

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

S. L. ET D. J.

Appellants

- and -

**COMMISSION SCOLAIRE DES CHÊNES and
PROCUREUR GÉNÉRAL DU QUÉBEC**

Respondents

and

**CHRISTIAN LEGAL FELLOWSHIP, CANADIAN CIVIL LIBERTIES
ASSOCIATION, COALITION POUR LA LIBERTÉ EN ÉDUCATION,
EVANGELICAL FELLOWSHIP OF CANADA, REGROUPEMENT CHRÉTIEN
POUR LE DROIT PARENTAL EN ÉDUCATION, CANADIAN COUNCIL OF
CHRISTIAN CHARITIES, FÉDÉRATION DES COMMISSIONS SCOLAIRES
DU QUÉBEC and CANADIAN CATHOLIC SCHOOL TRUSTEES'
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(TAB 1) French Translation of Factum

PART I: STATEMENT OF FACTS

1. The Evangelical Fellowship of Canada¹ (“EFC”) was granted leave to intervene in this appeal by the Order of the Honourable Charron J. on March 28, 2011. The EFC accepts the facts as set out by the Appellants. The EFC will make submissions on the following issues.

PART II: ISSUES

2. The public policy questions on this appeal are whether or not it is the state’s role to provide religious education or education which seeks to inculcate a certain worldview (religious or nonreligious) about religion. If so, is it the state’s role to compel all students to go through this type of state mandated education?
3. To answer these questions, we must also ask if, in Canadian society, individuals who hold varied sincere and exclusive beliefs can effectively co-exist in the public sphere, including the public education system.

PART III: ARGUMENT

A. In Canadian society, can individuals who hold varied sincere and exclusive beliefs effectively co-exist in the public sphere, including the public education system?

4. Quebec’s Ethics and Religious Culture curriculum (hereinafter referred to as “ERC”) purports to teach ethics and religion in a non-religious manner². The notions of “non-religious” and “secular” however, are often misunderstood or misapplied. In *Chamberlain v. Surrey School District No. 36*³, this Court found that the common usage of “secular” to mean “non-religious” is erroneous. Specifically, Gonthier J. commented (and was concurred with by McLachlin C.J. and Lebel J. for unanimity of the Court on this point):

In my view, Saunders J. below erred in her assumption that “secular” effectively meant “non-religious”. This is incorrect since nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the *Charter* itself establishes that “[...] Canada is founded upon principles that recognize the supremacy of God and the rule of law”. According to the reasoning espoused by Saunders J., if

¹ The Evangelical Fellowship of Canada (“EFC”) is a national, churches, church-related organizations and educational institutions. The EFC is an interdenominational association of Protestant denominations and represents a constituency of 39 denominations, approximately 125 other organizations and colleges and over 1,000 individual churches. There are approximately 3.8 million Protestant Evangelicals in Canada of which approximately 1.9 million are members or adherents of EFC affiliated organizations.

² Ethics and Religious Culture Curriculum, Preamble reads: “The Ethics and Religious Culture program constitutes the culmination of a long process during which the Québec school system has shifted away from essentially confessional structures and orientations—both Catholic and Protestant—to entirely non-religious structures.”, Book of Authorities of the Intervener, the EFC, [*EFC Authorities*] Tab 7.

³ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 [*Chamberlain*], Book of Authorities of the Respondent, the Attorney General of Québec, [*AG Quebec Authorities*] Tab 6.

one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has "belief" or "faith" in something, be it atheistic, agnostic or religious. To construe the "secular" as the realm of the "unbelief" is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.⁴ [emphasis added]

5. Proponents of "non-inclusive secularism" (to distinguish it from the "inclusive secularism" described by Gonthier, J.) suggest that non-inclusive secularism ensures freedom of religion for every religious individual and group by recognizing an "equality" of all religions and denying the unique and exclusive claims of any religious belief. They posit that it is this non-inclusive secularism that addresses the issue of not imperilling community living.
6. According to Canadian philosopher Charles Taylor there are two schools of liberalism: the "politics of equal dignity" and the "politics of difference"⁵. The "politics of equal dignity" propose a universal and identical set of human rights and dignities while the "politics of difference" recognize the unique identity and distinctness of each individual or group from everyone else⁶. He explains the dichotomy between both "politics" as follows:

The idea is that it is precisely this distinctness that has been ignored, glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of authenticity. [...]

For one [politics of equal dignity], the principle of equal respect requires that we treat people in a difference-blind fashion. The fundamental intuition that humans command this respect focuses on what is the same in all. For the other [politics of difference], we have to recognize and even foster particularity. The reproach the first [politics of equal dignity] makes to the second [politics of difference] is just that it violates the principle of non-discrimination. This would be bad enough if the mold were itself neutral - nobody's mold in particular. But the complaint generally goes further. The claim is that the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture. As it turns out, then, only the minority or suppressed cultures are being forced to take alien form. Consequently, the supposedly fair and difference-blind society is not only inhuman (because suppressing identities) but also [...] highly discriminatory.⁷ [emphasis added]

7. Taylor's notion of "authentic pluralism" is similar to that adopted by this Court in *Trinity*

⁴ *Chamberlain*, *supra* note 3 at 137, *AG Quebec Authorities*, Tab 6.

⁵ Charles Taylor, *Multiculturalism*, (Princeton N.J.: Princeton University Press, 1994) [*Multiculturalism*] p. 41-43, *EFC Authorities*, Tab 12.

⁶ *Multiculturalism*, *supra* note 5, p. 38, *EFC Authorities*, Tab 12.

⁷ *Multiculturalism*, *supra* note 5, pp. 38 and 43, *EFC Authorities*, Tab 12.

*Western University v. College of Teachers (British Columbia)*⁸) when it stated: “For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.”⁹ Taylor explains in this way:

[S]ecularism involves in fact a complex requirement. There is more than one good sought here [...] liberty, equality, fraternity. 1. No one must be forced in the domain of religion or basic belief [...] 2. There must be equality between people of different faiths or basic belief; no religious outlook or (religious or areligious) Weltanschauung can enjoy a privileged status. [...] 3. All spiritual families must be heard, included in the ongoing process of determining what the society is about (its political identity), and how it is going to realize these goals (the exact regime of rights and privileges)¹⁰.

8. The ERC purports to instruct children in a manner that will equip them to live in a pluralist society¹¹. This notion of pluralism, on its face, appears to be practical and conducive to religious freedom. However, by presenting all religions as being equal and relegating the role of the exclusive claims of religion to “heritage,” the ERC evidences a foundation in the concepts of non-inclusive secularism that is non-conducive to freedom of religion and non-conducive to the very tolerance, respect and openness described as the course objective. In the words of constitutional legal theorist Joseph E. Magnet, this form of non-inclusive:

[S]ecularization has led to a brand of liberalism that posits religion as private and as the result of an arbitrary choice, which means that only liberal ideals may be regarded as rational and as the only principles allowed in public discourse. However, secularism's view that religion is merely a private and arbitrary choice makes it easier to suppress religion, whether by limiting religious freedom or by defining it in exclusively secular terms. Secularism undermines perhaps the most basic freedom upon which liberal democracy lies.¹² [emphasis added]

9. Canada’s longstanding tradition of education from a Judaeo-Christian perspective has bred a vibrant, multicultural nation of acceptance of other beliefs and tolerance when there has been disagreement with or disapproval of those beliefs. To set aside the exclusive claims and beliefs of each religion and impose instruction that ignores the claims and beliefs of all religions is inconsistent with tolerance. Such a notion is unjustified and legally unsupportable in a society which is constitutionally pluralist, multicultural and guarantees freedom of

⁸ *Trinity Western University v. College of Teachers (British Columbia)*, [2001] 1 S.C.R. 772 [*Trinity Western*], *AG Quebec Authorities*, Tab 39.

⁹ *Trinity Western*, *supra* note 8 at 36, *AG Quebec Authorities*, Tab 39.

¹⁰ Charles Taylor, “Why we need a radical redefinition of secularism” in Butler, Habermas, Taylor and West eds., *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011) at pp. 34-35, *EFC Authorities*, Tab 13.

¹¹ Ethics and Religious Culture Curriculum, Preamble, *supra* note 2, *EFC Authorities*, Tab 7.

¹² Joseph E. Magnet, *Constitutional Law of Canada*, 8th Ed., a.m.e., 2001, c. 5, (QL), *EFC Authorities*, Tab 11.

religion. True tolerance, as this Court has recognized in *Alberta v. Hutterian Brethren of Wilson Colony*¹³, requires the protection of difference and disagreement¹⁴.

10. In fact, this Court has described Canada as “a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity.”¹⁵ In *Ross v. New Brunswick School District No. 15*¹⁶, this Court recognized that:

The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.¹⁷ [emphasis added]

11. By attempting to present all religions in an equal manner, the ERC relativizes religion. Through a philosophy of non-inclusive secularism, the ERC removes room for exclusive claims or disagreement. This is not an environment for preparation “to live in a pluralist and democratic society,” accepting of others and tolerant of beliefs and lifestyles with which one might disagree or disapprove, but rather a form of non-inclusive secularist indoctrination that imperils the very standard of community living it claims to espouse and instruct.
12. The Court here is not charged with balancing the competing interests of disparate groups, but rather with protecting the freedom of religion of parents and children against the state.

B. Can the tolerance of religious beliefs and moral worldviews be achieved through state compulsory religious education?

13. To compel tolerance is to dispense with it. Every religion is, in essence, exclusive. Compelling tolerance by state-mandated compulsory religious and moral education can only be accomplished by violating the freedom of religion of each religiously devout individual.
14. As explained by philosopher John Gray, the traditional notion of tolerance, the pursuit of convergence pluralism, must be substituted with the pursuit of accommodation pluralism:

Liberalism contains two philosophies. In one, toleration is justified as a means to truth. In this view, toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life. The first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism's future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*.¹⁸ [emphasis added]

¹³ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 [*Hutterian Brethren*], *AG Quebec Authorities*, Tab 1.

¹⁴ *Hutterian Brethren*, *supra* note 13 at para 181, *AG Quebec Authorities*, Tab 1.

¹⁵ *Chamberlain*, *supra* note 3 at 21, *AG Quebec Authorities*, Tab 6.

¹⁶ *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [*Ross*], *AG Quebec Authorities*, Tab 33.

¹⁷ *Ross*, *supra* note 16 at 42, *AG Quebec Authorities*, Tab 33.

¹⁸ John Gray, *Two Faces of Liberalism*, (New York: The New Press, 2000), p. 105, *EFC Authorities*, Tab 9.

15. In *R. v. Big M Drug Mart*,¹⁹ Chief Justice Dickson (as he then was) put it this way:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. [...] freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. [...] Freedom means that [...] no one is to be forced to act in a way contrary to his beliefs or his conscience. With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be.

[...] What unites enunciated freedoms in [...] human rights documents [...] is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation.²⁰ [emphasis added]

16. In *R. v. Morgentaler*²¹ Wilson J. recognized that the *Charter* calls for the respect and protection of the choices individuals make.

Individuals are afforded a right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely, that the State will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.²²

C. Does the mandatory nature of the Ethics and Religious Culture course violate the freedom of religion of Evangelical Christian parents and their children (and thus other religious parents and children)?

17. This Court has maintained that once it is determined that a religious belief is sincerely held, the state, neither through the government nor the court, should take on the role of interpreting those beliefs or becoming the arbiter of religious dogma.²³

18. An important component of freedom of religion, as demonstrated by its evolution in Canada, is the freedom to instruct one's children in a manner consistent with their faith.²⁴ Since the enactment of the *Constitution Act, 1867* the precept of religious education being determined by parents has been maintained and upheld within Canada and internationally.²⁵

¹⁹ *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 [*Big M*], *AG Quebec Authorities*, Tab 26.

²⁰ *Big M*, *supra* note 19 at 94 and at 121, *AG Quebec Authorities*, Tab 26.

²¹ *R. v. Morgentaler* (1988), 44 D.L.R. (4th) 385 [*Morgentaler*], *EFC Authorities*, Tab 4.

²² *Morgentaler*, *supra* note 21 at p. 288, *EFC Authorities*, Tab 4.

²³ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at 53, *AG Quebec Authorities*, Tab 37.

²⁴ See David M. Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights", (2000) 33 U.B.C.L. Rev. 551 (QL), *EFC Authorities*, Tab 8.

²⁵ United Nations, *Universal Declaration of Human Rights*, *EFC Authorities*, Tab 16 (see also *Convention on the Rights of the Child*, (Nov. 20, 1959) G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at Article 5, U.N. Doc. A/4354 at Article 7, *EFC Authorities*, Tab 14 and *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*) at Article 26(3), *EFC Authorities*, Tab 15.

19. Religious instruction has been a controversial issue in Canada. It has been dealt with in a number of decisions, including many of this Court, and has been consistently held to be the right of parents to decide, and not to be imposed by the state through the public education system without parental agreement²⁶. This Court has also held that parents are presumed to be acting in the best interest of their children unless there is a finding to the contrary²⁷.

20. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*²⁸, this Court recognized that parents have the right to rear their children according to their religious beliefs, as a fundamental aspect of freedom of religion, guaranteed by s. 2(a)²⁹:

The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being [...] The parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.

[...] [I]t would be difficult to deny that a parent can dictate to his or her child the place where he or she will live, or which school he or she will attend³⁰. [emphasis added]

21. The approach to teaching morality and religion as mandatory in both public and private schools in the manner determined by the government is a violation of religious freedom and the prohibition on accommodation interferes with parents' exercise of their freedom of conscience and religion in a manner that is substantial, not trivial. The ERC strips all parents, including Evangelical Christians, of their right to choose if, how, when, where and from whom their children will receive religious education.

22. In *R. v. Jones*³¹ this Court held that freedom of religion included the right of parents to educate their children according to their religious beliefs:

While a religious belief that a person has the right to educate his own children is not as strongly asserted nowadays, it is really not that unusual. It would be to negate history to fail to recognize that for many years the individual and the church played a far more significant role in the education of the young than the state. And when the state began to take the dominant role, it had to make accommodations to meet the needs and desires of those who had dissentient views. The provisions regarding separate schools in the Constitution are an example.³² [emphasis added]

²⁶ See *Zylberberg v. Sudbury Board of Education (Director)* [1988] OJ no. 1488 [Zylberberg], *AG Quebec Authorities*, Tab 41; *Ross, AG Quebec Authorities*, Tab 33; *Canadian Civil Liberties Association v. Ontario (Minister of Education)* [1990] OJ No. 104, Book of Authorities of the Appellants [Appellant's Authorities], Tab 7; *Russow v. British Columbia (Attorney General)* [1989] 4 WWR 186 (BCSC), *EFC Authorities*, Tab 3; *Bal v. Ontario (Attorney General)* [1994] OJ No. 2814, *Appellants' Authorities*, Tab 2; and *Adler v. Ontario* [1996] 3 SCR 609 *Appellants' Authorities*, Tab 1.

²⁷ *Chamberlain*, *supra* note 3 at 103, *AG Quebec Authorities*, Tab 6.

²⁸ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315 [B.(R.)], *Appellant's Authorities*, Tab 4.

²⁹ *B. (R.)*, *supra* note 28 at 105, *Appellants' Authorities*, Tab 4.

³⁰ *B. (R.)*, *supra* note 28 at 83 and 86, *Appellants' Authorities*, Tab 4.

³¹ *The Queen v. Jones*, [1986] 2 S.C.R. 284 [Jones], *AG Quebec Authorities*, Tab 30.

³² *Jones*, *supra* note 31 at 21, *AG Quebec Authorities*, Tab 30, (See also: *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, *EFC Authorities*, Tab 2).

23. The stated *purpose* of the ERC (to create a more tolerant society) does not necessarily infringe on the parents' or students' freedom of religion. The *implementation* of the ERC (establishing *mandatory* state-determined education in religion and ethics from a non-inclusive secularist or relativistic perspective) however, seriously infringes on the parents' freedom to educate their children according to the tenets of their faith.
24. Evangelical Christian parents sincerely believe that they are obligated to teach their children ethics and morality from the perspective that God is central to the making of ethical and moral decisions³³. In contrast, the ERC approaches ethics and religion without affirming or otherwise acknowledging the truth of the existence of God.
25. Teaching "about" religion may not be described in previously assessed forms of "indoctrination" and thus may appear benign to some. If the Court is to continue to support respect for parents' right to choose their child's religious education however, it will be essential to continue to acknowledge that state selected methods for teaching about religion may contradict the beliefs of certain parents. Such a contradiction may be in the belief that ethics and religion are not to be taught without reference to the centrality of God.
26. To allow the question as to whether these parents' beliefs are reasonable would undermine this Court's consistent approach to religion as subjectively determined, as well as the purpose of s. 2(a) described by Chief Justice Dickson in *R. v. Edwards Books*³⁴:
- The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, human nature, and in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices³⁵.
27. Teaching ethics and religion as mandatory in both public and private schools in the manner determined by the state is offensive and the prohibition on exemptions interferes with parents' exercise of their freedom of religion in a manner that is substantial, not trivial. It should be noted that the ERC has also been challenged by a private Catholic School³⁶.
28. The mandatory nature of the ERC undermines this Court's affirmation that freedom of religion ensures that every individual is free to manifest their beliefs without state coercion.

³³ Jeremiah 31:33: "This is the covenant I will make with the people of Israel after that time," declares the LORD. "I will put my law in their minds and write it on their hearts. I will be their God, and they will be my people." (NIV) (see also Mathew 28:19-20, John 14:15, Romans 2:13, Ephesians 6:4 and 1 John 2:3-6), *EFC Authorities*, Tab 6.

³⁴ *R. v. Edwards Books* [1986] 2 S.C.R. 713 [*Edwards Books*], *AG Quebec Authorities*, Tab 29.

³⁵ *Edwards Books*, *supra* note 34 at 97, *AG Quebec Authorities*, Tab 29.

³⁶ *Loyola High School c. Courchesne*, 2010 QCCS 2631 (on appeal), *EFC Authorities*, Tab 1.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another 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. [emphasis added]³⁷

29. It has been acknowledged that the state has a significant interest in education. However, this Court has also affirmed that parents have always had primary authority over their children.³⁸
30. Entirely excluding the concerns of parents who wish to see a right of exemption or other accommodation added to the legislation is an example where the concerns of the minority group are being ignored and determined completely by the interests of the state.
31. Similar to the reasoning by the Ontario Court of Appeal in *Zylberberg*, a finding of harm is irrelevant to the issue of whether the *Charter* freedom of religion is infringed. As was stated in that same case, there is no need for the additional burden on the parents to prove that there has been harm to their children.³⁹
32. World religious freedom experts Brian J. Grim and Roger Finke have noted:

When reviewing human rights throughout European history, Michael Horowitz described Jews as the “canaries in the coal mine”: nations persecuting Jews held less democratic commitment and were more likely to deny other freedoms as well. He later argued that vulnerable Christians are now the canaries, serving as a “litmus indicator of whether freedom exists not only for them – but for all others in their societies.” We expand the litmus test beyond a particular religious group to religious freedoms in general, and we agree that the violations of vulnerable religious liberties indicate potential threats to other liberties as well.⁴⁰

In this instance, the threat is to the freedom of parents to determine the education – and most particularly the religious education – of their children.

D. Is the mandatory nature of the ERC saved by section 1 of the *Charter*?

33. Freedom of religion is violated by the ERC. Absent a demonstrated need for the mandatory nature of the course to create more tolerant students, the prohibition on exemptions is unreasonable and unconstitutional.
34. This Court established in *Big M* that both the purpose and effect of an Act are useful in determining if a piece of legislation is unconstitutional⁴¹. Although the intent of the ERC may line up with *Charter* values, its effect is a clear violation of the *Charter*.

³⁷ *Big M.*, *supra* note 19 at 95, *AG Quebec Authorities*, Tab 26.

³⁸ *B. (R.)*, *supra* note 28 at 85, *Appellants' Authorities*, Tab 4.

³⁹ *Zylberberg*, *supra* note 26 at 41, *AG Quebec Authorities*, Tab 41.

⁴⁰ Brian J. Grim, Roger Finke, *The Price of Freedom Denied* (New York: Cambridge University Press, 2011) at p. 202, *EFC Authorities*, Tab 10.

⁴¹ *Big M.*, *supra* note 19 at 81, *AG Quebec Authorities*, Tab 26.

35. In *Multani v. Commission scolaire Marguerite-Bourgeois*⁴², this Court stated that when analyzing proportionality, “the duty to accommodate [...] is a corollary of the minimal impairment [test]”⁴³. It followed *Eldridge v. British Columbia (Attorney General)*⁴⁴, which stated that “reasonable accommodation” as conceptualized in s. 15(1) cases, is equivalent to the concept of “reasonable limits” in the s. 1 analysis.⁴⁵ Citing Professor Jose Woehrling, this Court explained the relationship between the duty to accommodate and the s. 1 analysis:

Anyone seeking to disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant. [...] it is necessary, in applying the test from *R. v. Oakes*, to show, in succession, that applying the standard in its entirety constitutes a rational means of achieving the legislative objective, that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test), and that there is proportionality between the measure’s salutary and limiting effects. At a conceptual level, the minimal impairment test, which is central to the section 1 analysis, corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation.⁴⁶

36. *RJR-MacDonald Inc. v. Canada (Attorney General)*⁴⁷ has shown that a complete ban or denial of a right will be more difficult to uphold than a partial one. Complete bans will only be permissible when the state shows that it is absolutely necessary to further its objective⁴⁸:

[i]f the law falls within a range of reasonable alternatives, the courts will not find [a legislative choice] overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. [...] On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.⁴⁹

37. The ERC assumes that tolerance can only be taught by relativizing religion and excludes the possibility that tolerance can be taught while maintaining the exclusivity of one’s religious beliefs. Such an unfounded assumption undermines the value of all religions and is incompatible with the goals of diversity and multiculturalism. Denying parents the ability to exclude their children from the ERC does not promote social harmony and diversity, but offends individuals with a sincerely held religious belief that their faith is true.

38. Accommodating religious beliefs, by allowing exemptions or otherwise would have the

⁴² *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256, 2006 SCC 6 [*Multani*], *AG Quebec Authorities*, Tab 22.

⁴³ *Multani*, *supra* note 42 at 52, *AG Quebec Authorities*, Tab 22.

⁴⁴ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*], *AG Quebec Authorities*, Tab 22.

⁴⁵ *Eldridge*, *supra* note 44 at 79 and *Multani*, *supra* note 41 at 52, *AG Quebec Authorities*, Tab 22.

⁴⁶ *Multani*, *supra* note 42 at 53, *AG Quebec Authorities*, Tab 22.

⁴⁷ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199 [*RJR*], *EFC Authorities*, Tab 2.

⁴⁸ *RJR*, *supra* note 47 at 163, *EFC Authorities*, Tab 2.

⁴⁹ *RJR*, *supra* note 47 at 160, *EFC Authorities*, Tab 2.

effect of promoting tolerance because parents and students would see that the state is accepting of different beliefs and that all beliefs deserve to be equally protected. The importance of teaching by example was explained by this Court in *R. v. M. (M.R.)*⁵⁰.

[S]chools [...] have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example and may be undermined if the students' rights are ignored by those in authority.⁵¹

39. Accommodation would still allow the ERC to accomplish its objective of creating a more tolerant society. For Evangelical Christians, Catholics, Orthodox Christians, adherents of the Christian faith generally, and adherents of many other religions, obedience to religious beliefs is compelled. Teaching their children religion and morality in a manner consistent with their Christian faith is not something Christian parents believe they can choose to do or not do.
40. The violation of fundamental *Charter* rights of individuals, through the denial of an exemption from ERC, or other accommodation, cannot be considered to impair the rights in question as little as possible, nor could it be found to have proportionality between the effects of the limiting measure and the objective of the legislation required to meet the s. 1 analysis.

PART IV: COSTS

41. The EFC does not seek costs, and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

42. The EFC respectfully submits that the ERC's *Charter* violation does not minimally impair the *Charter* rights of parents and their children and therefore cannot be saved under s. 1 of the *Charter*. As such, this appeal should be granted. The EFC requests permission to present oral arguments at the hearing of this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April 2011.


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DON HUTCHINSON


FAYE SOMIER

⁵⁰ *R. v. M. (M.R.)*, [1998] 3 SCR 393 [*R. v. M.*], *EFC Authorities*, Tab 5.

⁵¹ *R. v. M.*, *supra* note 50 at 3, *EFC Authorities*, Tab 5.

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PART VII: LEGISLATIVE PROVISIONS

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Convention on the Rights of the Child

**Adopted and opened for signature, ratification and accession by General Assembly
resolution 44/25 of 20 November 1989**

entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their

**Declaration on the Elimination of All Forms of Intolerance and of Discrimination
Based on Religion or Belief**

Proclaimed by General Assembly resolution 36/55 of 25 November 1981

The General Assembly,

Considering that one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action in co-operation with the Organization to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights and the International Covenants on Human Rights proclaim the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion and belief,

Considering that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations,

Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed,

Considering that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief and to ensure that the use of religion or belief for ends inconsistent with the Charter of the United Nations, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible,

Convinced that freedom of religion and belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination,

Noting with satisfaction the adoption of several, and the coming into force of some, conventions, under the aegis of the United Nations and of the specialized agencies, for the elimination of various forms of discrimination,

Concerned by manifestations of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world,

Resolved to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief,

Proclaims this Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief:

Article 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 2

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 3

Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Article 5

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

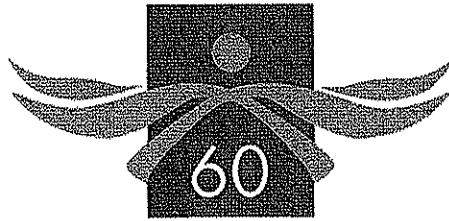
4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.

5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

Article 6



United Nations



**UNIVERSAL
DECLARATION
OF HUMAN
RIGHTS**

*All human beings are born with equal and inalienable rights
and fundamental freedoms.*

*The United Nations is committed to upholding, promoting and protecting
the human rights of every individual. This commitment stems from the
United Nations Charter, which reaffirms the faith of the peoples of the world in
fundamental human rights and in the dignity and worth of the human person.*

*In the Universal Declaration of Human Rights, the United Nations has stated
in clear and simple terms the rights which belong equally to every person.*

These rights belong to you.

*They are your rights. Familiarize yourself with them.
Help to promote and defend them for yourself
as well as for your fellow human beings.*

Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social

progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission

which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

(1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and

to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right to equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

United Nations Department of Public Information

For more information

www.ohchr.org/english/issues/education/training/udhr.htm

www.un.org/cyberschoolbus/humanrights/index.asp

TRADUCTION FRANÇAISE

PARTIE I: EXPOSÉ DES FAITS

1. L'Alliance évangélique du Canada («AÉC»)¹ intervient dans la présente requête suite à l'ordonnance émise par l'Honorable juge Charron en date du 28 mars 2011. L'AÉC accepte l'exposé des faits soumis par les appelants.

PARTIE II: QUESTIONS EN LITIGE

2. Les questions d'intérêt public dans la présente requête sont les suivantes: est-ce le rôle de l'État de fournir une éducation religieuse ou une éducation qui cherche à inculquer une certaine vision du monde (religieuse ou non) au sujet de la religion? Si oui, est-ce le rôle de l'État de rendre ce type d'éducation obligatoire?
3. À cet égard, il faut aussi se demander si, au sein de la société canadienne, des citoyens possédant diverses croyances sincères et exclusives peuvent effectivement coexister dans la sphère publique, et, plus particulièrement, dans le système d'instruction publique.

PARTIE III: ARGUMENT

A. Dans la société canadienne, est-ce que les individus qui ont diverses croyances sincères et exclusives peuvent effectivement coexister dans la sphère publique, y compris dans le système d'instruction publique?

4. Le programme d'Éthique et de culture religieuse (« ECR ») prétend enseigner l'éthique et la religion d'une façon non religieuse². Cependant, les notions du « non-religieux » et de la «laïcité» sont souvent mal comprises ou mal appliquées. Dans *Chamberlain c. Surrey School District No. 36*³, cette cour a constaté que l'usage quotidien du mot «laïcité» au sens du «non religieux » est erroné. Spécifiquement, le juge Gonthier a déclaré (laquelle déclaration fut approuvée par la juge en chef McLachlin et le juge LeBel) :

À mon avis, le juge Saunders a commis une erreur en présumant que le terme « laïque » signifiait en réalité « non religieux ». Ce n'est pas le cas puisque rien dans la Charte, dans la théorie politique ou démocratique ou dans le pluralisme bien compris n'exige, lorsque des questions d'intérêt public sont en cause, que les positions morales fondées

¹ L'AÉC est une association nationale, d'églises, d'organismes liés aux églises et d'institutions académiques. L'AÉC est une association interconfessionnelle des dénominations protestantes et représente une circonscription de 39 dénominations, approximativement 125 autres organismes et universités et plus de 1,000 église différente. Il y a approximativement 3.8 millions de protestant évangélique au Canada dont approximativement 1.9 million sont membres ou des adhérents des organismes filiales de l'AÉC.

² Le préambule du programme ECR se lit : « Le programme d'éthique et culture religieuse constitue l'aboutissement d'un long processus au cours duquel le système scolaire québécois est passé de structures et d'orientations essentiellement confessionnelles, catholiques et protestantes, à des structures entièrement laïques.», sources de l'intervenant, L'AÉC [Source de l'AÉC] onglet 7.

³ *Chamberlain c. Surrey School District No. 36*, [2002] 4 R.C.S. 710 [Chamberlain], sources des intimés, le procureur général du Québec, [Sources du PG Québec] onglet 6.

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sur l'athéisme l'emportent sur les positions morales fondées sur des croyances religieuses. Je souligne que le préambule même de la *Charte* précise que « . . . le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit ». Selon le raisonnement du juge Saunders, l'opinion morale qui traduit une croyance fondée sur une religion ne doit pas s'exprimer sur la place publique, alors qu'elle devient publiquement acceptable si elle n'est pas ainsi fondée. Le problème que pose une telle interprétation est que chacun a des « convictions » ou des « croyances », que celles-ci prennent leur source dans l'athéisme, l'agnosticisme ou la religion. Il est donc erroné de considérer que le terme « laïque » relève du domaine de la « non-croyance ». Cela étant, pourquoi alors les personnes ayant des convictions religieuses devraient-elles être pénalisées ou exclues? Ce faisant, on dénaturerait les principes du libéralisme d'une manière qui fragiliserait la notion de pluralisme. L'essentiel est que des personnes peuvent être en désaccord sur des questions importantes et qu'un tel désaccord, lorsqu'il ne met pas en péril la vie en société, doit pouvoir être accommodé au cœur du pluralisme moderne⁴. [soulignement ajouté]

5. Les partisans de la laïcité non inclusive (par opposition à la laïcité inclusive décrite par le juge Gonthier) proposent que la laïcité non inclusive assure la liberté religieuse de chaque individu ou groupe religieux en reconnaissant une «égalité» de toutes les religions et en niant les réclamations uniques et exclusives de toute croyance religieuse. Ils postulent que c'est cette laïcité non inclusive qui permet d'éviter qu'on mette en danger le vivre-ensemble.
6. Selon le philosophe canadien Charles Taylor, il existe deux écoles de pensée sur le libéralisme : la «politique de la dignité égale» et la «politique de la différence»⁵. La «politique de la dignité égale» propose un ensemble universel et identique des droits de l'homme et des dignités tandis que la «politique de la différence» reconnaît le caractère unique et distinct de chaque individu ou groupe⁶, de chaque individu ou groupe. Il explique la dichotomie entre les deux «politiques» comme suit :

The idea is that it is precisely this distinctness that has been ignored, glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of authenticity. [...]

For one [politics of equal dignity], the principle of equal respect requires that we treat people in a difference-blind fashion. The fundamental intuition that humans command this respect focuses on what is the same in all. For the other [politics of difference], we have to recognize and even foster particularity. The reproach the first [politics of equal dignity] makes to the second [politics of difference] is just that it violates the principle of non-discrimination. This would be

⁴ Chamberlain, *supra* note 3 at 137, *Source du PG Québec*, onglet 6.

⁵ Charles Taylor, *Multiculturalism*, (Princeton N.J.: Princeton University Press, 1994) [*Multiculturalism*] pp. 41-43, *Sources de l'AÉC*, onglet 12.

⁶ *Multiculturalism*, *supra* note 5, p. 38, *Sources de l'AÉC*, onglet 12.

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bad enough if the mold were itself neutral - nobody's mold in particular. But the complaint generally goes further. The claim is that the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture. As it turns out, then, only the minority or suppressed cultures are being forced to take alien form. Consequently, the supposedly fair and difference-blind society is not only inhuman (because suppressing identities) but also [...] highly discriminatory⁷. [soulignement ajouté]

7. La notion de Taylor du «pluralisme authentique» est semblable à celle adoptée par cette cour dans *Université Trinity Western c. College of Teachers*⁸ où elle a énoncé : «force est de constater que la tolérance de croyances divergentes est la marque d'une société démocratique⁹.» Taylor l'explique de cette façon :

[S]ecularism involves in fact a complex requirement. There is more than one good sought here [...] liberty, equality, fraternity. 1. No one must be forced in the domain of religion or basic belief [...] 2. There must be equality between people of different faiths or basic belief; no religious outlook or (religious or areligious) Weltanschauung can enjoy a privileged status. [...] 3. All spiritual families must be heard, included in the ongoing process of determining what the society is about (its political identity), and how it is going to realize these goals (the exact regime of rights and privileges)¹⁰.

8. Le programme ECR prétend instruire les enfants d'une façon qui les équipera à vivre dans une société pluraliste¹¹. Cette notion du pluralisme, à première vue, semble être pratique et favorable à la liberté religieuse. Cependant, en présentant toutes les religions comme étant égales et en reléguant le rôle des croyances exclusives d'une religion à «l'héritage», le programme ECR adopte un fondement issu des concepts de la laïcité non inclusive qui est défavorable à la liberté religieuse et défavorable à la tolérance, au respect et à l'ouverture qui sont les objectifs mêmes du programme. Voici ce que dit le théoricien constitutionnel Joseph E. Magnet sur cette forme de laïcité non inclusive:

[S]ecularization has led to a brand of liberalism that posits religion as private and as the result of an arbitrary choice, which means that only liberal ideals may be regarded as rational and as the only principles allowed in public discourse. However, secularism's view that religion is merely a private and arbitrary choice makes it easier to suppress religion, whether by limiting religious freedom or by defining it in exclusively secular terms. Secularism undermines perhaps the most basic freedom upon which liberal democracy lies¹². [soulignement ajouté]

9. La longue tradition canadienne d'éducation de perspective judéo-chrétienne a produit un pays multiculturel dynamique qui accepte les croyances divergentes et assure la tolérance lorsqu'il

⁷ *Multiculturalism*, supra note 5, pp. 38 et 43, *Source de l'ÂEC*, onglet 12.

⁸ *Université Trinity Western c. College of Teachers*, [2001] 1 R.C.S. 772 [*Trinity Western*], *Source PG Québec*, onglet 39.

⁹ *Trinity Western*, supra note 8 par. 36, *Sources PG Québec*, onglet 39.

¹⁰ Charles Taylor, "Why we need a radical redefinition of secularism" dans Butler, Habermas, Taylor et West eds., *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011) at pp. 34-35, *Source de l'ÂEC*, onglet 13.

¹¹ Programme d'ÉCR, Préambule, supra note 2, *Source de l'ÂEC*, onglet 7.

¹² Joseph E. Magnet, *Constitutional Law of Canada*, 8ième Éd., a.m.e., 2001, c. 5, (QL), *Source de l'ÂEC*, onglet 11.

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y a désaccord ou désapprobation de ces croyances. Il est contraire à la tolérance de faire abstraction des croyances propres à chaque religion et d'imposer une instruction qui cherche à les gommer. Une telle notion est injustifiée et juridiquement insupportable dans une société constitutionnellement pluraliste, multiculturelle qui vise à garantir la liberté religieuse. La tolérance réelle, telle que déclarée par cette cour dans *Alberta c. Hutterian Brethren of Wilson Colony*¹³ exige la protection de la différence et du désaccord¹⁴.

10. En fait, cette cour a décrit le Canada comme une société «multiculturel[le], [...] [qui attache les Canadiens aux valeurs d'accommodement, de tolérance et de respect de la diversité¹⁵.» Dans *Ross c. Conseil scolaire du district n° 15 du Nouveau-Brunswick*¹⁶, cette cour a reconnu que:

Une école est un centre de communication de toute une gamme de valeurs et d'aspirations sociales. Par l'entremise de l'éducation, elle définit, dans une large mesure, les valeurs qui transcendent la société. Lieu d'échange d'idées, l'école doit reposer sur des principes de tolérance et d'impartialité de sorte que toutes les personnes qui se trouvent en milieu scolaire se sentent également libres de participer.¹⁷ [soulignement ajouté]

11. En présentant toutes les religions d'une manière égale, le programme ECR relativise la religion. Partant d'une philosophie de laïcité non inclusive, le programme ECR réduit la place des croyances exclusives et du désaccord. Cela ne favorise pas la préparation à «vivre dans une société pluraliste et démocratique» ni l'acceptation de ceux dont les croyances et les styles de vie sont différents. Au contraire, il s'agit là d'une forme d'endoctrinement de laïcité non inclusive qui met en danger le vivre-ensemble que le programme prétend promouvoir et enseigner.
12. En l'espèce, la cour n'est pas chargée de réconcilier les intérêts divergents de groupes différents, mais plutôt de protéger la liberté religieuse des parents et des enfants contre l'État.

B. Est-ce que la tolérance des croyances religieuses et des visions du monde peut être réalisée par une éducation religieuse forcée par l'État ?

13. Forcer la tolérance, c'est l'anéantir. Chaque religion est, de par sa nature, exclusive. Forcer la tolérance par l'entremise d'une éducation religieuse et morale exigée et dictée par l'État viole la liberté religieuse de chaque croyant.

¹³ *Alberta c. Hutterian Brethren of Wilson Colony*, [2009] R.C.S. 567 [*Hutterian Brethren*], *Source du PG Québec*, onglet 1.

¹⁴ *Hutterian Brethren*, *supra* note 13 par 181, *Source du PG Québec*, onglet 1.

¹⁵ *Chamberlain*, *supra* note 3 par 21, *Sources du PG Québec*, onglet 6.

¹⁶ *Ross c. Conseil scolaire du district n° 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825 [*Ross*], *Sources du PG Québec*, onglet 33.

¹⁷ *Ross*, *supra* note 16 par. 42, *Sources du PG Québec*, onglet 33.

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14. Selon le philosophe John Gray, la notion traditionnelle de la tolérance, fondée sur la poursuite du pluralisme de convergence, doit céder devant le pluralisme d'accommodement :

Liberalism contains two philosophies. In one, toleration is justified as a means to truth. In this view, toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life. The first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism's future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*.¹⁸ [soulignement ajouté]

15. Dans *R. c. Big M Drug Mart*,¹⁹ le juge en chef Dickson s'est prononcé comme suit:

Une société vraiment libre peut accepter une grande diversité de croyances, de goûts, de visées, de coutumes et de normes de conduite. [...] Le concept de la liberté de religion se définit essentiellement comme le droit de croire ce que l'on veut en matière religieuse, le droit de professer ouvertement des croyances religieuses sans crainte d'empêchement ou de représailles et le droit de manifester ses croyances religieuses par leur mise en pratique et par le culte ou par leur enseignement et leur propagation. Toutefois, ce concept signifie beaucoup plus que cela. [...] La liberté au sens large comporte l'absence de coercition et de contrainte et le droit de manifester ses croyances et pratiques. La liberté signifie que, sous réserve des restrictions qui sont nécessaires pour préserver la sécurité, l'ordre, la santé ou les mœurs publics ou les libertés et droits fondamentaux d'autrui, nul ne peut être forcé d'agir contrairement à ses croyances ou à sa conscience. [...] La Charte reconnaît à tous les Canadiens le droit de déterminer, s'il y a lieu, la nature de leurs obligations religieuses et l'état ne peut prescrire le contraire.

[...] Les libertés énoncées dans [...] la Charte et dans les dispositions d'autres documents relatifs aux droits de la personne [est] la prééminence de la conscience individuelle et l'inopportunité de toute intervention gouvernementale visant à forcer ou à empêcher sa manifestation.²⁰ [soulignement ajouté]

16. Dans *R. c. Morgentaler*²¹ la juge Wilson a reconnu que la Charte oblige le respect et la protection des choix individuels.

Les individus se voient offrir le droit de choisir leur propre religion et leur propre philosophie de vie, de choisir qui ils fréquenteront et comment ils s'exprimeront, où ils vivront et à quelle occupation ils se livreront. Ce sont tous là des exemples de la théorie fondamentale qui sous-tend la Charte, savoir que l'État respectera les choix de chacun et, dans toute la mesure du possible, évitera de subordonner ces choix à toute conception particulière d'une vie de bien.²²

C. Est-ce que la nature obligatoire du programme ECR viole la liberté religieuse des parents chrétiens évangéliques et de leurs enfants (et par conséquent, d'autres parents et enfants religieux) ?

¹⁸ John Gray, *Two Faces of Liberalism*, (New York: The New Press, 2000), p. 105, *Sources de l'ÂEC*, onglet 9.

¹⁹ *R. c. Big M Drug Mart*, [1985] 1 R.C.S. 295 [*Big M*], *Source du PG Québec*, onglet 26.

²⁰ *Big M*, *supra* note 19 para. 94, 95, 121 et 135, *Source du PG Québec*, onglet 26.

²¹ *R. v. Morgentaler*, [1988] 1 R.C.S. 30 [*Morgentaler*], *EFC Authorities*, Tab 4.

²² *Morgentaler*, *supra* note 21 par 288, *Source de l'ÂEC*, onglet 4.

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17. Cette cour a maintenu que lorsqu'une croyance religieuse est sincère, l'État ne peut, ni par le gouvernement ni par les tribunaux, usurper le rôle d'interpréter cette croyance ou de devenir l'arbitre des dogmes religieux.²³
18. Une composante importante de la liberté religieuse au Canada est la liberté d'instruire ses enfants conformément à sa foi²⁴. Depuis la *Loi constitutionnelle 1867*, le principe selon lequel l'éducation religieuse relève des parents a été maintenu et confirmé ici au Canada ainsi qu'en droit international²⁵.
19. L'instruction religieuse a été un sujet de controverse au Canada. Elle a été traitée dans un grand nombre de décisions, y compris plusieurs décisions de cette cour. Toutefois, elle fut constamment reconnue comme relevant de l'autorité parentale et non de l'autorité étatique ou du système d'instruction publique. Cette cour a également soutenu que les parents sont présumés agir dans l'intérêt de leurs enfants, sauf preuve contraire²⁶.
20. Dans *B. (R.) c. Children's Aid Society of Metropolitan Toronto*²⁷, cette cour a reconnu qu'un élément fondamental de la liberté religieuse, tel que garanti par l'article 2(a) est le droit des parents d'élever leurs enfants selon leurs croyances religieuses²⁸:

La common law reconnaît depuis longtemps que les parents sont les mieux placés pour prendre soin de leurs enfants et pour prendre toutes les décisions nécessaires à leur bien-être.[...] Cela ne fait que confirmer que le droit des parents d'élever, d'éduquer et de prendre soin de l'enfant, notamment de lui procurer des soins médicaux et de lui offrir une éducation morale, est un droit individuel d'importance fondamentale dans notre société.

[...]Ainsi, on pourrait difficilement nier à un parent le pouvoir d'imposer à son enfant l'endroit où il vivra ou l'école qu'il fréquentera²⁹. [soulignement ajouté]

21. L'approche d'enseigner la moralité et la religion dans les écoles publiques et privées de manière obligatoire, dictée par l'État, est une violation de la liberté religieuse. De plus, la prohibition de l'accommodement interfère avec la manifestation de la liberté de religion et de conscience des parents d'une manière fondamentale, et non de manière insignifiante. Le

²³ *Syndicat Northcrest c. Amselem*, [2004] 2 R.C.S. 551 par 50, *Sources du PG Québec*, onglet 37.

²⁴ Voir David M. Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights", (2000) 33 U.B.C.L. Rev. 551 (QL), *Sources de l'ÉC*, onglet 8.

²⁵ United Nations, *Universal Declaration of Human Rights*, *Sources de l'ÉC*, onglet 16 (voir aussi *Convention on the Rights of the Child*, (Nov. 20, 1959) G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at Article 5, U.N. Doc. A/4354 à l'article 7, *Sources de l'ÉC*, onglet 14 et *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*) à l'article 26(3), *Sources de l'ÉC*, onglet 15.

²⁶ *Chamberlain*, *supra* note 3 par 103, *Sources du PG Québec*, onglet 6.

²⁷ *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315 [*B.(R.)*], source de l'appelant, onglet 4.

²⁸ *B. (R.)*, *supra* note 28 par 105, sources de l'appelant, onglet 4.

²⁹ *B. (R.)*, *supra* note 28 para 83 et 86, source de l'appelant, onglet 4.

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programme ECR dépouille tous les parents, y compris les chrétiens évangéliques, de leur droit de choisir la façon, le moment, le lieu et de qui leurs enfants recevront leur éducation religieuse.

22. Dans *R. c. Jones*³⁰ cette cour a tenu que la liberté religieuse comporte le droit des parents d'éduquer leurs enfants conformément à leurs croyances religieuses:

même si la croyance religieuse selon laquelle une personne a le droit d'éduquer ses propres enfants n'est plus affirmée aussi énergiquement de nos jours, elle n'est pas vraiment si inhabituelle. Ce serait nier l'histoire que de ne pas reconnaître que pendant de nombreuses années l'individu et l'église ont joué un rôle beaucoup plus important que l'état en matière d'éducation des jeunes. Et lorsque l'état a commencé à assumer un rôle dominant, il a dû faire des compromis pour répondre aux besoins et à la volonté de ceux qui avaient des opinions divergentes. Les dispositions de la Constitution concernant les écoles séparées en sont un exemple.³¹ [soulignement ajouté]

23. L'*objectif* du par le programme ECR (créer une société plus tolérante) ne viole pas nécessairement la liberté religieuse des parents ou des élèves. Par contre, la *mise en œuvre* du programme ECR (par un programme *obligatoire* fondé sur une perspective laïque non inclusive ou relativiste) viole d'une façon importante la liberté des parents d'instruire leurs enfants selon les principes de leur foi.
24. Les parents chrétiens évangéliques croient sincèrement qu'ils ont le devoir d'enseigner l'éthique et la morale à leurs enfants dans la perspective selon laquelle Dieu est central à la prise de décisions morales et éthiques³². En revanche, le programme ECR aborde l'éthique et la religion sans affirmer ou reconnaître la vérité de l'existence de Dieu.
25. L'enseignement «au sujet de» la religion n'a pas toujours été considéré comme une forme d'«endoctrinement» et peut ainsi sembler être bénin à certains. Cependant, si cette cour désire continuer à appuyer ou soutenir le respect du droit des parents de choisir l'éducation religieuse de leurs enfants, il sera essentiel de continuer à reconnaître que les méthodes choisies par l'État pour enseigner la religion peuvent contredire les croyances de certains parents. Une telle contradiction peut se trouver dans la croyance que l'éthique et la religion ne doivent pas être enseignées sans qu'il y ait référence à l'importance de Dieu.

³⁰ *R. c. Jones*, [1986] 2 RCS 284 [*Jones*], *Sources du PG Québec*, onglet 30.

³¹ *Jones*, *supra* note 31, par 21, *Sources du PG Québec*, onglet 30, (voir aussi: *P. (D.) c. S. (C.)*, [1993] 4 RCS 141, *Sources de l'AEÉC*, onglet 2).

³² Jérémie 31:33 ce lit: « Mais voici l'alliance que je ferai avec la maison d'Israël, Après ces jours-là, dit l'Éternel: Je mettrai ma loi au dedans d'eux, Je l'écrirai dans leur coeur; Et je serai leur Dieu, Et ils seront mon peuple.» (voir aussi Matthieu 28:19-20, Jean 14:15, Romains 2:13, Éphésians 6:4 and 1 Jean 2:3-6), *Sources de l'AEÉC*, onglet 6.

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26. Un examen de la raisonnable des croyances des parents irait à l'encontre de l'approche de cette cour quant à la religion et la nécessité de l'examiner de manière subjective, et porterait atteinte au but de l'article 2 (a) de la *Charte*, tel que décrit par le juge en chef Dickson dans *R. c. Edwards Books*³³:

L'alinéa 2a) a pour objet d'assurer que la société ne s'ingérera pas dans les croyances intimes profondes qui régissent la perception qu'on a de soi, de l'humanité, de la nature et, dans certains cas, d'un être supérieur ou différent. Ces croyances, à leur tour, régissent notre comportement et nos pratiques³⁴. [soulignement ajouté]

27. L'enseignement obligatoire de l'éthique et de la religion dans les écoles publiques et privées d'une façon déterminée par l'État est offensant et l'interdiction d'exemptions interfère avec l'exercice de la liberté religieuse des parents d'une façon importante, non insignifiante. Il convient de noter que le programme ECR a également été contesté par une école catholique privée³⁵.

28. La nature obligatoire du programme ECR porte atteinte à l'affirmation de cette cour selon laquelle la liberté religieuse assure la liberté de tout individu de manifester ses croyances sans coercition étatique.

La liberté peut se caractériser essentiellement par l'absence de coercition ou de contrainte. Si une personne est astreinte par l'état ou par la volonté d'autrui à une conduite que, sans cela, elle n'aurait pas choisi d'adopter, cette personne n'agit pas de son propre gré et on ne peut pas dire qu'elle est vraiment libre.³⁶ [soulignement ajouté]

29. Il été reconnu que l'État a un intérêt important en matière d'éducation. Cependant, cette cour a également affirmé que les parents ont toujours eu l'autorité primaire sur leurs enfants³⁷.

30. Exclure entièrement les soucis des parents qui souhaitent voir un droit d'exemption ou d'accommodement à la législation est un exemple où les préoccupations d'un groupe minoritaire sont ignorées et déterminées complètement par les intérêts de l'État.

31. Conformément au raisonnement de la Cour d'appel de l'Ontario dans *Zylberberg*, conclure qu'il existe un préjudice n'est pas pertinent à la détermination d'une violation du droit à la liberté religieuse conféré par la *Charte*. Comme énoncé dans cette même décision, il n'est

³³ *R. c. Edwards Books* [1986] 2 RCS 713 [*Edwards Books*], *Sources du PG Québec*, onglet 29.

³⁴ *Edwards Books*, *supra* note 34 par 97, *Sources du PG Québec*, onglet 29.

³⁵ *Loyola High School c. Courchesne*, 2010 QCCS 2631 (en appel), *Sources de l'AÉC*, onglet 1.

³⁶ *Big M.*, *supra* note 19 par 95, *Sources du PG Québec*, onglet 26.

³⁷ *B. (R.)*, *supra* note 28 par 85, sources des appelants, onglet 4.

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pas nécessaire d'imposer un fardeau additionnel aux parents de démontrer que leurs enfants ont subi un préjudice³⁸.

32. Les experts en religions du monde Brian J. Grim et Roger Finke ont noté:

When reviewing human rights throughout European history, Michael Horowitz described Jews as the “canaries in the coal mine”: nations persecuting Jews held less democratic commitment and were more likely to deny other freedoms as well. He later argued that vulnerable Christians are now the canaries, serving as a “litmus indicator of whether freedom exists not only for them – but for all others in their societies.” We expand the litmus test beyond a particular religious group to religious freedoms in general, and we agree that the violations of vulnerable religious liberties indicate potential threats to other liberties as well.³⁹

En l'espèce, on menace la liberté des parents de déterminer l'éducation, et plus particulièrement, l'éducation religieuse, de leurs enfants.

D. Est-ce que la nature obligatoire du programme ECR est sauvegardée par l'article 1 de la Charte?

33. La liberté de religion est violée par le programme ERC. Sans avoir justifié la nécessité de la nature obligatoire du programme visant à créer des étudiants plus tolérants, la prohibition d'exemption est déraisonnable et inconstitutionnelle.

34. Cette cour a établi dans *Big M* que le but et l'effet d'un acte sont utiles à déterminer si une loi est inconstitutionnelle⁴⁰. Bien que l'intention du programme ECR puisse être conforme aux valeurs de la *Charte*, son effet est une violation claire de la *Charte*.

35. Dans *Multani c. Commission scolaire Marguerite-Bourgeoys*⁴¹, cette cour a déclaré qu'en analysant la proportionnalité, «l'obligation d'offrir un accommodement est le corollaire» au critère d'atteinte minimale⁴². Cette décision a suivi *Eldridge c. Colombie-Britannique (Procureur général)*,⁴³ où la cour a déclaré que «l'accommodement raisonnable» tel que conçu dans les arrêts traitant de l'article 15 de la *Charte*, est équivalent au concept de «limites raisonnables» trouvée dans l'analyse effectuée en vertu de l'article 1⁴⁴. En se référant au professeur José Woehrling, cette cour a expliqué la relation entre le devoir d'accommodement et l'analyse effectuée en vertu de l'article 1:

³⁸ Zylberberg, *supra* note 26 par 41, *Sources du PG Québec*, onglet 41.

³⁹ Brian J. Grim, Roger Finke, *The Price of Freedom Denied* (New York: Cambridge University Press, 2011) p. 202, *Sources de l'AÉC*, onglet 10.

⁴⁰ *Big M.*, *supra* note 19 par 81, *Source du PG Québec*, onglet 26.

⁴¹ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6 [*Multani*], *Sources du PG Québec*, onglet 22.

⁴² *Multani*, *supra* note 42 par 52, *Sources du PG Québec*, onglet 22.

⁴³ *Eldridge c. Colombie Britannique (Procureur Général)*, [1997] 3 RCS 624 [*Eldridge*], *Sources du PG Québec*, onglet 22.

⁴⁴ *Eldridge*, *supra* note 44 par 79 et *Multani*, *supra* note 41 par 52, *Sources du PG Québec*, onglet 22.

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Celui qui veut repousser l'obligation d'accommodement doit démontrer que l'application intégrale de la norme, sans les exceptions réclamées par le demandeur, est nécessaire [...] en appliquant le test de l'arrêt *R. c. Oakes*, il faudra démontrer successivement que l'application entière de la norme constitue un moyen rationnel d'atteindre l'objectif législatif; qu'il n'existe pas de moyens d'y parvenir qui soient moins attentatoires aux droits en cause (critère de l'atteinte minimale); enfin, qu'il y a proportionnalité entre les effets bénéfiques de la mesure et ses effets restrictifs. En fait, le critère de l'atteinte minimale, qui est au cœur du test de l'article 1, correspond en grande partie, pour ce qui est des concepts, à la défense de contrainte excessive qui permet de s'opposer à l'obligation d'accommodement raisonnable dans le cadre des lois sur les droits de la personne.⁴⁵

36. *RJR-MacDonald Inc. v. Canada (Attorney General)*⁴⁶ a démontré qu'il serait plus difficile de soutenir une interdiction ou une dénégation complète que partielle. Les interdictions complètes ne sont permises lorsque l'État prouve qu'elles sont absolument nécessaires à l'accomplissement de ses objectifs⁴⁷:

Si la loi se situe à l'intérieur d'une gamme de mesures raisonnables, les tribunaux ne concluront pas qu'elle a une portée trop générale simplement parce qu'ils peuvent envisager une solution de rechange qui pourrait être mieux adaptée à l'objectif et à la violation; [...] Par contre, si le gouvernement omet d'expliquer pourquoi il n'a pas choisi une mesure beaucoup moins attentatoire et tout aussi efficace, la loi peut être déclarée non valide.⁴⁸

37. Le programme ECR suppose qu'on ne puisse enseigner la tolérance qu'en relativisant la religion tout en excluant la possibilité qu'on puisse enseigner la tolérance tout en maintenant l'exclusivité des croyances religieuses. Une telle supposition non fondée infirme la valeur de toutes les religions et est incompatible avec les objectifs de diversité et de multiculturalisme. Nier au parent l'option d'exclure ses enfants du programme ECR ne favorise pas l'harmonie et la diversité sociale, mais offusque plutôt les individus qui possèdent des croyances religieuses sincères quant au caractère véridique de leur foi.

38. En permettant des exemptions, l'accommodement des croyances religieuses aurait l'effet de promouvoir la tolérance, car les parents et les élèves verraient que l'État accepte le fait qu'il existe diverses croyances et que toutes ces croyances méritent d'être protégées de manière égale. L'importance d'enseigner par l'exemple a été expliquée par cette cour dans *R. c. M. (M.R.)*⁴⁹.

⁴⁵ *Multani*, supra note 42 par 53, *Sources du PG Québec*, onglet 22.

⁴⁶ *RJR-MacDonald Inc. c. Canada (Procureur Général)* [1995] 3 RCS 199 [RJR], *Sources de l'AÉC*, onglet 2.

⁴⁷ *RJR*, supra note 47 par 163, *Sources de l'AÉC*, onglet 2.

⁴⁸ *RJR*, supra note 47 par 160, *Sources de l'AÉC*, onglet 2.

⁴⁹ *R. c. M. (M.R.)*, [1998] 3 RCS 393 [R. v. M.], *Sources de l'AÉC*, onglet 5.

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les écoles ont l'obligation d'inculquer à leurs élèves le respect des droits constitutionnels de tous les membres de la société. L'apprentissage du respect de ces droits est essentiel à notre société démocratique et devrait faire partie de l'éducation de tous les élèves. C'est par l'exemple que ces valeurs se transmettent le mieux, et elles peuvent être minées si les personnes en autorité font fi des droits des élèves.⁵⁰

39. L'accommodement permettrait toujours au programme ECR d'atteindre son objectif de créer une société plus tolérante. Pour les chrétiens évangéliques, les catholiques, les chrétiens orthodoxes, les chrétiens en général, et pour les croyants d'autres confessions, le respect de leurs croyances religieuses respective est obligatoire. Les parents chrétiens croient qu'ils doivent enseigner la religion et la morale à leurs enfants d'une façon conforme à leur foi.
40. La violation des droits fondamentaux des individus protégés par la *Charte*, de par le refus d'accorder une exemption au programme ERC, ou tout autre accommodement, ne peut pas être considérée comme étant une atteinte minimale à ces droits. De plus, on ne peut conclure que l'effet de la mesure limitative est proportionnel à l'objectif, tel que cela est requis pour satisfaire au critère prévu à l'article 1 de la *Charte*.

PARTIE IV: DÉPENS

41. L'AÉC ne réclame aucuns dépens et demande qu'aucuns dépens ne soient prononcés contre elle.

PARTIE V: ORDONNANCE DEMANDÉE

42. L'AÉC soutient que la violation de la *Charte* par le programme ECR n'est pas une atteinte minimale aux droits conférés par la *Charte* aux parents et leurs enfants et ne peut donc pas être sauvegardée par l'article 1 de la *Charte*. L'appel devrait donc être accueilli. L'AÉC demande la permission de présenter des arguments oraux à l'audience de cette requête.

LE TOUT RESPECTUEUSEMENT SOUTENU, ce 26^{ième} jour d'avril 2011.

ALBERTOS POLIZOGOPOULOS
Procureur de l'Alliance évangélique du Canada

DON HUTCHINSON

FAYE SONIER

⁵⁰ R. c. M., *supra* note 50 par 3, *Sources de l'AÉC*, onglet 5.

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