bullying. Rather, it is designed to promote a particular ethic and worldview that may be contrary to that of the community supporting a particular school.

Provincial human rights codes also acknowledge the communal and institutional dimensions of religious practice by, for example, exempting religious institutions from certain employment standards. This Court upheld the application of such

¹ Pennings, R. et al., *A Rising Tide Lifts All Boats: Measuring Non-Government School Effects in Service of the Canadian Public Good* (Hamilton, ON: Cardus, 2012). This comprehensive sociological study found that independent religious schools statistically produce graduates who are more invested in the common good, donating more, volunteering more, etc. Based on the social-scientific evidence, independent religious education is "public" education because it contributes to and serves the common good.

² The Supreme Court, in an earlier decision, wrote, "We must recognize that trying to achieve religious neutrality in the public square is a major challenge for the state... We must also accept that, from a philosophical standpoint, absolute neutrality does not exist." *S.L. v. Commission scolaire de Chenes*, [2012] 1 S.C.R. 235 at paras. 30-31.

³ Georges Leroux, "Ethics and Religious Culture" p. 3, as cited in the report from the expert witness, Douglas Farrow, "On the Ethics and Religious Culture Program", re: *Loyola High School et John Zucchi c. Michelle Courchesne, en sa qualité de ministre de l'Éducation, du Loisir et du Sport*. Cour supérieure, district de Montréal, No500-17-045278-085.

accommodating provisions in *Caldwell v. Stuart* noting that religious conformity by Catholic teachers was reasonably necessary, objectively viewed, to ensure the accomplishment of “the religious or doctrinal aspect of the school [which] lies at its very heart and colours all its activities and programs.”⁴ It would likewise undermine the “very heart” of what it means to be a confessional school, if the teachers at these same schools were required to “turn off” their faith for the purposes of teaching a course or leading a student club, particularly when sexual ethics are implicated.

Principles from the Loyola case applied to Bill 10

First of all, we stand by our legal analysis of the case law of the Supreme Court over the past three decades. You can find ARPA Canada’s legal arguments for parental rights and religious freedom in our factum (written legal arguments) for the Supreme Court in the Loyola case on ARPA Canada’s website.⁵

To build on that foundation, the Loyola case confirmed the following:

1. The State must support pluralism and accommodate religious schools

The Supreme Court, at para. 6, summarized its finding, ruling that “prescribing to Loyola how it is to explain Catholicism to its students seriously interferes with freedom of religion”. Likewise, the Alberta government cannot tell independent Christian schools how to explain Christian sexual ethics to its students. To do so would seriously interfere with freedom of religion.

The Court quotes Prof. Moon at para. 44 who explains,

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.

This professor properly grasps the importance that the Christian worldview has to many faithful Christian individuals and communities. Their identity is primarily found in Christ. State actors must recognize this and make room for this. “Because it allows communities with different values and practices to peacefully co-exist, a secular state also supports pluralism...” (para. 45).

2. The State must justify any limitations on rights

⁴ *Caldwell v. Stuart*, [1984] 2 S.C.R. 603 at 624.

⁵ <http://arpacanada.ca/attachments/article/2035/ACES%20Factum%20final%20.pdf>

The Court also reminded the State that “The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate... reasonableness requires proportionality” (para. 38). The Quebec government failed to demonstrate how their clear violations of religious liberty were justifiable.

The Court went further at para. 43:

The... 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... A secular state respects religious differences, it does not seek to extinguish them.

Likewise, the Alberta government would do well to ask itself whether Bill 10 is balanced. The values of a secular state do not include pushing a particular worldview on sexual ethics on all school systems and religious communities. While the prevention of bullying is a good objective, that end can be met (and is being met!) in many different ways. The Alberta government does not have a monopoly on good ideas. It’s unjustifiable for the Alberta government to insist that all schools can only combat bullying through the means mandated in Bill 10.

3. The State must respect parental rights

The Court goes further in paragraphs 63 to 67, outlining how the actions of the Quebec Minister of Education “interferes with the rights of parents to transmit the Catholic faith to their children... 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.” (para. 64).

Later, the Court writes, “Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.” (para. 67) The phrase “lawful religious institutions” is important here. Independent Christian schools across the country are lawful institutions. The teaching that marriage should be between one man and one woman is also lawful, in fact, it is expressly protected in the very law that made same-sex marriage legal in Canada. And the teaching of virtue and self-restraint in sexual ethics is also legal.

All of which is to say that Bill 10 fails to recognize this reality and undermines the

wishes and principles of parents who want their children taught a particular sexual ethic.

4. Different can still be equivalent. While the State is allowed to promote a particular goal or outcome, they must allow for religious organizations to accomplish that goal in their own way

The government of Alberta, in passing Bill 10, makes the same fundamental error that the Minister of Education did in Quebec. The error is in their underlying assumptions: “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 [or GSA program] and that the religious school could not teach even its own religion from its own perspective.” (para. 5)

The Court explains why equivalence does not mean identical programming or approaches. “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.... As long as the alternative program substantially realizes the objectives of the ERC Program, it should be considered equivalent.” (para. 54, 56) The government in Alberta allows for exemptions to the State-run schools. They should also allow for exemptions in how these schools deal with bullying and how these schools teach sexual ethics.

In fact, to do otherwise violates the spirit of religious freedom: “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” (para. 63) Yet mandatory GSAs do exactly this – they require Christian schools, communities, parents, teachers and students to affirm a religious belief of sexual ethics that is contrary to their own.

The majority of the Supreme Court did say that Loyola teachers had to teach about other religions “as objectively as possible” (para. 78) which simply means that Christian schools should teach the factual elements of other religions (e.g. the 5 pillars of Islam, the 8-fold path of Buddhism, etc.), or the factual elements of laws relating to bullying or even same-sex marriage. Teaching those facts can be taught relatively objectively (and all the Christian schools we know do that anyway). However, GSAs do not allow a Christian critique of a particular sexual ethic. It is on this point, in particular where problems arise. The Alberta government’s one-size-fits-all approach fails to make room for religious schools to tackle the problem of

bullying from their own perspective, with their own religious worldview intact, and with their own virtues guiding their process.

The way forward – religious accommodation

The legal philosopher William Galston writes,

A liberal polity guided... by a commitment to moral and political pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will, rather, pursue a policy of *maximum feasible accommodation*, limited only by the core requirements of individual security and civic unity.⁶

As it is, dissent from the new orthodoxy on ethics, sexuality and religion in State-run schools is rarely tolerated. The uproar over something so harmless as a discussion on abstinence is a case in point. Why is that? Who should decide how religion or sexual ethics should be taught to a particular child: a State actor or a parent?

It would seem that the views on sexual, religious or ethical issues of some members of the education bureaucracy and of the Alberta Legislature are to be the standard for every child, regardless of the religious or ethical beliefs of a student's family. No other approach to religion or sexuality may be validly taught during class hours outside of what these State actors approve.

This is a classic case of what Galston calls "civic totalism", quite the opposite of principled pluralism. However, as detailed above, the Supreme Court has signalled that this approach violates freedom of religion. The way forward is for the Alberta Legislature to allow local schools and parents to decide how best to deal with bullying and how best to keep children safe. As long as that end is met, *how* a school or a religious community gets there should be left to them.

Reflecting on the greatest commandment,⁷ theologian, political philosopher and Dutch prime minister Abraham Kuyper once wrote, "Love for God with all your soul, all your heart, and all your mind, may yet stop at the feelings, or be confined to the ideal, but when you must love God also with all your strength, then it claims your actual life, your whole personal existence, *all the output of your person and life.*"⁸ Kuyper speaks to the reality of the pedagogy employed in many of the independent Christian schools in Alberta and across this country – every subject, every aspect of life, is totally Christ-

⁶ William A. Galston, *The Practice of Liberal Pluralism* (New York: Cambridge University Press, 2005) at 20.

⁷ "Love the Lord your God with all your heart and with all your soul and with all your mind and with all your strength." Deuteronomy 6:5, echoed by Jesus Christ in Mark 12:30.

⁸ Abraham Kuyper, *To Be Near Unto God*, trans. John Hendrik de Vries (Presbyterian and Reformed Publishing, paperback, 1979), "With All Thy Strength" p. 253 [emphasis added].

centered. Each school seeks to inculcate in their students the desire to make “all the output of your person and life” about loving God first of all and loving neighbour as self. To require a Christian school community to pretend, for even an hour a week or for one special student club, to be something else, strikes at its very heart.

Finally, it should be said that all of the forgoing is the very least accommodation the State must do to promote religious accommodation. However, it can and ought to go much further. The State should not arrogate unto itself power that it was never given. Parents are the first educators of children, and the State should have a robust policy of trusting parents to make the best decisions for their children. Civic society has much more to offer and can do education so much better than a burdensome, bureaucratic, one-size-fits-all State monopoly. A bold government with visionary leadership would recognize this and stand for freedom, liberty and prosperity.