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Loyola High School v. Attorney General of Quebec: On Non-triviality and the Charter Value of Religious Freedom

Howard Kislowicz*

I. INTRODUCTION

From one perspective, Quebec’s Ethics and Religious Culture Program (“ERCP”), at issue in *Loyola High School v. Quebec (Attorney General)*,¹ is far-reaching. It is mandatory teaching for primary and secondary students in all educational institutions — public or private, confessional or non-confessional. On the interpretation of the Home School Legal Defence Association of Canada, parents cannot even avoid the ERCP by educating their children at home.² The only way out of the ERCP is to seek an exemption from the Minister of Education, Recreation and Sports, either at the individual or institutional level. However, the ERCP is a two-credit course, and schools are free to create an additional course of up to four credits without ministerial approval. Though schools are required to educate about religion in accordance with the ministerial dictates of neutrality and objectivity in the context of the ERCP, they can be non-neutral in a course offered for twice as many classroom hours.

Parents seeking an individual exemption from the ERCP were rebuffed in a ministerial decision upheld by the Supreme Court of Canada (“SCC”)

* Assistant Professor, Faculty of Law, University of New Brunswick. Large thanks to Audrey Macklin for helpful discussions in the preparation of this article, to Kathryn Chan, Kate Glover and an anonymous reviewer for comments on earlier drafts, and to Geneva McSheffery for able research assistance. This article was enriched through a discussion at the Osgoode Hall Law School 2014 Constitutional Cases Conference and I thank Sonia Lawrence and Benjamin Berger for including me in that program. Special thanks to Dr. Naomi Lear and Gabriel Kislowicz. Mistakes are mine.

¹ [2015] S.C.J. No. 12, 2015 SCC 12 (S.C.C.) [hereinafter “*Loyola*”].

² *Id.* (Factum of the Home School Legal Defence Association of Canada, at paras. 3-4); *Education Act*, CQLR, c. I-13.3, s. 15(4).

in *L. (S.) v. Commission scolaire des Chênes*.³ The Court found that the parents had failed to demonstrate how being exposed to neutral, objective presentations of religious cultures and ethical systems interfered with their or their child's religious freedom. *Loyola* presented the more difficult issue of whether the government could require a Catholic educational institution to teach about religion and culture in a "neutral" way.

This article takes *Loyola* as an opportunity to examine two ways that courts have justified limits on religious freedom. First, I interrogate an under-examined aspect of the law of religious freedom: the requirement that claimants prove the interference with their religious freedom is "more than trivial or insubstantial" (Part IV). Second, I examine how the majority and minority decisions articulate broader visions of religious freedom. I argue that religious freedom has been interpreted through the value of tolerance, understood in *Loyola* as giving rise to a state obligation to educate students in the skills of non-exclusionary dialogue (Part V). Before entering into these analyses, I provide some historical and legislative context (Part II), and a summary of the SCC's decision (Part III).

II. LEGISLATIVE AND HISTORICAL BACKGROUND

The ERCP is the most recent step in Quebec's legislative effort to secularize its education system. The 1867 constitutional compromise entrenched whatever denominational schools existed in each province at the time of union.⁴ This left schools in Quebec divided along religious lines, with Catholic and Protestant Committees of the Council of Public Instruction in charge of "their respective schools with little or no government interference".⁵

In the 1960s, a growing appetite for societal change focused in part on public education. The government established a new Ministry of Education in 1964. It replaced the Council of Public Instruction with the Superior Council of Education. This body, comprising a Catholic and Protestant Committee, set the curricula for religious education in Quebec schools. This "resulted in a loss of influence of the Catholic Church" as

³ [2012] S.C.J. No. 7, 2012 SCC 7 (S.C.C.) [hereinafter "*des Chênes*"].

⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93.

⁵ Spencer Boudreau, "From Confessional to Cultural: Religious Education in the Schools of Québec" (2011) 38:3 *Religion & Education* 212, at 213 [hereinafter "Boudreau"].

the standardization of education “shifted authority away from local boards and the Church and centralized it in the Ministry of Education”.⁶

In the 1990s, efforts to deconfessionalize⁷ Quebec’s school boards gained more momentum. This was made constitutionally possible by a 1997 amendment to the *Constitution Act, 1867*, releasing Quebec from its previous obligation to maintain denominational schools.⁸ In 1998, Quebec replaced its denominational school boards with linguistic boards, and deconfessionalized all public schools in 2000.⁹ Parents were still, however, allowed the choice between Catholic, Protestant, and nonreligious Moral curricula for their children; they could, alternatively, take an exemption from all such programs.¹⁰

The next step was the 2005 modification of section 41 of Quebec’s *Charter of Human Rights and Freedoms*,¹¹ which had previously given parents the right to “require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law”.¹² Under the new version, parents have “a right to give their children a religious and moral education in keeping with their convictions and with proper regard for their children’s rights and interests”.¹³ This cleared a legal obstacle for the development of a single curriculum regarding religion and ethics to be implemented throughout the province, which the government formally put into place in 2008 with the ERCP.¹⁴ The ERCP’s main objectives are “the recognition of others’ and the ‘pursuit of the common good’”.¹⁵ To these ends, it seeks to develop three competencies in students: reflection on ethical questions, understanding the phenomenon of religion and engagement in dialogue.¹⁶

⁶ *Id.*

⁷ This term refers to the change from religiously based school boards (Protestant and Catholic) to linguistically based school boards (English and French).

⁸ *Constitution Act, 1867*, s. 93A.

⁹ Lucille Otero & David Burgee, “Freedom of Conscience and Religion in Québec Schools” (2011) 21 *Educ. & L.J.* 63, at 65.

¹⁰ *Id.*

¹¹ CQLR, c. C-12.

¹² *Id.*

¹³ *Id.*

¹⁴ Lorna M.A. Bowman, “Freedom of Religion and Publicly Funded Religious Schools in Canada” in Stephen Parker, Rob Freathy & Leslie J. Francis, eds., *Religious Education and Freedom of Religious Belief* (Oxford: Peter Lang, 2012) 29, at 39.

¹⁵ *Loyola, supra*, note 1, at para. 11.

¹⁶ Boudreau, *supra*, note 5, at 220.

The ERCP is treated the same as any other required course in the public and private educational systems. The Minister has the power to set compulsory subjects,¹⁷ and private schools are required to use the educational materials designated by the Minister.¹⁸ However, a private school can be exempted from a mandatory course when it “dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent”.¹⁹

Everything turned, in *Loyola*, on the definition of “equivalent”. When Loyola, a private Catholic high school, applied for an exemption, the Minister denied that application because the Minister viewed Loyola’s approach to the ERCP as confessional, not neutral and objective, and therefore not “equivalent”. Loyola successfully sought judicial review at the Quebec Superior Court, but the Quebec Court of Appeal unanimously overturned that decision.

III. THE SCC’S DECISION

The SCC was unanimous in allowing Loyola’s appeal, though the Court divided on the appropriate remedy. The majority applied the analytical framework developed in *Doré*,²⁰ which applies a reasonableness standard of review to administrative decisions that engage Charter²¹ values. However, Abella J. held that “where *Charter* rights are engaged, reasonableness requires proportionality”,²² and a “proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate”.²³ Accordingly, the Minister’s decision in this case was required to reflect a “proportionate balance” between the statutory goals and the fullest possible protection of religious freedom.²⁴

On the substance, Abella J. held that the central question in the appeal was how to balance the protection of religious freedom and the “values of

¹⁷ *An Act Respecting Private Education*, CQLR, c E-9.1, s. 25.

¹⁸ *Id.*, s. 35.

¹⁹ *Regulation respecting the application of the Act respecting private education*, CQLR, c. E-9.1, r. 1, s. 22.

²⁰ *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12 (S.C.C.) [hereinafter “*Doré*”].

²¹ *Canadian 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 [hereinafter “*Charter*”].

²² *Loyola*, *supra*, note 1, at para. 38.

²³ *Id.*, at para. 39.

²⁴ *Id.*, at para. 32.

a secular state”.²⁵ She held that secularism, properly understood, requires “respect for religious differences”.²⁶ However, state action designed to further the values of “equality, human rights and democracy” can legitimately limit religious freedom.²⁷ In the *Loyola* context, this meant that the state could justifiably try to ensure that “students in all schools are capable, as adults, of conducting themselves with openness and respect as they confront cultural and religious differences”,²⁸ even where this might limit religious freedom.

Applying this understanding of the various values at stake, Abella J. turned her attention to the provision in the Regulation that requires the Minister to grant an exemption from a mandatory program where the school offers an “equivalent” program. Justice Abella held that the Minister’s interpretation of “equivalent” was unreasonable because it failed to proportionately balance the values of religious freedom against the statutory objectives. According to Abella J., the Minister sought too close a match between the ERCP and Loyola’s proposed alternative. The regulatory scheme assumes the continued existence of private denominational schools. In such an environment, “it is unreasonable to interpret equivalence as requiring a strict adherence to specific course content, rather than in terms of the ERC’s program objectives generally”.²⁹ The Minister’s decision effectively prohibited Loyola from teaching Catholic religion and ethics from a Catholic perspective, which impacted Loyola as an institution and interfered with parents’ rights to transmit their faith to their children. Further, the Attorney General of Quebec had failed to adequately demonstrate how requiring Loyola to teach about Catholicism from a neutral standpoint furthered the legislative objectives of encouraging respect and openness to others.³⁰ This amounted to a disproportionate balancing of the Charter values against the statutory objectives. In Abella J.’s view, however, requiring Loyola to teach about non-Catholic religions and ethical systems in a “neutral, historical and phenomenological way” would not have been disproportionate.³¹ Indeed, such a curricular requirement would not even be considered an infringement of religious freedom.

²⁵ *Id.*, at para. 43.

²⁶ *Id.*

²⁷ *Id.*, at para. 47.

²⁸ *Id.*, at para. 48.

²⁹ *Id.*, at para. 56.

³⁰ *Id.*, at paras. 68-69.

³¹ *Id.*, at para. 71.

At the same time, Abella J. acknowledged that, in real classrooms, questions may arise that challenge the distinction between the school's own religion, which it must be allowed to teach in a non-neutral way, and other religions or ethical perspectives, which it can be required to teach objectively. In such situations, a "comparative approach that explains the Catholic ethical perspective and responds to questions about it is of course legitimate".³² Teachers could bring a Catholic perspective into such discussions, but the role of that perspective would be "one of significant participant rather than hegemonic tutor".³³ In the result, the majority remitted the matter to the Minister for reconsideration in light of their reasons.

The minority opinion, authored by McLachlin C.J.C. and Moldaver J., differed from the majority opinion in three main respects. First, the minority adopted a different method of analysis, at odds with the Court's holding in *Doré*. Instead of applying a reasonableness standard of review and using a shortened proportionality analysis, the majority goes directly to an analysis of the Charter infringement and its potential justification under section 1. Second, the minority would have ordered a different remedy, granting Loyola's requested exemption without remitting the decision to the Minister.³⁴

Third, the minority held that the majority's reasons would effectively require Loyola to adopt a "secular perspective at all times, other than during their discussion of the Catholic religion".³⁵ This, according to the minority, would not fully protect Loyola's³⁶ religious freedom rights and would be "unworkable in practice".³⁷ For the minority, Loyola's teachers should be able to bring Catholic perspectives to bear on ethical issues and doctrines of non-Catholic religions, particularly those contrary to Catholicism. Requiring teachers to remain silent on the Catholic

³² *Id.*, at para. 73.

³³ *Id.*, at para. 76.

³⁴ *Id.*, at para. 165.

³⁵ *Id.*, at para. 154.

³⁶ The minority also addressed the question of whether a legal person can hold the right of religious freedom. The minority adopted two criteria for a religious organization to be able to assert its rights to religious freedom. It must (1) be constituted primarily for religious purposes, and (2) operate in accordance with those religious purposes. Once these have been established, courts should evaluate the organization's claim to ensure it is made in good faith. The majority held it unnecessary to decide whether corporations enjoy the right of religious freedom because Loyola had the right to seek judicial review in any event. *Id.*, at paras. 99-101, 138. For a comparative perspective, see *Burwell v. Hobby Lobby*, 573 U.S. (2014).

³⁷ *Loyola*, *supra*, note 1, at para. 154.

perspective in these moments violates religious freedom and also limits the ERC's capacity to attain its stated objective of developing students' competence in dialogue.³⁸ Instead, the appropriate posture to demand of teachers is one of "respect, tolerance and understanding".³⁹

IV. NON-TRIVIALITY

In order to make out a claim that government action infringes religious freedom, a litigant must prove:

- (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and
- (2) that the impugned conduct of a third party interferes, in a manner that is *non-trivial or not insubstantial*, with his or her ability to act in accordance with that practice or belief.⁴⁰

In *Loyola*, the non-triviality element was highlighted when the Quebec Court of Appeal held unanimously that any infringement of Loyola's religious freedom was trivial.⁴¹ The SCC disagreed, which provides an impetus to reflect on what accounts for this difference, and, more broadly, on what proves that interferences with religious practices or beliefs are "more than trivial or insubstantial". I suggest that the non-triviality requirement demands more careful attention, as it stands in tension with the highly subjective approach to proving the existence of a religious belief or practice. Indeed, in a recent decision of the Ontario Superior Court, Durno J. casts some doubt on the clarity of the concept:

The cases ... do not specify the manner in which the not trivial or insubstantial test is to be applied. While it appears that there may be a reasonableness assessment when determining whether the claimant has met the [triviality] branch, it is a very low threshold given that s. 2(a) protects beliefs in an almost limitless manner.⁴²

The "non-triviality" requirement can be traced to the 1986 decision of *R. v. Jones*.⁴³ Mr. Jones had objected to a requirement under Alberta's *School Act* that he seek an exemption from sending his children to public

³⁸ *Id.*, at para. 159.

³⁹ *Id.*, at para. 162.

⁴⁰ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6, at para. 34, 2006 SCC 6 (S.C.C.) (emphasis added); *Loyola*, *supra*, note 1, at para. 134.

⁴¹ *Quebec (Attorney General) v. Loyola High School*, [2012] Q.J. No. 15094, at paras. 173-174, 2012 QCCA 2139 (Que. C.A.) [hereinafter "*Loyola High School*"].

⁴² *R. v. Purewal*, [2014] O.J. No. 2824, at para. 197, 2014 ONSC 2198 (Ont. S.C.J.).

⁴³ [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284 (S.C.C.) [hereinafter "*Jones*"].

school if he wished to educate them at home. Justice Wilson found that any infringement was trivial, and that “[l]egislative or administrative action whose effect on religion is trivial or insubstantial is not ... a breach of freedom of religion.”⁴⁴ Though Wilson J. wrote in dissent, this particular holding attracted majority support.⁴⁵

The SCC has since referred consistently to the non-triviality requirement,⁴⁶ and explained that “[t]rivial or insubstantial’ interference is interference that does not threaten actual religious beliefs or conduct”.⁴⁷ This elaboration, however, may only delay the analytical difficulty. In the face of a claimant’s argument that their religious beliefs or conduct are “threatened”, on what basis is a court to hold otherwise? Presumably, a claimant who, sincere in her or his beliefs, undertakes litigation with all its associated costs, believes the infringement to be more than trivial. If a court disagrees, by what standard is it to determine triviality? Earlier case law suggests that a reasonableness-based analysis will be applied. Chief Justice Dickson held in *Edwards Books* that “[t]he Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might *reasonably* or actually be threatened.”⁴⁸ Chief Justice Dickson’s example of a trivial infringement was “a taxation act that imposed a modest sales tax extending to all products, including those used in the course of religious worship”.⁴⁹ He reasoned that while such legislation would impose a small cost on the worshipper, the Charter should not offer protection from this type of trivial burden.

Putting the non-triviality component back in context of the overall section 2(a) infringement analysis, I suggest that there are actually two layers of reasonableness at play. First, a claimant must demonstrate that there is some objective interference with a religious practice,⁵⁰ *i.e.*, that it is not only the claimant who can recognize the problem. Second, the claimant must show the interference is non-trivial, which also incorporates a notion of reasonableness.

⁴⁴ *Id.*, at 314 (Wilson J.).

⁴⁵ *Id.*, at 308 (McIntyre J.).

⁴⁶ See, *e.g.*, *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at 759 (S.C.C.) [hereinafter “*Edwards Books*”]; *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, at para. 58, 2004 SCC 47, at para. 58 (S.C.C.) [hereinafter “*Edwards Amselem*”]; *Multani v. Commission scolaire Marguerite-Bourgeoys*, *supra*, note 40, at para. 34.

⁴⁷ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, at para. 32, 2009 SCC 37 (S.C.C.).

⁴⁸ *Edwards Books*, *supra*, note 46, at 759 (emphasis added).

⁴⁹ *Id.*

⁵⁰ *des Chênes*, *supra*, note 3, at para. 2.

But all this still does not fully answer the question of how to distinguish the trivial from the non-trivial. In *Loyola*, for example, the Court of Appeal articulated two reasons why the Minister's decision to deny Loyola an exemption from the ERCP was, if anything, a trivial infringement of religious freedom. First, the ERCP was only one course among many, and second, the curriculum did not require teachers to refute Catholic precepts, but only to refrain from expressing their own views.⁵¹ In contrast, the majority of the SCC held that a curriculum dictating how a Catholic school discusses Catholicism has a "serious impact on religious freedom".⁵² Similarly, the minority articulates its departure from the Court of Appeal by explaining that requiring teachers to remain "mum ... in the face of ethical positions that do not accord with the Catholic faith" would coerce teachers "into adopting a false and facile posture of neutrality".⁵³ On either version, observers are offered little guidance in *Loyola* for locating the boundary between the trivial and the non-trivial. There are, however, some lower court decisions that may offer some direction.

Courts have sometimes used the notion of triviality as a way to focus on whether the activity at the centre of the litigation had a religious purpose. In *R. v. Welsh*,⁵⁴ for example, the Court assessed whether a police undercover operation, in which an officer posing as an Obeah⁵⁵ spiritual advisor obtained incriminating statements, infringed the accused's religious freedom. Despite the Crown's concession on the accused's sincere belief,⁵⁶ the Court held that any interference with the accused's religious freedom was trivial or insubstantial. The Court based this conclusion, principally, on the absence of evidence "that either appellant communicated with [the undercover officer] to satisfy or fulfill some spiritual need or purpose".⁵⁷

Echoes of this reasoning can be found in the Ontario Court of Appeal's decision that the requirement for new Canadian citizens to swear an oath to the Queen did not violate religious or conscientious

⁵¹ *Loyola High School*, *supra*, note 41, at para. 174.

⁵² *Loyola*, *supra*, note 1, at para. 62.

⁵³ *Id.*, at paras. 155-156.

⁵⁴ [2013] O.J. No. 1462, 2013 ONCA 190 (Ont. C.A.) [hereinafter "*Welsh*"].

⁵⁵ The Court held that "Obeah describes a system of spiritual and mystical beliefs practiced in Jamaica and other black communities of the West Indies." *Id.*, at para. 21.

⁵⁶ *Id.*, at para. 56.

⁵⁷ *Id.*, at paras. 70-71.

freedom because the oath itself has no religious purpose.⁵⁸ Similarly, when faced with a turban-wearing Sikh motorcyclist's argument for a religious exemption from a helmet law, the Ontario Court of Justice found that motorcycling is not a religious activity and "the burden of simply not being able to operate a motorcycle is clearly trivial and insubstantial".⁵⁹ The Alberta Court of Queen's Bench responded to a religious freedom challenge to a municipal ban on amplification systems in city parks in like manner. The Court reasoned that, though the claimant could not use his preferred method of preaching to the homeless, the ban did not impair his ability to preach.⁶⁰

The Federal Court of Appeal relied on the notion of triviality in a somewhat different way. A Jewish man argued that the government's refusal to list his birthplace as "Jerusalem, Israel" in his passport interfered with his religious belief that Jerusalem is the capital of Israel.⁶¹ The Court did not impugn the sincerity of the claimant's belief. Instead, it held that the government's policy not to list any state after "Jerusalem" on passports did not interfere with the claimant's ability to believe, declare, and disseminate his religious views, and did not "impose an expression of religious identity which is not true to [the claimant]".⁶² Accordingly, the policy's effects were "negligible",⁶³ because the belief, practice, and identity-based aspects of religious freedom rights were not sufficiently engaged.

Other findings of triviality relate to land uses. Courts have adopted the view that an otherwise legal use of land by another can only amount to a trivial interference with religious freedom.⁶⁴ Similarly, when a

⁵⁸ *McAteer v. Canada (Attorney General)*, [2014] O.J. No. 3728, at paras. 119-120, 2014 ONCA 578 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 444 (S.C.C.). This finding is arguably troubling as its focus on the intention of the oath rather than the effect on the litigant removes subjectivity out of the equation. See *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] F.C.J. No. 33, [1994] 2 F.C.R. 406, at 428 (F.C.A.); Léonid Sirota, "True Allegiance: The Citizenship Oath and the Charter" (2014) 33:2 N.J.C.L. 137; See also *Chainnigh v. Canada (Attorney General)*, [2008] F.C.J. No. 53, 2008 FC 69 (F.C.).

⁵⁹ *R. v. Badesha*, [2011] O.J. No. 2564, at para. 68, 2011 ONCJ 284 (Ont. C.J.) [hereinafter "Badesha"]; but see *Dhillon v. British Columbia (Ministry of Transportation and Highways, Motor Vehicle Branch)*, [1999] B.C.H.R.T.D. No. 25, 35 C.H.R.R. D/293 (B.C.H.R.T.) for an opposite result.

⁶⁰ *R. v. Pawlowski*, [2011] A.J. No. 189, 2011 ABQB 93 (Alta. Q.B.), aff'd [2014] A.J. No. 394, 310 C.C.C. (3d) 349 (Alta. C.A.).

⁶¹ *Veffey v. Canada (Minister of Foreign Affairs)*, [2007] F.C.J. No. 908, 2007 FCA 247 (F.C.A.), leave to appeal refused [2007] S.C.C.A. No. 457 (S.C.C.).

⁶² *Id.*, at para. 33.

⁶³ *Id.*, at para. 33.

⁶⁴ *Residents for Sustainable Development in Guelph v. 6 & 7 Developments Ltd.*, [2005] O.J. No. 1158, 129 C.R.R. (2d) 173 (Ont. S.C.J.): the Ontario Superior Court upheld a finding of the

church was prohibited by a city zoning decision from operating a shelter in the church, the Court found the infringement to be trivial because there were parts of the city where the church might have legally operated a shelter.⁶⁵

The Quebec Court of Appeal made a triviality finding in *Saguenay (Ville de) v. Mouvement laïque québécois*⁶⁶ that may shed additional light on the notion. One part of the claim was that a city's practice of opening town council meetings with a non-denominational prayer addressed to "Dieu tout puissant" (almighty God) was an infringement of freedom of conscience and religion.⁶⁷ For present purposes, the pertinent issue is that the Court of Appeal held the prayer to be, if anything, a trivial or insubstantial interference with the conscientious freedom rights of a non-religious citizen. The SCC disagreed, finding an impairment of the "right to full and equal exercise of ... freedom of conscience and religion".⁶⁸ The reasoning supporting the Court of Appeal's triviality finding was that the prayer only lasts some 20 seconds, and that the evidence presented did not show the claimant to be particularly sensitive or even particularly troubled by the prayer.⁶⁹ In response to the litigant's claim of discrimination, the Court of Appeal held that a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under

Ontario Municipal Board that any impact on a Jesuit spiritual retreat centre by the otherwise lawful development of a Walmart was trivial and insubstantial. The Divisional Court granted leave to appeal, but the appeal was never decided. See also *Cham Shan Temple v. Ontario (Ministry of the Environment)*, [2015] O.E.R.T.D. No. 9. In *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2014] B.C.J. No. 584, at para. 296, 2014 BCSC 568 (B.C.S.C.), aff'd [2015] B.C.J. No. 1682, 2015 BCCA 352 (B.C.C.A.), the British Columbia Supreme Court held that s. 2(a) could not be relied upon to restrict "the otherwise lawful use of land, on the basis that such action would result in a loss of meaning to religious practices carried out elsewhere."

⁶⁵ *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia (Trustees of)*, [2014] O.J. No. 2193, at paras. 20-24, 2014 ONSC 1572 (Ont. S.C.J.), rev'd on other grounds [2015] O.J. No. 3527, 2015 ONCA 494 (Ont. C.A.).

⁶⁶ [2013] Q.J. No. 5220, 2013 QCCA 936 (Que. C.A.) [hereinafter "*Saguenay*"].

⁶⁷ The case also included discussion of the presence of religious symbols — a crucifix and a statue of the Sacred Heart — in council chambers, but the SCC found the Tribunal lacked jurisdiction on these issues as no investigation had been undertaken by the Human Rights Commission: *Mouvement laïque québécois v. Saguenay (City)*, [2015] S.C.J. No. 16, at para. 61, 2015 SCC 16 (S.C.C.).

⁶⁸ *Id.*, at para. 64.

⁶⁹ *Id.*, at para. 115. See also *Allen v. Renfrew (County)*, [2004] O.J. No. 1231, 69 O.R. (3d) 742 (Ont. S.C.J.); but see *Freitag v. Penetanguishene (Town)*, [1999] O.J. No. 3524, 47 O.R. (3d) 301 (Ont. C.A.) where the recitation of the Lord's Prayer at the opening of town council meetings was held an unconstitutional violation of religious freedom.

similar circumstances as [the claimant]⁷⁰ would not have found any detriment to the claimant. The Court of Appeal's reasoning on discrimination echoes the underlying message of its reasoning on religious freedom: a reasonable person would have found these matters to be trivial. In the Court's view, the claimant's own evidence supported the interpretation that he was simply uncomfortable, and not sufficiently aggrieved to have the benefit of the Charter's (Canada's or Quebec's) protection.

In sum, with the exception of *Welsh*⁷¹ where the accused's argument can perhaps be explained as an attempt to evade punishment,⁷² the common message of the above cases is: even if the claimants' religious beliefs were sincere, the impugned state action should not have bothered them so much. The usually unarticulated standard by which this is measured is reasonableness.

The trouble is that the reasons set out in *Amselem* in favour of a subjective approach to the proof of religious practices counsel against allowing this kind of reasonableness standard to enter the triviality analysis. Religious commitments are assessed subjectively because section 2(a)'s purpose is to protect *individual* choice.⁷³ Further, courts should not attempt to distinguish mandatory from voluntary religious practices because "the State is in no position to be, nor should it become, the arbiter of religious dogma".⁷⁴ If courts are to be restricted to sincerity when evaluating the existence or the nature of the religious practice, what justifies a shift to reasonableness when assessing how bothered a particular claimant should have been? If courts do not have the institutional capacity or legitimacy to assess the intensity of a religious obligation, what changes when courts shift to assessing the intensity of upset caused by an interference with that obligation? It is certainly understandable that courts want to prevent the Charter from being trivialized by capricious claims. But this can be accomplished by ensuring that litigants meet the requirement set out in *des Chênes* of "objectively" proving the infringement. This latter is best understood, in

⁷⁰ *Saguenay*, *supra*, note 66, at para. 136, citing *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, at para. 60, [1999] 1 S.C.R. 497 (S.C.C.).

⁷¹ *Supra*, note 54.

⁷² Even though *Badesha*, *supra*, note 59, involved a prosecution, the intervention of the Ontario Human Rights Commission in favour of the accused suggests that something else is at play.

⁷³ But see Robert E. Charney, "How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief" in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (2d) 47 for an argument for requiring some measure of objectivity in the analysis of religious practices.

⁷⁴ *Amselem*, *supra*, note 46, at paras. 39-43, 50.

my view, as an obligation for litigants to make their practices intelligible to judges, with judges being under a reciprocal obligation to seek understanding across cultural barriers.⁷⁵

An under-theorized understanding of triviality risks creating a jurisprudence where “the large print giveth and the small print taketh away”.⁷⁶ Reliance on the notion of triviality risks masking, perhaps even to judges themselves, moments when dominant expectations of what is a “reasonable” interference with religious practice may undermine the constitutional protection of religious and conscientious difference.⁷⁷ Perhaps the more transparent way to limit religious freedom claims is through a proportionality analysis, where courts are more practiced at laying out explicitly all the countervailing considerations. The more explicit the discussion is, the more likely are judges to uncover moments when they have evaluated a religious freedom claim from their own perspective rather than from the claimant’s. This opens up the question of how the proportionality analysis was undertaken in the particular context of *Loyola*, to which I now turn.

V. CHARTER VALUES AND RELIGIOUS FREEDOM

Commentators have divided on the SCC’s approach to proportionality analysis in the administrative context, with *Doré*’s apparent distinction between Charter rights and values. Some have argued that the scope of a value, as compared to a right, is uncertain in the abstract and raises practical difficulties as regards who bears the onus of proof to justify infringements.⁷⁸ Related criticisms have attacked Charter values as either an erosion of the Charter’s promise to the citizenry⁷⁹ or as an ambiguous

⁷⁵ For a deeper engagement with cross-cultural communication, see Howard Kislwicz, “Faithful Translations? Cross-Cultural Communication in Canadian Religious Freedom Litigation” (2014) 52:1 Osgoode Hall L.J. 141; Benjamin L. Berger, “The Cultural Limits of Legal Tolerance” (2008) 21 Can. J.L. & Jur. 245.

⁷⁶ Tom Waits, “Step Right Up” *Small Change* (1976).

⁷⁷ Indeed, though the non-triviality requirement can be traced to Wilson J.’s opinion in *Jones*, *supra*, note 43, Wilson J. herself later wrote, about freedom of association, that when “the Court is placed in the position of having to choose between so-called meaningful and trivial constitutional claims, an opening for the exercise of arbitrary line drawing has been created.” *Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.R. No. 52, [1991] 2 S.C.R. 211, at 262 (S.C.C.).

⁷⁸ Christopher D. Bredt & Ewa Krajewska, “*Doré*: All that Glitters is Not Gold” in J. Cameron, B.L. Berger & S. Lawrence, eds., *Constitutional Cases 2013* (2014) 67 S.C.L.R. (2d) 339.

⁷⁹ Audrey Macklin, “Charter Right or Charter-Lite? Administrative Discretion and the Charter” in J. Cameron, B.L. Berger & S. Lawrence, eds., *Constitutional Cases 2013* (2014) 67 S.C.L.R. (2d) 561.

limit on legislative action.⁸⁰ Others have praised the jurisprudential development as a way to provide “a broader and far more accessible way to ensure the Charter’s relevance to the sphere of administrative justice.”⁸¹

How does *Loyola* respond to this commentary? As noted above, the Court divided on methodology. The majority valorized *Doré*’s approach while the minority ignored it. One might expect that precisely this division would have elucidated the real differences between *Doré*’s Charter values and the previous *Oakes*-as-usual approach (articulated in *Multani*) to the Charter in administrative settings. However, the disagreement between the majority and minority turned out not to stem from any methodological difference, but rather from a divergence on what proportionality required in the circumstances.⁸²

Indeed, in Abella J.’s view, reasonableness requires proportionality. Thus, to Matthew Lewans’ post-*Doré* question of whether “a conclusion will be *ipso facto* reasonable as long as administrative decision-makers formally acknowledge that policy objectives must be balanced against Charter values”,⁸³ the majority’s answer appears to be “no”. The kind of deference courts are to show administrative decision-makers is effectively the same as the kind of deference they are to show legislators in choosing between constitutionally valid options.⁸⁴

Perhaps stemming from this parallel, the majority and minority judgments actually took similar approaches to proportionality from a practical perspective, though they arrived at a somewhat different result. Indeed, it is difficult to meaningfully distinguish between the minority’s approach of applying a correctness standard that finds fault with the Minister’s proportionality analysis and the majority’s approach of adopting a reasonableness standard but equating reasonableness with proportionality (understood as encompassing notions of minimal impairment and the balancing of salutary and deleterious effects).

⁸⁰ Matthew Horner, “Charter Values: The Uncanny Valley of Canadian Constitutionalism” in J. Cameron, B.L. Berger & S. Lawrence, eds., *Constitutional Cases 2013* (2014) 67 S.C.L.R. (2d) 361.

⁸¹ Lorne Sossin & Mark Friedman, “Charter Values and Administrative Justice” in J. Cameron, B.L. Berger & S. Lawrence, eds., *Constitutional Cases 2013* (2014) 67 S.C.L.R. (2d) 391, at 396.

⁸² Paul Daly, “Reasonableness, Proportionality and Religious Freedom: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12” (March 19, 2015), *Administrative Law Matters* (blog), online: <<http://www.administrativelawmatters.com/blog/2015/03/19/reasonableness-proportionality-and-religious-freedom-loyola-high-school-v-quebec-attorney-general-2015-scc-12/>>.

⁸³ Matthew Lewans, “Administrative Law, Judicial Deference, and the *Charter*” (2014) 23:2 Const. Forum Const. 19 at 28.

⁸⁴ *Loyola*, *supra*, note 1, at para. 40; *Doré*, *supra*, note 20, at para. 57.

The heart of the analysis is the same: the state action rises or falls on proportionality. How, then, might we explain the majority's insistence on the importance of the method? Audrey Macklin suggests that this may have to do with remedies.⁸⁵ Under administrative law principles, courts almost always remit the matter back to the decision-maker to render a new decision in compliance with the reasons on judicial review. This is precisely what the majority ordered. However, when courts are reviewing government action through the lens of the Charter, the breadth of remedies available under section 24(1) may give courts more confidence to simply substitute their own decisions for the decision-maker's, as the minority would have done in this case. Alternatively, one might see the concern with methodology as an expression of a practical concern for how administrative decision-makers will go about their daily business. The truncated proportionality analysis prescribed by *Doré* and the *Loyola* majority may have been seen as more expedient or more accessible to decision-makers.⁸⁶

Yet another way to explain the methodological division in *Loyola* is that the majority wanted to prevent courts from “retrying” a range of administrative decisions that would otherwise be subjected to a reasonableness standard⁸⁷ while still allowing courts the option of substituting their own views on Charter questions. By equating reasonableness with “robust”⁸⁸ proportionality, the general standard of review remains reasonableness, which gets the special definition of “proportionality” when it comes to Charter values. This may also be understood as a response to the tension in the case law that constitutional challenges to legislation undertaken in the administrative context are reviewed on a correctness standard⁸⁹ while constitutional challenges to the application of legislation is reviewed on a reasonableness standard. If this is the explanation, it seems like a compromise that may give rise to difficulties in application. In any event, given that the Charter values side carried the

⁸⁵ See Prof. Macklin's comments in Daly, *supra*, note 82.

⁸⁶ Macklin cautions that the “burgeoning legal scholarship and jurisprudence devoted to describing, defending, refining and critiquing proportionality might suggest undue optimism on that score” Macklin, *supra*, note 79, at 571.

⁸⁷ *Doré*, *supra*, note 20, at para. 51, citing David Mullan, “Administrative Tribunals and Judicial Review of Charter Issues after Multani” (2006) 21 N.J.C.L. 127.

⁸⁸ *Loyola*, *supra*, note 1, at paras. 3, 40.

⁸⁹ *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] S.C.J. No. 54, 2003 SCC 54 (S.C.C.).

day in *Loyola*, it is sensible to ask which Charter values are at stake when religious freedom interests are implicated by administrative decisions.

1. What Charter Values are Associated with Religious Freedom?

In unpacking the notion of Charter values, Sossin and Friedman ask whether every Charter value must “derive only from one or more particular rights or can [instead] flow from underlying Charter principles that are not set out in specific rights such as human dignity”.⁹⁰ It is possible to see elements of both alternatives in *Loyola*. First, the majority and minority judgments identify some values deriving from the protection of religious freedom in the Charter. Second, the judgments can be read as positing more general values associated with a diverse, democratic, secular state. These values arguably underlie not only religious freedom, but other Charter guarantees as well, such as freedom of expression, freedom of association, and equality.

With respect to the values deriving from religious freedom, both the majority and minority emphasize the collective aspects of religious experience. The majority refers to “the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions”.⁹¹ The minority similarly holds that the “communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as *Loyola*”.⁹²

Neither set of reasons is explicit about whether the protection of the collective dimensions of religious freedom derives from the value of religious freedom to the individual. The reasons may be read as supporting the perspective that individuals need religious freedom to be protected on a collective level in order to fully live out their individual religious commitments. Alternatively, the holdings in *Loyola* are equally consistent with the proposition that some religions have inherently collective or communal aspects that are different in kind from the individual autonomy-based reasons for protecting religious freedom. The

⁹⁰ Sossin & Friedman, *supra*, note 81, at 403.

⁹¹ *Loyola*, *supra*, note 1, at para. 60. See also para. 61.

⁹² *Id.*, at para. 91.

citation by the majority of both Will Kymlicka and Dwight Newman,⁹³ each of whom embraces one of these alternative perspectives, may be read as a signal that the majority viewed both perspectives as leading to the same legal result. On both theories, the law's protection of collective aspects of religious freedom remains crucial. In other words, the values underpinning the protection of religious freedom require some consideration of religion's collective dimension. This indicates a departure from the majority holding in *Hutterian Brethren* which, some have argued (myself included), gave too short shrift to the collective aspects of religious freedom.⁹⁴

At the more general level, both judgments affirm the position that, while a secular state has obligations to be neutral as between religions,⁹⁵ it need not be neutral on all value-based matters. In the majority's view, "[t]he state always has a legitimate interest in promoting and protecting ... core national values," which include "equality, human rights and democracy".⁹⁶ There are echoes here of the Court's jurisprudence on expressive freedom. In that context, the Court has held that laws cannot advance a particular form of morality, but can be enacted "on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society".⁹⁷

⁹³ *Id.*, at para. 60. See also Colin Macleod, "Toleration, Children and Education" (2010) 42:1 *Educational Philosophy and Theory* 9, at 16 for the argument that autonomy has an "adherence dimension," that is "the ability to make and sustain ongoing commitments to valuable projects and relationships"; Cheryl Milne, "Religious Freedom: At What Age?" (2009) 25 N.J.C.L. 71 at 79: "community belonging and familial attachment is a significant benefit of religious affiliation and is an inherent component of religious freedom, even where ostensibly there are practices that appear to be harmful".

⁹⁴ Benjamin L. Berger, "The Supreme Court of Canada on Religious Freedom and Education: *Loyola High School v. Québec (Attorney General)*" (March 23, 2015). *I-CONnect* (blog), online: <<http://www.iconnectblog.com/2015/03/the-supreme-court-of-canada-on-religious-freedom-and-education-loyola-high-school-v-quebec-attorney-general/>>; Benjamin L. Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (2d) 25; Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39 Queen's L.J. 175.

⁹⁵ *Loyola*, *supra*, note 1, at paras. 43-44; Richard Moon, "Freedom of Religion under the Charter of Rights: The Limits of State Neutrality" (2012) 45 U.B.C. L. Rev. 497.

⁹⁶ *Loyola*, *supra*, note 1, at paras. 46-47.

⁹⁷ *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452, at 493 (S.C.C.). While the potential justification for the criminalization of obscenity or indecency was curtailed in *R. v. Labaye*, [2005] S.C.J. No. 83, 2005 SCC 80 (S.C.C.), *Loyola* reaffirms the state's ability to legislate to advance certain normative ends.

A crucial analytical step, of course, is differentiating between “core national values” and other values. The divergence between the majority and minority in *Loyola* can be explained in these terms. For the majority, the provincial government has the capacity to require religious schools to teach their students about other religions and ethical perspectives in a neutral way in order to advance core national values of equality and democracy. Both of these values require fostering tolerance for diverse religions and perspectives. This is consistent with the Court’s vision in *Chamberlain*,⁹⁸ which interpreted a legislated requirement of secularism in the public school system as allowing for the inclusion of religious perspectives in the discussion of school curricula provided that the religious perspectives were not exclusive of other perspectives. *Loyola* represents a variation of this vision: the state can require religious schools to be non-exclusive on religious and ethical content, up to the point that the state’s policy effectively excludes the particular religious viewpoint of the school. Interfering with how *Loyola* teaches Catholicism is a “core values” problem because the Catholic perspective on Catholicism is excluded. At the same time, a school’s refusal to teach about other religious or ethical systems from a neutral perspective is a “core values” problem because it fails to foster respect for outside perspectives.

For the minority, even requiring *Loyola*’s teachers to remain neutral on ethical questions is too exclusive of the Catholic perspective. The minority understands the requirement of inclusion as extending beyond the formal discussion of religion and into the realm of morality more generally. The minority’s example is compelling on this score. If a class discussion involves the ethics of sexual intimacy outside of marriage, it is quite realistic to expect students in a Catholic school to ask what the Catholic teachings are on this question.⁹⁹ What is a Catholic teacher to do in such a circumstance? The minority says the effect of the majority’s position is to prohibit the teacher from effectively bringing the Catholic perspective into the dialogue.

One wonders, however, what the minority’s view would be where a religious position is more at odds with other Charter provisions or with the value of non-exclusionary dialogue. What if the ethical question is about same-sex relationships or marriage?¹⁰⁰ Would requiring Catholic teachers

⁹⁸ *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, 2002 SCC 86 (S.C.C.).

⁹⁹ *Loyola*, *supra*, note 1, at paras. 157-158.

¹⁰⁰ The minority may have expressly avoided this question so as not to prejudice litigation surrounding the accreditation of a law school at Trinity Western University, a Christian institution

to remain neutral on this question be seen in the same light as sex outside marriage, given the “core national value” of equality? Or, more hypothetically, given the goals of educating about religious diversity and fostering dialogue, it would seem reasonable and largely uncontroversial for the ERCP to mandate field trips to a variety of religious centres. However, some Orthodox Jews see entering certain places of worship, particularly where deities are visually represented, as religiously forbidden.¹⁰¹ Such a religious belief, while sincerely held, may be seen as in tension with a goal of maximizing understanding or dialogue.

How do Charter values help us resolve these challenges? Perhaps they do not in any obvious way. As Berger notes, “[t]he adjudicative challenge and ethical demands posed are intrinsic to the constitutional protection of religion ... It can never be wholly avoided.”¹⁰² Whether in the context of Charter values or rights, at some point the decision must be made, and there will be cases where, “[e]ven if the state seeks to avoid passing judgment ... on the truth or falsity of a spiritual belief, it must sometimes pursue goals that are inconsistent with particular religious practices or values.”¹⁰³ One wonders if Loyola’s claim would have been as successful if it had insisted on a more controversial view or its rights to keep its students insulated from ideas and debates it thought harmful.¹⁰⁴ On this score, it is worth recalling that Loyola’s victory was not complete, as the majority did not accept Loyola’s claim with respect to the ethics component of the ERPC. It remains to be seen how this will affect the members of Loyola’s community.¹⁰⁵

that requires students and faculty to commit to having sexual relations only within a marriage between a man and a woman. See *Trinity Western University v. Nova Scotia Barristers’ Society*, [2015] N.S.J. No. 32, 2015 NSSC 25 (N.S.S.C.); *Trinity Western University v. Law Society of Upper Canada*, [2015] O.J. No. 3492, 2015 ONSC 4250 (Ont. S.C.J.).

¹⁰¹ See Rabbi Doniel Neustadt, “Weekly Halacha: Visiting a Church or a Mosque” (2012), *Torah.org*, online: <<http://www.torah.org/advanced/weekly-halacha/5772/bo.html>>; “Is a Jew Permitted to Enter a Mosque or a Church in a Case of Great Need?” (January 8, 2012), *Halacha Yomita*, online: <<http://www.halachayomit.co.il/EnglishDisplayRead.asp?readID=2367>>; “Contemporary Avodah Zarah Issues”, *KOF-K Kosher Supervision*, online: <<http://www.kof-k.org/articles/040308030457W-34%20Contemporary%20Avodah%20Zara%20Issues.pdf>>.

¹⁰² Berger, “Section 1, Constitutional Reasoning, and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*”, *supra*, note 94, at 41.

¹⁰³ Moon, *supra*, note 95, at 534.

¹⁰⁴ See Manfred L. Pirner, “Freedom of Religion and Belief in Religious Schools? Toward a Multi-perspective Theory” in Stephen Parker, Rob Freathy & Leslie J. Francis, eds., *Religious Education and Freedom of Religious Belief* (Oxford: Peter Lang, 2012) 167, at 173.

¹⁰⁵ Further, religious schools and their associated communities might be troubled by some passages in the majority decision. Twice, the majority suggests that an important part of the overall context is that denominational schools are “legal” or “authorized” in Quebec: *Loyola*, *supra*, note 1,

The majority's overall vision of a secular society's education system might be brought into sharper focus by reading *Loyola* together with *des Chênes*. In that case,¹⁰⁶ the SCC held that parents of a child in a public school had not established that the ERCP gave rise to an objective infringement of their religious freedom rights. This is perhaps confusing, as the majority in *Loyola* identifies parents' ability to transmit their faith to their children as part of the religious freedom right. The majority's main justification for this difference in result is that, in *Loyola*, the ERCP amounted to an infringement "not because it requires neutral discussion of other faiths and ethical systems, but because it prevents a Catholic discussion of Catholicism".¹⁰⁷

The combined effect seems to be this: when parents choose to educate their children in a confessional manner, the state cannot dictate the terms of that education. So, the government cannot tell parents how to discuss their faith at home with their children, and can likewise not tell a religious school how to educate about its own religion. On the other hand, the state can require that all students be exposed to "neutral" discussions of religion and ethics, and public schools will provide only such discussion. This leaves room for religious schools to train students in particularistic forms of reasoning through ethical dilemmas,¹⁰⁸ which enriches societal debates by increasing available perspectives.¹⁰⁹ At the same time, it insists on the state's obligation to attempt to ensure that all children are equipped with the skills of encountering one another through respectful dialogue. While this may achieve a fair balance, we should not overlook that the extent of parents' control over how their faith is taught to their children has an economic component. Where parents can afford private education, or where a school's community has sufficient resources to subsidize those in need, the extent to which freedom of religion can be enjoyed is greater.

at paras. 6, 69. It would be hard to believe the Court would entertain the notion that the province could ban religious schools altogether, so the repeated reference to religious schools being legal is somewhat puzzling.

¹⁰⁶ See Sections I and III above.

¹⁰⁷ *Loyola*, *supra*, note 1, at para. 64.

¹⁰⁸ Pirner, *supra*, note 104, at 169.

¹⁰⁹ Benjamin L. Berger, "Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed" (2011) 19:2 Const. Forum Const. 41, at 48; Christopher J. Evans, "Adjudicating Contested Values: Freedom of Religion and the *Oakes* Test" (2013) 10 J.L. & Equality 5, at 18.

VI. CONCLUSION

The Charter value of religious freedom and the more specific notion of non-triviality are both attempts to work out the terms on which religious individuals and communities can demand that the state recognize and take into account their differences. I have argued that the jurisprudence on non-triviality is under-theorized. This obscures the basis on which courts assess triviality, and risks undercutting the subjective analysis undertaken with respect to a claimant's sincere religious belief. In contrast, though the distinction between Charter values and rights remains elusive, the Court took some care in *Loyola* to work out the balance between what autonomous space religious individuals and communities can legitimately demand from the state and what the state can legitimately demand of them.

