

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

BETWEEN:

LOYOLA HIGH SCHOOL and JOHN ZUCCHI

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(Respondents)

-and-

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant)

-and-

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This case examines the balancing of (a) government regulation of education, and (b) the freedom of independent/private, confessional schools to teach from a confessional perspective as guaranteed under the Canadian *Charter of Rights and Freedoms*.¹
2. The Association of Christian Educators and Schools Canada (“ACES Canada”) is a national association of organizations, which collectively represents three hundred and thirteen (313) confessional, independent/private, elementary and secondary schools and eleven (11) post-secondary confessional educational institutions from across Canada.²
3. The confessional schools represented by ACES Canada: (a) are primarily parent-run, (b) have an enrolment of approximately 70,000 students from kindergarten to grade 12, (c) employ approximately 6,600 teachers, and (d) have a broader supporting community of well over 250,000 Canadians.
4. These schools teach from a confessional Christian perspective and, in that respect, continue in a tradition that pre-dates Confederation and the State-run school system. They now operate as independent/private schools, and as an alternative to the State-run schools. The issues raised in this appeal are integral to the continued ability for each of the 324 schools of ACES Canada to teach from their confessional perspective. Indeed, the outcome of this case could undermine their very existence.
5. ACES Canada adopts the facts as set out in the Appellant’s factum.

PART II – STATEMENT OF ISSUES

6. ACES Canada will make the following submissions on the legal principles that should inform any judicial assessment balancing (a) government regulation in education and (b) the

¹ *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Section 2(a) guarantees “everyone has the following fundamental freedoms [including] freedom of conscience and religion”.

² The Ontario Alliance of Christian Schools (71 schools); The Association of Christian Schools International – Eastern Canada (69 schools and 4 post-secondary institutions); The Association of Christian Schools International – Western Canada (76 schools and 6 post-secondary institutions); The Prairie Centre for Christian Education (20 schools); The Society of Christian Schools in British Columbia (42 schools); The Coalition of Reformed Educators (35 schools and 1 teachers college); and The Association for Reformed Political Action (ARPA) Canada, which is the organizing member of ACES Canada.

freedom of independent/private, confessional schools to teach from a confessional perspective:

- a. The State may not interfere with the confessional foundation of education in a confessional school.
- b. Freedom of religion in the context of independent confessional schools cannot meaningfully distinguish between the rights of individuals and of the organization.
- c. Confessional schools must be accommodated as an alternative to State-run schools.

PART III – STATEMENT OF ARGUMENT

A. The State may not interfere with the confessional foundation of education in a confessional school.

7. This Honourable Court has previously held that the State has a legitimate interest in the education of the young, but that its role is limited.³ The extent the State can intrude in the context of confessional schools needs to be balanced against the religious objectives and freedoms of those who have established the schools for confessional purposes.

8. Where a government regulation, or the exercise of ministerial discretion, interferes with the *core* of what it means to be a confessional school, such regulation or discretion needs to be appropriately constrained.

9. There are three key elements that define what it means to be a “confessional school”:

- a. **They are a school:** they teach young people and in doing so, must satisfy the provincial learning requirements in subjects such as language arts, mathematics, social studies and science;
- b. **They are confessional:** they teach from a particular religious perspective within a confessional environment; and
- c. **They are independent/private:** they operate as an alternative to the State-run school system, and are typically organized by parents or leaders within a particular religious community. These schools are independent from State-run schools in their governance structure, ideology, educational philosophy, funding model and in their identity.

10. The jurisprudence of this Court recognizes that confessional schools are significantly different from State-run schools, mainly because of the doctrinal bases upon which they are established:

This difference does not consist in the mere addition of religious training to the academic

³ *R. v. Jones*, [1986] 2 S.C.R. 284 at 298 [Book of Authorities of Intervener (“B.A.I.”), Tab. 7].

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.⁴

11. When the teachers in these schools teach, they do so from a particular religious perspective (e.g., Roman Catholic, Jewish, Christian, Sikh, Buddhist) and on behalf of parents as an alternative to the perspective taught in a State-run school. Teaching from a religious perspective is not something that is done arbitrarily, or something that can be separated from the academic curriculum. The purpose of these schools is not to be “neutral”, but to teach from a particular religious perspective that is fused into all courses and across all grade levels. It cannot be removed without undermining the character and purpose, the “very heart”,⁵ of what it means to be a confessional school. Any infringement is thus significant and more than trivial.

12. In *Big M Drug Mart*, Dickson J. (as he then was) noted that s. 2(a) of the *Charter* is to be interpreted in a “generous rather than a legalistic” fashion, and explained that freedom of religion includes “the right to manifest religious belief... by teaching and dissemination.”⁶ He wrote the now famous words:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state ... to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.⁷

13. The protection of freedom of religion is “jealously guarded”.⁸ It includes protection from a requirement to teach from a worldview other than one’s own, including a “neutral” perspective. A government regulation, or the exercise of ministerial discretion, that directs a confessional

⁴ *Caldwell v. Stuart*, [1984] 2 S.C.R. 603 at 624 [emphasis added] [Book of Authorities of Appellant (“B.A.A.”), Tab 7].

⁵ *Ibid.* [B.A.A. Tab 7].

⁶ *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at paras 117 and 94 [B.A.I. Tab 6].

⁷ *Ibid.*, at para. 95 [emphasis added] [B.A.I. Tab 6].

⁸ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para.53 [B.A.I. Tab 4].

school to refrain from teaching from a particular confessional perspective is coercive. It fundamentally misunderstands religion and that these confessional schools were set up to teach from a religious perspective, not a “neutral” perspective. Such a direction undermines the very *core* of what it means to be a confessional school. It engages freedom of religion and can only be permitted when proven “necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.”⁹

14. In *Jones*, La Forest J. considered how far the State can legitimately intrude:

Certainly a reasonable accommodation would have to be made in dealing with this issue to ensure that provincial interests in the quality of education were met in a way that did not unduly encroach on the religious convictions of the appellant. In determining whether pupils are under “efficient instruction”, it would be necessary to delicately and sensitively weigh the competing interests so as to respect, as much as possible, the religious convictions of the appellant as guaranteed by the *Charter*. Those who administer the province's educational requirements may not do so in a manner that unreasonably infringes on the right of parents to teach their children in accordance with their religious convictions. The interference must be demonstrably justified.¹⁰

15. The onus then is on the State 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 about ethics and religion.

16. 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.¹¹ 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.

17. The requirement that a course be taught from a secular perspective is coercive. It requires confessional schools to teach from a competing worldview, purporting to be “neutral”.¹² As

⁹ *Big M Drug Mart*, *supra* note 6 at para. 95 [B.A.I. Tab 6].

¹⁰ *R. v. Jones*, *supra* note 3 at 298 [emphasis added] [B.A.I. Tab 7].

¹¹ 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) [B.A.I. Tab 18]. 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.

¹² This Honourable Court 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

explained in the expert evidence before the trial Court, 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.”¹³

18. To outright prohibit the ability to manifest religious beliefs and practices, if even for a limited duration, is not trivial. Saying that a school can teach from a confessional perspective in other courses does not negate this fact. Fundamentally, seeking to impose secularism or “neutrality” in a confessional school strikes at the very heart of why the school was established, that is, to teach from a confessional perspective.

B. Freedom of religion in the context of independent confessional schools cannot meaningfully distinguish between the rights of individuals and of the organization.

19. There is no meaningful difference between the religious freedom of the individuals that establish and operate a confessional school (e.g., the teachers, parents, and students) and that of the school itself.

20. Confessional schools are, by their very nature, independent and religious. They operate as an alternative to the State-run schools. They are founded on religious principles by parents and/or leaders of a particular religious community for expressly religious purposes. In this regard, confessional schools, such as Loyola and the hundreds of schools represented by ACES Canada, are extensions of the home and manifestations of a religious community.

21. McLachlin J. (as she then was) wrote, “The right to teach children religious beliefs and share with them religious practices is arguably as much an aspect of religious practice as going to church.”¹⁴ ACES Canada wholeheartedly agrees with this statement, for it clearly articulates the *raison d'être* of its member schools. The ability to teach children about, and from, a religious perspective different from what is offered in the State-run system is the very reason that parents and religious communities have established their own independent/private confessional schools as an alternative to the State-run schools.

does not exist.” *S.L. v. Commission scolaire de Chenes*, [2012] 1 S.C.R. 235 at paras. 30-31 [B.A.A. Tab 37].

¹³ 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 [B.A.I. Tab 16].

¹⁴ Beverley McLachlin, “Who Owns Our Kids? Education, Health and Religion in a Multicultural Society” in *The Cambridge Lectures*, 1991, p. 150 [B.A.I. Tab 17].

22. In *Jones*, La Forest J. observed that freedom of religion encompasses the rights of parents to educate their children according to their religious beliefs.¹⁵ He later affirmed this position, writing in *B.(R.)*, “It seems to me that the right of parents to rear their children according to their religious beliefs... is an equally fundamental aspect of freedom of religion.”¹⁶

23. Similarly, in *Chamberlain*, after reviewing Canadian jurisprudence on the paramount role of parents in the rearing of their children, Gonthier and Bastarache JJ. concluded:

... parents clearly have the right, whether protected by s. 7 or s. 2(a) of the *Charter*, to nurture, educate and make decisions for their children, as long as these decisions are in the children’s “best interests”. Parents will be presumed to be acting in their children’s “best interests” unless the contrary is shown.¹⁷

24. As seen above, this Honourable Court has consistently held that, in all areas of education, including religion, ethics and sexuality, parents are the primary decision-makers in, and directors of, their child’s education. These rulings recognize the distinct roles and functions of the institutions of the family and the State. While the State has an interest in the quality of education, the State has not been given the authority to require that children be taught according to its own religious convictions, regardless of how neutral it understands these to be. McLachlin J. (as she then was) wrote, “Courts must guard against substituting their views of religion and morality for those of parents simply because the latter are different.”¹⁸ When the State takes this authority upon itself, it undermines the religious rights of all parents.

25. In *Audet*, La Forest J. wrote, “Parents delegate their parental authority to teachers and entrust them with the responsibility of instilling in their children a large part of the store of learning they will acquire during their development.”¹⁹

26. This does not suggest that parents *surrender* their role or authority. Parents are the primary educators of their children. They authorize either (a) the State-run system, or (b) an independent church-run school (similar to Loyola), or (c) an independent parent-run school (like many of the schools represented in ACES Canada), to deliver education to their children. They

¹⁵ *R. v. Jones*, *supra* note 3 at 298 [B.A.I. Tab 7].

¹⁶ *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 105 [B.A.I. Tab 2].

¹⁷ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 at para. 108 [emphasis added] [B.A.I. Tab 3]. Though Gonthier and Bastarache JJ. are writing in dissent, the majority concurs on this point (see para. 3).

¹⁸ McLachlin, “Who Owns Our Kids?” *supra* note 14 at p. 158 [B.A.I. Tab 17].

¹⁹ *R. v. Audet*, [1996] 2 S.C.R. 171 at para. 41 [emphasis added] [B.A.I. Tab 5].

entrust these institutions to deliver this education in a manner that does not undermine their own religious rights or the rights of their children. Parents also have the option of not delegating authority at all, as in the case of home schooling.

27. The fact that parents associate together to form an independent/private confessional school in order to teach their children from a religious perspective does not diminish their *Charter* rights in any way. Rather, “freedom of religion must include some acknowledgement of the collective aspects of religion. Religion usually includes both individual and communal religious practices.”²⁰

28. The State violates the *Charter* rights of the parents if it requires these schools (as proxies of the parents and manifestations of their collective will) to teach in a manner that undermines the religious beliefs of the parents. This is particularly the case as these schools have been specifically established to teach from a confessional perspective consistent with the parents’ religious beliefs and obligations.²¹

29. Unless the State can demonstrate that consistently teaching from a confessional perspective is not in the best interests of children and will result in “demonstrated neglect or unsuitability”,²² the State ought not to interfere with how these parents educate their children. This includes how the parents, through teachers as proxies, teach their children about other religions or ethical systems.

30. In considering the role of parents and the State in the “best interests” of the child, Gonthier and Bastarache JJ. wrote in *Chamberlain*, “the role of the state is properly construed as generally providing assistance to parents to nurture and educate their children, a good example being public schools...”²³

²⁰ Janet Epp-Buckingham, “The Fundamentals of Religious Freedom: The Case for Recognizing Collective Aspects of Religion” (2007), 36 S.C.L.R. (2d) 1 at 22 [B.A.I. Tab 12]. See also the two dissenting opinions of Justice Abella and Justice LeBel in the *Hutterian Brethren* case in which the honourable justices discuss the integral role that community plays in many religious traditions. The majority did not disagree on this point. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 114, 118, 131, 164-65 (Abella, J.) and para. 181, 182 (LeBel, J.). [B.A.I. Tab 1].

²¹ Genesis 18:18-19; Deuteronomy 6:1-9; Psalm 78:1-8; Proverbs 22:6; Ephesians 6:4 [B.A.I. Tab 9].

²² *B.(R.) v. Children’s Aid*, *supra* note 16 at para. 85 [B.A.I. Tab 2].

²³ *Chamberlain*, *supra* note 17 at para. 103 [emphasis added] [B.A.I. Tab 3].

31. By choosing to opt out of the State-run public school system, and sending their children to an independent/private confessional school, parents have expressed their desire to have their children taught in a manner consistent with their specific religious beliefs and traditions. In this regard, the role of teachers in a confessional school is different than the role of teachers in State-run schools. While it is understandable that the latter teach in as neutral a manner as possible, this is not expected or desired by parents and religious organizations in confessional schools. As noted by this Honourable Court in *Caldwell v. Stuart*, the role of the teacher in a confessional school is fundamental to the spiritual and academic efforts of the school, and which are interwoven into all activities and programs.²⁴

32. In this context, and given the religious and associational rights of parents, any intrusion on confessional teaching is an intrusion on the rights of each parent and their organization, the school. In this context, it is artificial to create a distinction between the individual and the group.

33. This independent/private nature of confessional schools is one of the many factors that distinguishes the case at bar from *S.L. v. Commission scolaire de Chenes*.²⁵ In that case, this Court considered a claim by Catholic parents in the Québec State-run system to exempt their child from participating in the ERC course. The current case, by contrast, involves the rights of a collection of families and/or a religious community who associate in the educational context for religious reasons.

34. The impact of the Respondent's action is to de-confessionalize, even secularize, an independent/private school that exists to teach from a confessional perspective. This fundamentally undermines the *raison d'être* of the school and the collective rights of the entire religious community. If such a precedent were upheld, it would fundamentally undermine the hundreds of religious schools and millions of religious families and communities across Canada.

C. Confessional schools must be accommodated as an alternative to State-run schools.

35. Confessional schools form part of, and have a place in, our vibrant society. In *Big M Drug Mart*, this Court recognized that “[a] truly free society is one that can accommodate a wide

²⁴ *Caldwell v. Stuart*, *supra* note 4 at 624 [B.A.A. Tab 7].

²⁵ *S.L. v. Commission scolaire*, *supra* note 12 [B.A.A. Tab 37].

variety of beliefs, diversity of tastes and pursuits, customs, and codes of conduct.”²⁶ This was later affirmed in *Trinity Western*, where this Court noted, “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.”²⁷

36. Continuing to recognize the legitimacy and religious integrity of confessional schools, as alternatives to State-run schools, is entirely appropriate – indeed necessary – within our pluralistic society. There is no question that these schools have a right to exist. Their existence is undermined if they are then not permitted to teach from a confessional perspective in all courses.

37. The latest announcements from the federal government regarding *First Nations Control Over First Nations Education Act* show that there is already room for communities to provide education according to the values of their own communities.²⁸ Respect for communities is necessary to permit diversity to flourish. The one-size-fits-all approach of mandating not only what to teach, but how to teach it, is untenable and intolerant.

38. 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 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.”²⁹

39. 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, particularly in a course about ethics and religious culture.

40. As William Galston wrote:

²⁶ *Big M Drug Mart*, *supra* note 6 at para 94 [B.A.I. Tab 6].

²⁷ *Trinity Western University v. B.C.C.T.*, [2001] 1 S.C.R. 772 at para. 33 [B.A.I. Tab 8].

²⁸ See, Assembly of First Nations, *Education, Jurisdiction and Governance (AFN Annual Report, 2013)*, online: <<http://www.afn.ca/index.php/en/policy-areas/education>> [B.A.I. Tab 11] and *First Nations Control Over First Nations Education Act*, (7 Feb. 2014) online: <<http://www.pm.gc.ca/eng/news/2014/02/07/first-nations-control-first-nations-education-act>> [B.A.I. Tab 19]. See also Natan Lerner’s discussion on indigenous populations in “Group Rights and Legal Pluralism” in Natan Lerner, *Religion, Secular Beliefs and Human Rights*, 2nd rev. ed., (Leiden: Martinus Nijhoff Publishers, 2012), 109-112 [B.A.I. Tab 15].

²⁹ *Caldwell v. Stuart*, *supra* note 4 at 624 [B.A.A. Tab 7].

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.³⁰ [emphasis in original]

41. Reflecting on the greatest commandment,³¹ 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.”³² Kuyper speaks to the reality of the pedagogy employed in the schools represented by ACES Canada – every subject, every aspect of life, is totally Christ-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, to be something else, strikes at its very heart.

PART IV – COSTS

42. ACES Canada does not seek costs, and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

43. ACES Canada requests permission to present oral argument at the hearing of this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 6th day of March 2014.

Ian C. Moes
André Schutten
 Counsel for the intervener,
 Association of Christian Educators and Schools Canada

³⁰ William A. Galston, *The Practice of Liberal Pluralism* (New York: Cambridge University Press, 2005) at 20 [B.A.I. Tab 13].

³¹ “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 [B.A.I. Tab 10].

³² 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] [B.A.I. Tab 14].

PART VI – TABLE OF AUTHORITIES

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