

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT

No:

Loyola High School

and

John Zucchi

Plaintiffs

v.

Michelle Courchesne

Defendant

AMENDED MOTION TO INSTITUTE PROCEEDINGS
(Art. 110, 844, 846 C.C.P.)

IN SUPPORT OF THEIR MOTION, THE PLAINTIFFS RESPECTFULLY SUBMIT THE FOLLOWING:

A. Plaintiff Loyola High School

1. Plaintiff Loyola High School (hereinafter "**Loyola**") traces its origins back some 160 years, to the English section of St. Mary's College, which opened in 1848.
2. In 1896, the English section of St. Mary's College came under the responsibility of the newly created Loyola College, today Loyola High School.
3. Since its inception in 1848, Loyola has been administered by the Jesuit Order.
4. Loyola's statement of identity contains the following:

"The goal of Loyola High School is the formation of mature, responsible, Christian adults, in accordance with the tradition of the Catholic Church and the Society of Jesus."
5. Loyola's mission statement begins with the following words:

“Loyola is a Jesuit, Catholic school that challenges its young men to become intellectually competent, open to growth, religious, loving and committed to doing justice.

A university-preparatory school, Loyola is committed to the development of the whole person through a comprehensive educational experience of academic excellence, spiritual and religious formation, and extra-curricular involvement.

In the Ignatian spirit of care and concern for the individual, Loyola strives to develop the diverse and unique talents of each member of the Loyola community, and encourages the use of these talents to serve others for the greater glory of God.”

6. Loyola is a body corporate governed by Part III of the *Companies Act* (R.S.Q., c. C-38).
7. Loyola is a religious non-profit organization.
8. Loyola operates a private educational institution in Quebec with 734 students.
9. Loyola is subject to the *Act respecting Private Education* (R.S.Q., c. E-9.1) (hereinafter the “**Act**”) and holds a permit pursuant to the provisions of the Act.
10. Loyola has educated generations of Quebecers and among its alumni can be found many prominent members of the community.

B. Plaintiff John Zucchi

11. Plaintiff John Zucchi is the father of Thomas Zucchi and has been mandated by Thomas’s mother Cecilia Grava to institute the present proceedings.
12. Mr Zucchi and Ms Grava are Catholic and wish to give Thomas a religious and moral education in keeping with their Catholic convictions.
13. For that reason, Thomas attends Loyola in Secondary III.

C. The Defendant minister

14. The Defendant is Minister of Education, Recreation and Sports, and in that capacity is vested with powers bestowed upon her by statute of the Quebec National Assembly and by regulation of the Government of Quebec.
15. The Defendant minister is responsible for administering the work of the Ministry of Education, Recreation and Sports (hereinafter the “**Ministry**”).
16. Moreover, the Defendant minister is vested with the power to grant exemptions pursuant to section 22 of the *Regulation respecting the application of the Act respecting Private Education*, (c. E-9.1, r. 1), as will be more fully discussed below.

D. The legislative and regulatory background

17. Pursuant to the Act, schools under its regime are subject to the following provisions.
18. The first paragraph of section 32 of the Act reads as follows:

“32. The elementary school program of studies and the secondary school program of studies in general education shall, for compulsory subjects, be the programs established by the Minister under section 461 of the Education Act (chapter I-13.3).”
19. The opening words of section 25 of the Act, up to and including subparagraph 1 of the first paragraph, read as follows:

“25. The basic school regulation which applies to the educational services contemplated in this division shall be the basic school regulation prescribed under the Education Act (chapter I-13.3) which applies to the educational services of the category dispensed by school boards, in all matters concerning

 - 1) the subjects to be taught, subject to restrictions mentioned in the permit;”
20. In short, the Act, at sections 32 and 25 respectively, makes applicable to the schools governed by it both the “Programs of Studies” and the “Basic School Regulation” adopted for public schools pursuant to the *Education Act* (R.S.Q., c. I-13.3).
21. Prior to the current academic year, the Program of Studies for secondary education provided for a choice between Catholic Religious and Moral Education, Protestant Religious and Moral Education and Moral Education. Beginning in the

2008-2009 academic year, the Program of Studies has been amended by the abolition of all three of these choices, and their replacement by a single new series of courses labelled "Ethics and Religious Culture" (hereinafter "**ERC**").

22. The *Basic School Regulation for Preschool, Elementary and Secondary Education* (c. I-13.1, r. 3.1) (hereinafter the "**Basic School Regulation**") has likewise been amended, notably at sections 23 and following, to make the ERC courses compulsory.

23. Pursuant to the Act, the Government of Quebec has adopted the *Regulation respecting the application of the Act respecting Private Education* (c. E-9.1, r. 1) (hereinafter the "**Regulation**"), section 22 of which reads as follows:

"22. Every institution shall be exempt from the application of the first paragraph of section 32 provided the institution dispenses programs of studies which the Minister of Education judges equivalent.

Furthermore, if the Minister of Education so authorizes, a religious non-profit organization or association shall be exempt from the application of subparagraph 1 of the first paragraph of section 25, the fourth paragraph of section 32 and section 35 of the Act respecting private education, provided the organization or association meets the conditions set out by the Minister of Education."

24. The effect of this provision is to allow all private educational institutions subject to the Act to seek exemption from the requirements of the Ministry's Program of Studies as set out in the first paragraph of section 32 of the Act, which has been quoted above. Furthermore, it allows schools of a religious character to seek certain further exemptions, notably with respect to the requirements of the Basic School Regulation as set out in subparagraph 1 of the first paragraph of section 25 of the Act, which has also been quoted above.

25. The criterion for applying for an exemption under section 22 of the Regulation is that of equivalence.

26. In this regard, it should be stressed that equivalence is the sole criterion which the minister is to turn her mind to in the exercise of the power vested in her by virtue of said section 22.

27. If equivalence is present, the minister has no discretion and must grant the exemption, as is evidenced by the use of the imperative word *shall* in both paragraphs of section 22.

E. The background to the Plaintiff's request

28. During the process by which the Ministry advised schools of the forthcoming ERC courses, the administration of Loyola came to the conclusion that the program was fundamentally incompatible with its Catholic convictions and mission.
29. The issue was not with the idea of exposing students to several important religions and religious traditions. Indeed, Loyola has for many years taught its students about other religions. In addition to teaching the Catholic faith to its student body, it has sought to foster a deep understanding and appreciation of other religions in its students.
30. Rather, the incompatibility, which is both substantive and methodological, is that the ERC programme put forward by the Ministry represents and inculcates a relativistic philosophy, which, to employ for convenience a label used by some academics, may be referred to as "normative pluralism", and a pedagogy that corresponds to that philosophy.
31. Far from being a neutral philosophical position, normative pluralism is as infused with philosophical and ideological content as any other religion or philosophy. It is part of a well-established school of relativistic thought, being represented by academics and thinkers. Its fundamental tenets entail the denial of any claims to truth beyond the subjective experience of each individual and the reduction of all religious beliefs and traditions to the level of purely human manifestations, stripping them of all transcendent dimensions. Normative pluralism effectively trivializes and implicitly negates religious belief and experience.
32. A detailed exposition of normative pluralism will be adduced before this Honourable Court through the presentation of expert evidence.
33. Expert evidence will also demonstrate that the ERC program, both in its substance and methodology, is by no means a neutral presentation of various religious traditions, but is replete with normative pluralism as its fundamental ideological undercurrent.
34. The world view espoused by normative pluralism is incompatible with the Plaintiff's Catholic character.
35. Moreover, while the new program does not prohibit private Catholic schools such as Loyola from providing supplementary religious education in addition to the mandatory ERC courses, such a course of action is unacceptable in that it would amount to inculcating in students two incompatible world views.

F. Loyola's request

36. As a result of the above, on 30 March 2008, Loyola sent a formal written request to the Defendant minister asking her to exempt it from the requirement to follow the Ministry's ERC curriculum, as appears from said request, to be filed as **Exhibit P-1**.
37. As appears from request P-1, Loyola, from the outset, stated the above-mentioned incompatibility as its reason for seeking the exemption.
38. Secondly, Loyola indicated its intention to provide an equivalent curriculum, with a view to meeting the Ministry's objective of ensuring that young Quebecers are provided with an understanding and appreciation for religions other than their own.
39. Thirdly, Loyola emphasised that its proposed approach to teaching other religions goes far deeper than the Ministry's course. Indeed, rather than reducing religions to their purely cultural dimension, Loyola approaches the exposition of other religions from the standpoint of instilling in its students a level of appreciation for the profound spiritual dimensions of such other religions. Loyola's espousal of such an approach stems from its administration's deeply-held conviction that tolerance and peaceful cohabitation in contemporary society are much more likely to be achieved where each individual is first and foremost well grounded in his or her own beliefs and identity, rather than by the imposition of a single State-sanctioned ideology which the State seeks to see embraced by all.
40. The Ministry first responded by seeking further information about the alternative curriculum being proposed by Loyola.
41. Loyola provided the information sought, notably the outline to be filed as **Exhibit P-2**.
42. Then, in a letter dated 7 August 2008, the Defendant minister denied the request for an exemption, as appears from said letter, to be filed as **Exhibit P-3**.
43. Decision P-3 was received by Loyola on or about 14 August 2008.
44. Feeling the Defendant minister had misunderstood its request, interpreting the proposed alternative curriculum as simply a return to the former Catholic Religious and Moral Education curriculum, the Plaintiff wrote once again to the minister on 25 August 2008, as appears from a letter of that date, to be filed as **Exhibit P-4**.
45. Letter P-4 asked the Defendant minister to reconsider her decision and respond by 5 September 2008.

46. As of the date of the institution of the present proceedings, the Defendant minister had not yet favoured Loyola with a reply. In a decision dated 13 November 2008, Line Gagné, assistant deputy minister, rendered a decision communicated herewith as **Exhibit P-5**, once again rejecting the request for an exemption. Decision P-5 will be discussed at length following the analysis of Decision P-3.

G. The illegality of Decision P-3

47. Decision P-3 is illegal for several reasons, as shall be outlined below.

48. The Plaintiffs therefore invite this Honourable Court to quash the decision and order the Defendant minister to grant the exemption.

49. The Plaintiffs' legal grounds are two-fold, flowing from both administrative law and constitutional law.

(a) Administrative law grounds

50. The request for an exemption was accompanied by a proposal involving an equivalent course of study.

51. The Ministry initially approached the request from the point of view of equivalency, seeking and obtaining further information about Loyola's proposed program for the teaching of world religions.

52. In reaching her decision, however, the Defendant minister failed to turn her mind to the criterion of equivalency set out in section 22 of the Regulation, making no mention of it in her reasons.

53. In addition, the Defendant minister applied an incorrect criterion which has no basis in the regulation or in the governing statute.

54. Indeed, her decision is based solely on her desire to achieve complete uniformity in education throughout Quebec. As she put it in her reasons, granting the exemption "*empêcherait les élèves visés de recevoir la formation souhaitée pour tous les élèves du Québec*".

55. And yet, nowhere does the regulation or the legislation mandate uniformity. Quite the opposite, several provisions, and section 22 of the Regulation in particular, expressly permit exemptions and derogations of various kinds. This flexibility is in harmony with other Quebec legislation, notably the *Charter of Human Rights and Freedoms* (R.S.Q., c. c-12), which bears witness to the Quebec National Assembly's special attention to institutions with a religious character.

56. Refusal of the request for an exemption on the sole ground that it would prevent the realisation of complete uniformity across Quebec constitutes, from the standpoint of administrative law, the application of an illegal and improper test

which calls for the intervention of this Honourable Court, exercising its supervisory jurisdiction over the acts of the executive branch of government.

57. Decision P-3 must therefore be quashed.
58. Moreover, given the imperative nature of section 22 of the Regulation, which uses the word *shall*, it is clear that in the absence of an express finding of lack of equivalence, the Defendant minister is bound and must grant the exemption.
59. Loyola is therefore entitled to an order from this Honourable Court that the Defendant minister be ordered to grant the exemption.

(b) Violation of constitutional and quasi-constitutional norms

60. While reserving its rights to do so at a later time, the Plaintiffs are not seeking declaratory relief with respect to the constitutionality of any legislative or regulatory provisions, notably the provisions of the Basic School Regulation making the ERC courses compulsory.
61. The Plaintiffs do argue, however, that in rendering her decision in response to Loyola's request for an exemption, the Defendant minister had the duty to act in accordance with constitutionally and quasi-constitutionally entrenched rights and freedoms and that Decision P-3 is reviewable on constitutional grounds for having violated such rights, both those of Loyola and the underlying individual rights.
62. Notwithstanding the 1997 constitutional amendment concerning the application of section 93 of the *Constitution Act 1867* to Quebec and the subsequent deconfessionalisation of Quebec's public schools, Loyola remains a private confessional, Catholic school.
63. As such, the failure by the Defendant minister to grant the exemption has the effect of imposing on Loyola the propagation of a world view which is incompatible with its Catholic mission. This runs afoul of its constitutionally protected freedom of religion, both under section 3 of the Quebec *Charter of Human Rights and Freedoms* and section 2a) of the *Canadian Charter of Rights and Freedoms* and, in the latter case, is not justified under section 1.
64. Moreover, Loyola's request for an exemption aims not only at preserving its integrity and character as a Catholic educational institution, but also at allowing Catholic parents to exercise their right to educate their children according to their religious convictions.
65. To that extent, Loyola's application for an exemption is made on behalf of all such parents.
66. Co-plaintiff John Zucchi is such a parent, whose son Thomas is a student at the school.

67. Given his Catholic convictions, co-plaintiff John Zucchi has expressed the desire that Thomas not take the ERC course.
68. Loyola has also received hundreds of other expressions of disapproval of the ERC program from other parents of students.
69. The right of Quebec parents to give their children a religious and moral education in keeping with their convictions is entrenched in section 41 of the *Charter of Human Rights and Freedoms* which, despite having been amended in 2005, nevertheless preserves that right.
70. Any decision of the executive branch of government which is at cross-purposes with the practical exercise of that right, by seeking to impose a relativistic ideology whose effect will be to undermine the religious and moral education sought by the parents, runs afoul of section 41 of the *Charter of Human Rights and Freedoms* and must therefore be quashed by this Honourable Court.
71. That must therefore be the fate of Decision P-3.
72. Decision P-3 also violates the child's right to freedom of religion, the State having no place in imposing its views about religion on children.
73. Indeed, the 1997 amendment to the *Constitution Act 1867*, which, by the addition of a new section 93A, rendered inapplicable to Quebec the historical rights to confessionally-based education in public schools, in no way paved the way for the State to arrogate to itself the role formerly played by Catholic and Protestant public schools, in order to pursue the indoctrination of Quebec youth into a new, single, State-sanctioned ideological paradigm. According to well-established constitutional principles, the Canadian State, both in its federal and provincial ramifications, has no place in the promotion of any such ideology, be it normative pluralism or any other.
74. It is ironic that while overtly espousing the separation of Church and State and promoting "*la laïcité*", the Quebec State has chosen to cross the boundary between the two and to exercise direct intervention by secular authorities in affairs of religious conviction.
75. As shall be demonstrated before this Honourable Court through expert evidence, the Quebec State and the leading exponents of this new method, have rejected both the so-called communitarian model followed in certain countries in northern Europe, which preserves confessional education in public schools, and the French republican model of a secular State, where the State abstains from intervention in religious affairs. Rather, forsaking both of these avenues, the Government of Quebec, and in particular the Defendant minister, have chosen to assume the role historically played by established confessional schools, thereby encroaching upon the religious lives of Quebec citizens.

76. In the present case, granting Loyola's request for an exemption was the only way for the Defendant minister to have proper regard for the constitutional and quasi-constitutional principles set out above. Unfortunately, the Defendant minister failed to do so.
77. As a result, in addition to the administrative law arguments set out above, Decision P-3 must therefore also be quashed on constitutional and quasi-constitutional grounds.

H. The illegality of Decision P-5

(a) Administrative law grounds

- 77.1 From the standpoint of administrative law, and in contrast with Decision P-3, Decision P-5 has the merit of addressing the criterion of equivalency.
- 77.2 That being said, it misapplies it and is therefore subject to judicial review by this Honourable Court.
- 77.3 Indeed, of the six bases on which the ministerial official concluded that Loyola's programme fails to comply with the criterion of equivalency, five are explicitly grounded in Loyola's Catholic character:

"[Le programme de Loyola High School] englobe une conception de l'autre, mais toujours par rapport à la perspective chrétienne catholique."

"[C]ontrairement au programme Éthique et culture religieuse, le programme de Loyola High School n'amène pas l'élève à réfléchir sur le bien commun, ni sur des questions d'éthique, mais l'amène plutôt à adopter la perspective jésuite du service chrétien."

"[L]e volet éthique du programme proposé par Loyola High School apparaît axé sur l'enseignement de repères moraux édictés par l'Église catholique."

"[Le programme de Loyola High School] ne satisfait pas aux exigences du programme Éthique et culture religieuse relatives à la culture religieuse, car l'étude des religions apparaît être réalisée en lien avec la religion catholique."

"[L]’enseignant du programme proposé par Loyola High School semble devoir enseigner les fondements de la religion et de l’univers des croyances catholiques jésuites." [emphasis added]

- 77.4 The one remaining basis which does not make specific reference to Loyola's Catholic character is the fourth, which simply says, ambiguously, that "*le programme proposé par Loyola High School ne prévoit pas le développement de la compétence à la pratique du dialogue au sens où le programme Éthique et culture religieuse l'entend*".
- 77.5 There is no ambiguity, however, in the overall thrust of Decision P-5. It is clear that the Ministry's basis for concluding that Loyola's programme fails to comply with the criterion of equivalency is that it is Catholic in character.
- 77.6 From the standpoint of administrative law, this is an erroneous and unreasonable misapplication of that criterion, which requires that Decision P-5 be quashed by this Honourable Court.
- 77.7 Indeed, section 22 of the Regulation must be read as promoting flexibility and, in particular, enabling private religious educational institutions to cultivate the specificity which is theirs. To invoke this very specificity as the basis on which equivalency is found to be wanting is therefore to turn the provision on its head.
- 77.8 "Equivalent" does not mean "identical". If it did, there would be no point for Loyola to request the exemption nor for the Government of Quebec to have provided a specific mechanism in the Regulation for the granting of such exemptions.
- 77.9 Moreover, what is most striking in Decision P-5 is the lack of any explicit basis *other than Loyola's Catholic character* for refusal of the request for an exemption.
- 77.10 Decision P-5 therefore establishes that, but for the improper basis of Catholicity, the Ministry does in fact view Loyola's programme as being otherwise equivalent.
- 77.11 This constitutes grounds for this Honourable Court to order that the exemption be granted.
- (b) Constitutional law grounds
- 77.12 The constitutional grounds set out in paragraphs 60 through 77, above, in relation to the earlier Decision P-3, apply with equal force to Decision P-5.
- 77.13 Indeed, Decision P-5 not only runs afoul of the constitutional and quasi-constitutional principles set out in those paragraphs; it even goes so far as to make explicit the imposition on a religious institution of the ministerial view on such critical matters as the common good and the recognition of others.
- 77.14 Whereas the earlier Decision P-3 denied the request for an exemption on the basis of the impediment it would create to the uniform propagation of ministerial ideology (in that the exemption "*empêcherait les élèves visés de recevoir la formation souhaitée pour tous les élèves du Québec*"), Decision P-5 overtly condemns the teaching of the subjects in question (ethics and religious culture)

on the basis of a Catholic understanding of the common good and of the recognition of others.

- 77.15 In its sixth and final reason, Decision P-5 also explicitly condemns a pedagogical methodology which incorporates the transmission of Catholic beliefs and worldview in the exposition of the topics covered by the programme. It thus demands that Loyola teach the subjects of ethics and of religious culture in a manner that violates the school's mission and the fundamental pedagogical commitments that govern all of its teaching.
- 77.16 Decision P-5 must therefore also be set aside on constitutional grounds.
78. Moreover, in order to ensure the respect of Loyola's and co-plaintiff Zucchi's constitutional and quasi-constitutional rights, the plaintiffs ask, on this basis also, that this Honourable Court order that the exemption be granted.
79. The Plaintiffs reserve the right to amend the present proceedings to seek a declaration that sections 23 and 23.1 of the Basic School Regulation be declared invalid and inoperative as being in violation of fundamental rights and freedoms as set out in the *Canadian Charter of Rights and Freedoms* and the *Charter of Human Rights and Freedoms*.
80. The Plaintiffs also reserve the right to seek interim relief as required.
81. The present motion is well founded in fact and in law.

WHEREFORE, THE PLAINTIFFS PRAY THIS HONOURABLE COURT TO:

- A. GRANT** the present Motion;
- B. QUASH** the decision of 7 August 2008 of the Minister of Education, Recreation and Sport;
- B.1 QUASH** the decision of 13 November 2008 of Ms Line Gagné of the Ministry of Education, Recreation and Sport;
- C. ORDER** the Minister of Education, Recreation and Sport, within 15 days of the judgment, to grant Loyola's request for an exemption and to relieve it of the obligation to teach the Ministry's Ethics and Religious Culture courses as set out in its program, on the condition that the Loyola High School's program as set out in Exhibit P-2 be taught to students in Secondary I, II, IV and V;
- D. ORDER** that the judgment remain executory notwithstanding appeal;
- E. GRANT** any other relief as required to serve the interests of justice;
- F. THE WHOLE** with costs.

Montreal, 2 December 2008

(Sgd) Borden Ladner Gervais LLP

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