

‘A Delicate Exercise’: Balancing Freedom for and Freedom from Religion in Canada: *Loyola High School v Quebec (Attorney General)*

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In *Loyola High School v Quebec (Attorney General)*¹ the Supreme Court of Canada (SCC) found that a Roman Catholic high school run by the Jesuits in Montreal, could be exempted from the provincial Ethics and Religious Culture Program (ERCP), legislatively mandated for all schools in Quebec, whether public or private, provided it offered an ‘equivalent program’, if from a Roman Catholic perspective. In the earlier companion case, *SL v Commission scolaire des Chênes*,² the Court held that religious parents could not claim an exemption for their children enrolled in the public schools from the same course. This discrepancy between the legal treatment of children in fee-paying religious schools and children in the public school system is one of several interesting aspects of the *Loyola* decision which this comment will address. Notwithstanding this discrepancy, the Court also restated its earlier observations about the nature and meaning of section 2(a), ‘freedom of conscience and religion’, of the Canadian Charter of Rights and Freedoms (the Charter), thereby reassuring some Canadian observers that it is committed to a more robust protection of freedom of religion than may have been surmised from its earlier freedom of religion jurisprudence. Equally interesting is that, in coming to its decision, the majority of the Court moved away from the Court’s earlier approach to freedom of religion issues of applying first section 2(a) and then section 1 of the Charter, which operates as a brake on full freedom of religion, to a proportional analysis more in tune with proportionality tests for religious freedom found in English and European cases. Whether this is the start of a long-term trajectory in Canadian freedom of religion cases or a single instance remains to be seen.

1 2015 SCC 12 (CanLII).

2 2012 SCC 7 (CanLII). For a comment, see M Ogilvie, ‘What’s sincerity got to do with it? Freedom of religion in Canada’, (2012) 14 *Ecc LJ* 417–425.

BACKGROUND

The ERCP at the heart of both decisions has been compulsory in all schools in Quebec from kindergarten to grade 12 since 2008. Its two stated objectives are the recognition of others, based on the principle that all people possess equal value and rights, and the pursuit of the common good, designed to foster shared values of human rights and democracy.³ The programme seeks to develop three competencies in students: understanding religious culture, including the study of world religions; ability to reflect on ethical questions; and ability to engage in dialogue. The first competency explores the socio-cultural contexts of different religions and takes a cultural and phenomenological rather than doctrinal approach. The ethics component is designed to encourage critical reflection by students on their own ethical conduct as well as that of others, especially from different religious and social groups. The dialogue component is meant to help students develop the skills necessary to interact with people of diverse beliefs.

Each component is taught through themes. The world religions component includes elements of different religious traditions, such as representations of divinity, creation stories, meaning of life and death, and religious rites; Quebec's religious heritage; and the development of world religions. The ethical component explores themes such as freedom, autonomy and tolerance, and the dialogue component explores different forms of dialogue, strategies for explaining and challenging different points of view, and ways of thinking that undermine dialogue such as stereotyping and prejudice. The general orientation of the programme is secular and cultural and, although teachers are given flexibility, they are expected to be objective and impartial, and to refrain from advancing the truth of any particular belief system. The main criticism of the programme is that it promotes relativism by presenting various religious and cultural positions as equally valid, thereby interfering with parental abilities to pass on their faith to their children.

As a Roman Catholic school, Loyola High School applied for an exemption from teaching the programme designed by the province, proposing an 'equivalent' programme, as permitted by the legislation. The Minister of Education exercised her discretion by rejecting two variations proposed by Loyola, based on teaching the programme from a Roman Catholic perspective as would be expected in a Roman Catholic school. On application for judicial review of the Minister's decision, the applications judge found the Minister's decision incorrect as a violation of Loyola's freedom of religion.⁴ The Quebec Court of Appeal unanimously overturned that decision, finding that the Minister had exercised

³ The following description is drawn from the majority decision of Abella J in *Loyola* at paras 10–17.

⁴ 2010 QCCS 2631 (CanLII).

her discretion in a reasonable manner and that the programme did not substantially interfere with Loyola's freedom of religion.⁵

SUPREME COURT HEARING

On appeal to the SCC, Loyola revised its proposal for an equivalent programme, so that it would teach the first component objectively and the second from a Roman Catholic perspective, with the third component integrated into the first and second components. The Minister continued to assert that no component taught from a religious perspective is an equivalent programme meriting the exemption. While the SCC was unanimous in support of Loyola's position, two very different approaches were taken by the two justices writing decisions. Both Abella J (writing for three other justices) and McLachlin CJ (writing for two other justices) began by considering the unresolved question of whether Loyola as a corporation could enjoy freedom of religion, coming to different conclusions. Then, while Abella J moved into a proportionality analysis to decide whether there had been an infringement of freedom of religion, McLachlin CJ proceeded to the standard Canadian Charter analysis. Abella J spent considerable time defining freedom of religion, which constituted the significant aspect of the entire decision, but McLachlin CJ gave very little consideration to the issue at all. Finally, in respect to the remedy, Abella J remitted the matter to the Minister for reconsideration, while McLachlin CJ would have granted a mandamus that the Loyola programme be approved by the Minister.

The initial issue of whether Loyola as a corporation could enjoy freedom of religion may be addressed directly. Abella J concluded that the matter need not be resolved here because, although she recognised that individuals may require a legal entity to give effect to the communal aspects of religion, the Minister was bound to exercise her discretion in a way that respected the values underlying the grant of her decision-making authority, including the Charter-protected freedom of religion of individual members of the Loyola community who wished to receive a Roman Catholic education.⁶ By contrast, McLachlin CJ would have decided that corporations, including non-profit corporations such as Loyola, enjoy freedom of religion *qua* corporation. Section 2(a) of the Charter protects both individual and collective freedom; individual and collective aspects of freedom of religion are indissolubly intertwined because individual religious freedom cannot flourish without the entities through which individuals express and transmit their faith. The SCC had previously found that other Charter freedom guarantees – for example, to expression or from unreasonable search and seizure or to trial within a reasonable time – were applicable to

⁵ 2012 QCCA 2139 (CanLII).

⁶ *Loyola* at para 34.

corporations⁷ and she saw no reason why freedom of religion should not be added.⁸ She noted that the Charter expressly applied to ‘everyone’ not every ‘individual’, so that corporate entities could be included,⁹ and proposed two criteria that an entity should meet: being constituted primarily for religious purposes; and operating in accordance with those religious purposes.¹⁰ Loyola High School obviously satisfied those criteria. While Abella J gave no reasons why she preferred not to decide whether religious entities enjoyed section 2(a) rights, arguably McLachlin CJ’s approach is preferable. Any concerns about granting religious freedom rights to religious entities which might assert rights of an unacceptable nature should be mollified by remembering that, like individuals asserting such rights, they would still be subject to both section 1 of the Charter and the general law, including the criminal law.

To address the central question of whether the freedom of religion of Loyola community members had been infringed, Abella J adopted the analytical framework that the Court had set out in an earlier case, *Doré v Barreau du Québec*,¹¹ for judicial review of discretionary administrative decisions: that is, the role of the court is to decide whether there had been a proportionate balance between the Charter-protected rights at stake and the relevant statutory mandate of the decision-maker. Charter rights are to be limited no more than necessary given the statutory objectives, and the decision must be reasonable. Religious rights should not trump core national values, such as equality, human rights and democracy, and religious freedom must be understood in the context of a secular, multicultural and democratic society. Thus, in the Loyola context, the state has a legitimate interest in ensuring that students are prepared to live in a pluralist, democratic society whose interests must be balanced against Loyola’s freedom of religious rights.¹²

Turning to the two interests to be proportionately balanced, Abella J stated that the key factor was whether Loyola’s proposed programme could be ‘equivalent’ to the provincial programme in advancing the state’s interests. The existence of statutory provision for the substitution of equivalent programmes meant that equivalent programmes could be approved and that they were not expected to be identical to the provincial programme.¹³ That Loyola’s programme would be taught from a Roman Catholic perspective, at least partially, was problematic since the provincial programme was expected to be neutral. In Abella J’s

7 *Edmonton Journal v Alberta* 1989 CanLII 20; *Hunter v Southam Inc* 1984 CanLII 33; *R v CIP Inc* 1992 CanLII 95.

8 *Loyola* at paras 95–99, also noting international protections for collective rights to freedom of religion.

9 *Ibid* at para 102.

10 *Ibid* at para 100.

11 2012 SCC 12 (CanLII).

12 *Loyola* at paras 36–48.

13 *Ibid* at para 54.

view, this engaged the other interest to be balanced – Loyola’s freedom of religion – and in addressing this she revisited the nature of the section 2(a) protection.

Abella J based her analysis of section 2(a) on that set out in *R v Big M Drug Mart*,¹⁴ the first SCC decision on section 2(a), in particular on the idea that no one can be forced to adhere to or refrain from a particular belief system. Thus, for Abella J, freedom of religion means, first, freedom to choose to believe or not to believe. Second, religious freedom is also about religious relationships: that is, religious belief is socially embedded in communal institutions. Third, communal institutions are crucial to the manifestation and transmission of religious belief systems. Fourth, since section 2(a) precludes the state from dictating or interfering with the transmission of religious belief, for the province to tell a Roman Catholic school how to explain its faith undermines religious freedom because it requires a religious entity to speak about its beliefs in terms defined by the state rather than its own understanding of its beliefs. Fifth, this also interferes with the rights of the parents to transmit their faith through communal institutions. Thus, she concluded that there would be a profound interference with religious freedom if Loyola had to teach provincially mandated programmes.¹⁵

Abella J suggested that the underlying problem with the Minister’s decision was that it assumed that teaching the provincial programme from a Roman Catholic perspective was necessarily inimical to the programme’s core objectives; however, because private religious schools are permitted in Quebec this assumption is unreasonable, so that the decision based on it is also unreasonable. Rather, she accepted Loyola’s proposal to teach the first component from a neutral perspective combined with teaching the second component from a Roman Catholic perspective as a reasonable compromise, admitting that it would be ‘a delicate exercise’ to navigate between being objective and respectful about other religions while teaching Roman Catholicism as well.¹⁶ She concluded that a proportionate and reasonable balance of Charter protection for freedom of religion and the statutory objectives of the provincial programme would require such, and that the ERCP objectives could be achieved through Loyola’s equivalent programme.¹⁷ She remitted the matter to the Minister to reconsider in light of the majority reasons.¹⁸

In the course of her decision, Abella J also made a number of observations about the proper role for the state in a religiously pluralistic society. First, a secular state should not interfere with religious beliefs except where they

14 1985 CanLII 69 (SCC).

15 *Loyola* at paras 58–64.

16 *Ibid* at para 73.

17 *Ibid* at paras 58–80.

18 *Ibid* at para 81.

conflict with or harm overriding public interests. Second, a secular state should neither support nor prefer one religious group over another. Third, a secular state permits its members to hold or manifest different religious beliefs. Fourth, a secular state respects religious differences and does not seek to extinguish them. Fifth, through its neutrality, a secular state affirms and recognises the religious freedom of individuals and their communities. Finally, a secular state supports religious pluralism.¹⁹ In short, Abella J believed that it is possible to balance freedom of religion with religious and other diversity provided some national values are paramount, such as equality, human rights and tolerance. Whether core national values facilitate or have the potential to smother religious freedom was not addressed.

While McLachlin CJ agreed with the outcome, she took a different approach, with very little to say about freedom of religion pursuant to section 2(a) of the Charter notwithstanding the fact that, unlike Abella J, her entire analysis was founded on section 2(a). She characterised the ERCP as requiring respect for freedom of conscience and religion, which spills over into the provision of exemptions to ensure the needs of a religious school. She believed this reading to be necessary to ensure that the state neither promotes nor discourages religion in the public school system and that this same obligation has even greater resonance in the private system.²⁰ Instead of adopting the proportionality analysis of the majority, McLachlin CJ preferred the traditional Charter approach of deciding, first, whether there is a breach of the section 2(a) protection for freedom of religion, and second, whether the limitation on religion is reasonable and demonstrably justifiable under section 1 of the Charter. In her view, the two approaches are similar since they both ask whether the Minister's decision was a proportionate limitation on Loyola's freedom of religion: that is, whether it limited religious freedom no more than necessary.²¹

Turning first to the section 2(a) claim, McLachlin CJ observed that Loyola's proposal departed from the provincial programme in two ways: it proposed teaching Roman Catholicism from a Roman Catholic perspective and emphasising the Roman Catholic point of view in discussing ethical questions, although it would take a neutral perspective on world religions. Yet the proposal would achieve the two key objectives of the ERCP of recognition of others and the pursuance of the common good.²² Section 2(a) encompasses freedom to manifest belief by teaching and dissemination, so the question is whether the Minister's decision infringed that aspect of Loyola's section 2(a) rights. To

19 Ibid at paras 43–46.

20 Ibid at paras 103–112.

21 Ibid at para 114.

22 Ibid at paras 128–129.

decide, McLachlin CJ restated the earlier two-part test for infringement formulated in *Multani v Commission scolaire Marguerite-Bourgeois*²³ of sincere belief in a practice or belief that has a nexus with religion, and interference in a non-trivial and not insubstantial manner with the ability to act in accordance with that practice or belief.²⁴ Since this test was originally devised for individual rather than corporate persons, especially in regard to proving sincerity, she adapted the test for corporate persons accordingly: first, is the corporation's claimed belief consistent with its organisational purpose and operation; second, has the ability to act on this belief been infringed in any way that is more than trivial or insubstantial?²⁵ In response to both parts, she was content to adapt the application judge's fact findings that Loyola as a Roman Catholic high school was sincere in believing that it ought to teach from a Roman Catholic perspective and that the Minister's denial of the exemption constituted a significant infringement of the ability to do so. Thus Loyola's section 2(a) freedom of religion had been violated.²⁶

Rather than engage in the proportionality analysis of Abella J, McLachlin CJ then asked whether the infringement constituted a reasonable limit on Loyola's religious freedom under section 1 of the Charter and concluded that it did. She considered the Minister's denial to be flawed basically because of her definition of 'equivalent' to require a cultural and non-denominational approach, whereas the legislation contemplated a flexible approach provided that the programme's objectives were met; to require a purely secular approach would render the statutory exemption illusory. Thus, she concluded that the decision could not be justified as a reasonable limit under section 1 because it impaired Loyola's freedom of religion.²⁷ She then suggested five guidelines for Loyola to follow to satisfy the exemption:

- i. It may explain Roman Catholic doctrine and beliefs from a Roman Catholic perspective;
- ii. It must explain the beliefs and doctrines of other religions in an objective and respectful way;
- iii. It must maintain a respectful tone of debate by ensuring that classroom discussion proceeds in accordance with respect, tolerance and understanding for those with different beliefs;
- iv. It may explain the ways in which non-Roman Catholic beliefs do not accord with other belief systems; and

23 2006 SCC 6 (CanLII).

24 *Loyola* at para 134.

25 *Ibid* at paras 135–140.

26 *Ibid* at paras 141–145.

27 *Ibid* at paras 146–151.

- v. It is not required to teach beliefs that are contrary to Roman Catholicism in a way that portrays them as equally credible or worthy, provided that highlighting differences is not done in a derogatory or derisive manner. To teach all belief systems as equally credible would be incompatible with Loyola's religious freedom.²⁸

McLachlin CJ concluded by stating that she would grant an order of mandamus to the Minister to grant the exemption.²⁹

COMMENT

The *Loyola* decision is significant for a number of reasons and may point to a new direction for freedom of religion jurisprudence in Canada, should future courts follow the approach taken by Abella J. A number of observations may be made. First, it remains unclear why the majority did not support freedom of religion rights for corporate persons, including religious institutions and religiously sponsored institutions such as schools, hospitals or charities. On the one hand, Abella J recognised the role of religious institutions in shaping and passing on belief when she observed that belief is socially embedded in communal institutions but also that communal institutions are crucial to the transmission of beliefs and that parents have individual rights to transmit their faith through such institutions. On the other, she offered no reasons for her reluctance to support the position taken by McLachlin CJ for the minority, which would simply elevate freedom of religion to the same status as the other freedoms found in the Charter, as available to both corporate and individual persons. Any concerns that religious institutions might assert religious freedom claims which constitute a threat to the common good can be simply addressed by remembering both that all Charter claims remain subject to core national values such as democracy and human rights, and that corporate persons are equally as subject to the general law, including the criminal law, as individuals are.

Second, whatever the merits of the proportionality analysis over a traditional Charter analysis might be, the majority clearly stated that the analysis of the factual balance of rights was to be conducted under the umbrella of core national values, some of which the majority identified, including equality, human rights, tolerance and a commitment to a pluralist society. While many earlier Charter cases had identified these and other similar values as powering the Charter analysis, their characterisation as 'core national values' is novel and may indicate the establishment by the Court of benchmarks against which all future Charter claims are to be measured. There would appear to be something different

²⁸ Ibid at paras 152–162.

²⁹ Ibid at para 164.

being said here about core national values on the one hand and Charter values on the other because the former are posited as a standard against which even Charter values are to be measured. How future courts treat the concept of core national values will reveal whether this way of framing the values expressed in the Charter guarantees adds something new to the analyses. If that is indeed the case, this development is potentially problematical because the Charter itself is supposed to express the core national values of Canada, and the addition of an alleged higher standard devised by the SCC would cast significant doubt on the sovereignty of Parliament rather than the courts to define such national values. However, when courts decide to state core values which determine how cases will be decided under the Charter, it is useful to know what those are rather than to have to guess what they may be. A healthy democracy should be able to withstand any ensuing public debate should those values prove to be controversial.

Third, under the umbrella of core national values, the question becomes whether a proportionality analysis is an improvement over the traditional Charter analysis whereby a court would ask, first, whether there had been a breach of section 2(a) freedom of religion, and second, if so, whether this breach was reasonable and demonstrably justifiable in a free and democratic society pursuant to section 1 of the Charter. The second question had been further fleshed out into a complex multi-part test by the SCC in 1986 in *R v Oakes*:³⁰

- i. The limit must be prescribed by law, whether legislation or regulation;
- ii. The purpose of the limit must be pressing and substantial; and
- iii. The means for furthering the goal of the legislation must be proportional to the goal: that is, it must be rationally connected to the purpose, must minimally impair the right alleged and must be proportionate in its effect.

By contrast, the proportionality analysis of the majority amounted to balancing two interests: the religious freedom of a Roman Catholic school to teach from a Roman Catholic perspective and the province's power to determine how schools should prepare students for good citizenship. Because of the specific facts in *Loyola*, it was relatively easy to strike a balance between the two by finding that Loyola could teach Roman Catholicism from a Roman Catholic perspective but would be required to teach about other faiths and philosophies from an objective and respectful perspective. Provided this can actually be done, both interests were thought to be balanced in a proportional and reasonable way. The traditional analysis of the minority produced the same conclusion by finding a breach of section 2(a) because, first, Loyola sincerely believed that it must teach from a Roman Catholic perspective so that compulsion to do so

30 [1986] 1 SCR 103.

otherwise constitutionally infringed their religious freedom, and second, the provincially required programme did not constitute a reasonable limit pursuant to section 1 of the Charter.

On the face of it, there are few differences between the two approaches, as McLachlin CJ observed. Both are premised on whether conflicting interests can be balanced. Both are based on value judgments by a court. And, while the two justices were agreed on how to assess the rights claims, these are ultimately impossible to prove in any empirical way as the correct value judgments. In this sense, there is nothing to prefer one approach over the other. However, the finer details required by a traditional Charter analysis are bypassed by a proportionality analysis. First, there is no need for a sincerity test requiring one party to prove the sincerity of their religious assertions in order to comply with section 2(a). Proving sincerity is empirically unsatisfactory and also adds considerable complication to the adjudication of a claim.³¹ Rather than attempting to prove what one party really, really, really believes, a proportionality analysis simply accepts the two conflicting claims and decides whether and to what extent they can co-exist. Provided neither claim is illegal as measured by the general or criminal law, a pluralist and diverse society is understood to permit conflicting claims to co-exist. Thus, a proportionality analysis is more appropriate where pluralism is a core national value because it supports a pluralist response to real conflict.

The second way in which a proportionality analysis bypasses a Charter analysis is that there is no need to resort to the complex and ultimately unsatisfying *Oakes* test in a proportionality analysis. While the *Oakes* test is, broadly speaking, a proportionality test fleshed out to provide a pseudo-scientific rationale for a judicial decision where the legislative action is found to be proportional, its complexity, ambiguity, inability to produce credible results, absence of resonance with the public, and the fact that it is subject to the suspicion that it is a disguise behind which the courts have made choices that they would have made anyway, have made the test unattractive as a mechanism for striking a proportional balance between conflicting interests in Charter litigation. By contrast, the attractive feature of the comparatively bald proportionality test used by Abella J is that it lays bare the explicit choices of a court directly so that the public can see what these are, regardless of their broad public acceptability. The disadvantage of a bare proportionality balance is that it may not yield abstract principles useful as precedents for predicting future decisions. The resulting case law may appear or actually be capricious, even after a body of law had been built up. Nevertheless, the statements about core national values, as well as the role of the state as guarantor of freedom of religion, are helpful as clues as to how a future court could adjudicate Charter rights disputes.

31 See M Ogilvie, 'And then there was one: freedom of religion in Canada: the incredible shrinking concept', (2008) 10 Ecc LJ 197–204; Ogilvie, 'What's sincerity got to do with it?'

The other main disadvantage of a bare proportional balance approach is that the implicit policy choices of a court may not be transparent. Why, for example, is Loyola's religious freedom abridged by having to teach a provincially mandated programme required in *all* schools in the province in a neutral and respectful way, when the school can continue to provide classes on Roman Catholicism in preparation for confirmation both within and outside school hours, can continue to require chapel attendance for all Roman Catholic students, can place crucifixes and other symbols of Roman Catholicism throughout the school, and can generally maintain a Roman Catholic ambience in the school reinforced by visits from bishops and other clergy and successful 'old boys' who are practising Roman Catholics? Loyola students can still be indoctrinated in Roman Catholicism notwithstanding the provincial programme. The Court did not state why Loyola's religious freedom rights had been infringed when freedom to teach and practice Roman Catholicism outside the required programme continued. It is futile to speculate why Loyola got off so lightly, but the superficial nature of the infringement assessment by the Court suggests that future courts should be challenged to state the reason for their policy choices if these are to be credible in a pluralist society.

Fourth, Abella J's summary of the role of a secular state in relation to the protection of religious freedom is notable for the hands-off approach to religion which she appears to advocate. The particular emphasis on a secular state respecting and affirming different religious beliefs and supporting religious pluralism constitutes the strongest statement yet from the SCC about the role of a secular state. Previously, the court's position amounted to toleration of the fact of the existence of religious citizens in all their diversity but subject to the state.³² The more robust role for the state implicit in requiring it to affirm and respect religious pluralism is welcome, although three of the seven justices (all of whom decided in Loyola's favour) did not sign on to the decision promoting that position but to the decision of McLachlin CJ, which had little to say about the nature of freedom of religion or the role of the state. Again, while it is futile to speculate as to the reasons for these divergent approaches, it remains to be seen if and how courts will affirm and support religious pluralism in a robust way, given how extraordinarily difficult that could potentially be. Abella J's approach is resoundingly hopeful that religious pluralism is possible, and that should surely be the legal starting point in any society where religious pluralism is already a social fact. That hopefulness carries through to the ultimate outcome that Loyola can be expected to perform the delicate balance of both teaching Roman Catholicism and respect for other faiths or none – a balance which is necessary for social peace and prosperity but difficult to accomplish well.

32 See *SL v Commission scolaire des Chênes*, for example.

Finally, it is in the future application of the *Loyola* decision that the challenges of pluralism are likely to be addressed. Several examples are currently matters of public debate in Canada. One pertains to public school students in Quebec in relation to whom the SCC found in the companion case, *SL v Commission scolaire des Chênes*, that they could not claim exemption from the programme on grounds of religious freedom. The provincial legislation establishing the ERCP created an exemption for private religious schools but was silent about religious children in the public schools. In *SL*, the SCC refused parental requests for an exemption pursuant to section 2(a) of the Charter on the grounds that the programme was neutral and the parents had not proven objectively that the programme interfered with their right to pass on their faith to their children. The differential treatment of the religious freedom of private and public school students may now need to be revisited because there is no obvious reason why a tiny minority of students whose parents can afford to pay school fees should enjoy freedom of religion while the vast majority of students should not.

A second example is the legislation currently contemplated by several provinces requiring all schools, whether public, private or religious, to sponsor 'gay-straight' student clubs as part of a school's regular student club activities, a move that many Roman Catholic, evangelical and Muslim schools are attempting to avoid on religious grounds. The logic of the *Loyola* decision appears to provide a reason not to proceed with these compulsory clubs on the basis of freedom of religion. Again, the introduction of new sex education programmes, especially in the primary grades, in a number of provinces has provoked considerable outrage from religious parents, expressed by withdrawal of their children from school, either as a temporary protest or for home-schooling, and again *Loyola* creates the possibility that these parents may be able to make effective freedom of religion arguments to win exemption of their children from those programmes.

A final example involves Trinity Western University (TWU), a private evangelical institution in British Columbia, which is currently in the process of establishing a professional Faculty of Law, and is running into resistance on the basis of the university-wide code of conduct for all faculty, staff and students requiring abstention from all sexual activity outside the context of heterosexual marriage. Three provincial law societies (British Columbia, Ontario and Nova Scotia), through their governing bodies, have voted not to permit future law graduates from TWU to article or practise law in their provinces, on the ground that the university policy is homophobic, although there are no restrictions on enrolment as students at TWU other than meeting academic requirements.³³ However, in Nova Scotia, the Nova Scotia Supreme Court has

33 A number of TWU graduates in arts and sciences who have studied law elsewhere already do practise law across the country.

overturned that decision and litigation is pending in the other two.³⁴ The *Loyola* decision is especially pertinent in this context because a religious institution *qua* institution is arguing that it has freedom of religion to expect Christian practices of its students, including its future law students, without legal penalty. If the logic of *Loyola* is applied in these four examples, complainants may well succeed in winning exemptions from prevailing social norms about sexuality expressed in various legal and regulatory provisions.

Loyola may turn out to be a watershed case, should subsequent cases follow its leads in relation to freedom of religion for corporate persons, adoption of a proportionality analysis, abandonment of a section 1 analysis, a more robust role for the state in affirming and supporting religious pluralism, and generally permitting a more complex mosaic of belief systems to exist side by side in Canadian society. By allowing Roman Catholic parents to ensure one means of passing on their faith to their children through their schools, the SCC may have signalled that it will take freedom of religion claims more seriously. The challenge will be to find and articulate the appropriate balance between freedom for religion and freedom from religion necessary to ensure peaceful and prosperous pluralist societies.

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The Educational Work of the Ecclesiastical Law Society

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The Ecclesiastical Law Society (ELS) is a charity whose object is ‘to promote education in ecclesiastical law for the benefit of the public, including in particular the clergy and laity of the Church of England’. The ELS Committee has recently begun a review of this part of the society’s work and this piece is a part of that review. This article seeks to set out what is currently happening and to solicit

34 The Nova Scotia Barristers’ Society has announced that it will appeal the decision.