**C A N A D A**

**PROVINCE DE QUÉBEC**
**DISTRICT DE MONTRÉAL**

Nº 500-17-108353-197

**C O U R  S U P É R I E U R E**
(Chambre civile)

**ICHRAK NOUREL HAK**
et
**CONSEIL NATIONAL DES MUSULMANS CANADIENS (CNMC)**
et
**ASSOCIATION CANADIENNE DES LIBERTÉS CIVILES**
Demanderesses

c.

**PROCUREUR GÉNÉRAL DU QUÉBEC**
Défendeur

et
**WORLD SIKH ORGANIZATION OF CANADA**
et
**AMRIT KAUR**
et
**AMNISTIE INTERNATIONALE, SECTION CANADA FRANCOPHONE**
et
**COMMISSION CANADIENNE DES DROITS DE LA PERSONNE**
et
**QUÉBEC COMMUNITY GROUPS NETWORK**
et
**MOUVEMENT LAÏQUE QUÉBÉCOIS**
et
**POUR LES DROITS DES FEMMES DU QUÉBEC, PDF QUÉBEC**
et
**ALLIANCE DE LA FONCTION PUBLIQUE DU CANADA (AFPC)**
**et**
**LIBRES PENSEURS ATHÉES**
Intervenants

imk
avocats • advocates

**Dossiers joints :**

Nº 500-17-107204-193

**FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT**
Demanderesse
c.
**JEAN-FRANÇOIS ROBERGE**
et
**SIMON JOLIN-BARRETTE**
et
**PROCUREUR GÉNÉRAL DU QUÉBEC**
Défendeurs

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Nº 500-17-109731-193

**ANDRÉA LAUZON**
et
**HAKIMA DADOUCHE**
et
**BOUCHERA CHELBI**
et
**COMITÉ JURDIQUE DE LA COALITION INCLUSION QUÉBEC**
Demandeurs
c.
**PROCUREUR GÉNÉRAL DU QUÉBEC**
Défendeur
et
**L'ASSOCIATION DE DROIT LORD READING**
Intervenante

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Nº 500-17-109983-190

**ENGLISH MONTREAL SCHOOL BOARD**
et
**MUBEENAH MUGHAL**
et
**PIETRO MERCURI**
Demandeurs
c.
**PROCUREUR GÉNÉRAL DU QUÉBEC**
Défendeur

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**PLAN D'ARGUMENTATION DES DEMANDERESSES ICHRAK NOUREL HAK, CONSEIL NATIONAL DES MUSULMANS CANADIENS ET ASSOCIATION CANADIENNE DES LIBERTÉS CIVILES**

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## I. SURVOL

1. La constitution du Canada permet-elle à un gouvernement provincial de refuser un emploi à des pratiquants d'une religion particulière? Un gouvernement provincial peut-il forcer ses fonctionnaires à violer leurs croyances religieuses sincères? Une loi est-elle valide si elle est si vague qu'elle revient à accorder une discrétion absolue à ceux qui l'appliquent? Telles sont les questions au cœur de la présente demande.

2. La réponse à ces questions doit être négative. Cette réponse s'applique indépendamment de l'utilisation par le défendeur, le Procureur général du Québec, de la clause nonobstant. La clause dérogatoire n'immunise pas la validité constitutionnelle de la *Loi sur la laïcité de l'État*, c. L-0.3 (la « **Loi** » ou « **Act** »).

3. La démocratie constitutionnelle du Canada ne se limite pas à la *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11 (« **Charte canadienne** » ou « **Canadian Charter** »). Elle englobe une architecture qui fonde notre société sur des principes d'égalité et d'inclusion; elle est encrée dans l'état de droit; et elle comprend un partage de compétences entre les gouvernements fédéral et provinciaux. La Loi telle qu'elle a été adoptée viole tous ces éléments de notre démocratie constitutionnelle.

4. En outre, certains aspects de la loi enfreignent les principes d'indépendance judiciaire et le droit d'éligibilité garantis par la constitution du Canada.

5. La Loi ne peut être maintenue en vigueur.

6. Dans sa défense de la Loi, le Procureur général du Québec laisse entendre que cette affaire porte sur la laïcité dans la culture québécoise. Avec égards, ce n'est pas le cas.

7. D'un point de vue juridique, la laïcité est indiscernable de toute autre justification qu'un gouvernement peut invoquer comme prétendue justification d'une discrimination. Le gouvernement ne peut pas davantage discriminer en raison de la laïcité qu'il ne pourrait le faire en raison du fondamentalisme religieux, du racisme ou du sexisme.

8. De plus, la prémisse selon laquelle un gouvernement provincial est libre d'*interdire* le port de signes religieux est juridiquement identique à l'argument selon lequel un gouvernement provincial est libre d'*exiger* le port de signes religieux. Ce sont les deux faces d'une même médaille. Reconnaître que le gouvernement du Québec

a le pouvoir d'empêcher un chrétien de porter une croix signifie qu'il a aussi le pouvoir d'obliger un non-chrétien à en porter une.

9. La présente affaire ne porte donc pas sur l'objectif politique particulier que ce gouvernement a choisi d'atteindre en ne tenant pas compte de la Charte canadienne et de la *Charte des droits et libertés de la personne,* RLRQ, c. C-12 (« **Charte québécoise** » ou « **Québec Charter** »). Elle porte sur les limites constitutionnelles auxquelles tout gouvernement doit faire face. Elle porte sur la nature et la portée de la démocratie dans laquelle nous vivons.

## II. CONTEXTE FACTUEL ET HISTORIQUE JUDICIAIRE

### a. Le projet de Loi 21

10. Le 3 octobre 2018, M. Simon Jolin-Barrette (maintenant ministre de la Justice), a indiqué que le gouvernement nouvellement élu présenterait une loi visant à interdire le port de « signes religieux » à certains employés du secteur public.

11. Il a alors déclaré que le gouvernement défendrait sa loi devant les tribunaux avant d'invoquer les dispositions dérogatoires prévues à la Charte canadienne et à la Charte québécoise.

- **Pièce P-2** : *Signes religieux et clause dérogatoire : Jolin-Barrette clarifie les propos de Legault,* Le Soleil, 3 octobre 2018.

12. En novembre 2018, le ministère de l'Éducation a envoyé un questionnaire aux directeurs d'école dans la province pour connaître le nombre d'employés portant des « signes religieux », les écoles où ils travaillent et le type de demandes d'accommodement religieux, « ethnoculturel » ou linguistique étant plus fréquemment présentées.

- **Pièce P-3** : *Religious profiling ? Quebec plays blame game over school survey,* Montréal Gazette, 6 février 2019.

13. Ce sondage a suscité la controverse dans plusieurs écoles et commissions scolaires, et certaines ont tout simplement refusé d'y répondre.

14. Néanmoins, les résultats du sondage indiquent que, dans les écoles ayant répondu, des centaines d'employés portent des « signes religieux », y compris des centaines de membres du personnel scolaire[1].

    - **Pièce P-4** : Copie des Résultats préliminaires de l'« Enquête sur la gestion en contexte de diversité ethnoculturelle, linguistique et religieuse » menée par le ministère de l'Éducation.

15. Du même souffle, la grande majorité des écoles répondantes – 93 pour cent – ont affirmé qu'aucune tension n'était causée par les personnes qui portent des « signes religieux » dans ces écoles. En fait, les résultats indiquent qu'il n'y avait alors eu qu'une seule plainte dans toutes les commissions scolaires répondantes relativement au port de « signes religieux ».

    - **Pièce P-5** : Ventilation des résultats de l'Enquête menée par le ministère de l'Éducation, 9 mai 2019.

16. Le 28 mars 2019, le gouvernement a présenté le Projet de loi.

    - **Pièce P-7** : Projet de loi nº 21, *Loi sur la laïcité de l'État* (le « **Projet de loi** »).

17. Le Projet de loi affirme la « laïcité » de l'État et indique que celle-ci repose sur quatre principes, soit la séparation de l'État et des religions, la neutralité religieuse de l'État, l'égalité de tous les citoyens et citoyennes ainsi que la liberté de conscience et la liberté de religion.

18. Le Projet de loi prévoit qu'un membre du personnel d'un organisme public provincial doit exercer ses fonctions à visage découvert, à moins que son visage soit couvert en raison d'un motif de santé, d'un handicap ou des exigences propres à ses fonctions ou à l'exécution de certaines tâches. Le Projet de loi interdit également le port de « signes religieux » au travail à certaines personnes occupant des fonctions au sein d'institutions publiques.

19. Le Projet de loi contient une « clause de droits acquis » prévoyant que l'interdiction du port de signes religieux ne s'applique pas à certaines personnes, dont des enseignantes et enseignants, qui occupaient déjà leurs fonctions en date de la présentation du Projet de loi. Cependant, ces « droits acquis » sont soumis à la condition que la personne ne change pas de « fonction ». Aucune définition du

[1] Par ailleurs, il appert du sondage que ce nombre prend seulement en compte les personnes portant des « signes religieux » visibles, puisque rien ne porte à croire que le personnel scolaire devait auto-déclarer le port de « signes religieux ». Ainsi, seuls les signes visibles par le personnel administratif responsable de la complétion du sondage à l'œil nu auraient pu être comptabilisés.

terme « fonction » n'a été fournie. L'application de la clause demeure incertaine dans les cas où, par exemple, un enseignant changerait de commission scolaire ou commencerait à enseigner une matière différente.

20. Le gouvernement a aussi tenté de limiter le contrôle judiciaire de la validité du Projet de loi en recourant d'emblée aux clauses dérogatoires prévues aux articles 33 de la Charte canadienne et 52 de la Charte québécoise.

21. Le premier ministre du Québec, M. François Legault, a affirmé que le recours immédiat à ces dispositions visait à éviter de longs débats devant les tribunaux.

- **Pièce P-8** : *Legault présente un projet de loi sur la laïcité « modéré » dans une allocution,* La Presse, 31 mars 2019.

22. En réponse à la crainte que l'adoption du Projet de loi réduise considérablement les possibilités d'emploi pour les individus religieux au Québec, M. Legault s'est limité à déclarer qu'« [il] y a d'autres emplois de disponibles ».

- **Pièce P-11** : *Laïcité de l'État : l'opposition en attente de réponses du gouvernement,* Journal de Montréal, 3 avril 2019.

23. En plus, le gouvernement a donné des réponses divergentes lorsqu'on lui a posé des questions de base sur la mise en œuvre du Projet de loi. Par exemple, à l'occasion d'une conférence de presse tenue le 28 mars 2019, M. Jolin-Barrette a spécifié que les alliances n'étaient pas visées par l'interdiction de « signes religieux ». Or, il est évident qu'une alliance échangée lors d'une cérémonie de mariage religieux pourra revêtir une signification religieuse pour l'individu qui la porte ou même aux yeux du public.

- **Pièce P-12** : Transcription officielle de la conférence de presse de M. Jolin-Barrette, 28 mars 2019, p. 16.

24. De même, M. Jolin-Barrette a indiqué qu'une partie du corps, comme les cheveux, ne serait pas visée par l'interdiction, et ce, même si des personnes, y compris certains membres de la religion sikhe ou musulmane par exemple, font pousser leurs cheveux pour des motifs religieux.

- **Pièce P-12**: Transcription officielle de la conférence de presse de M. Jolin-Barrette, 28 mars 2019, p. 32.

25. En fait, plutôt que de clarifier la définition de « signe religieux », M. Jolin-Barrette a simplement affirmé qu'il faudra s'en remettre au « sens commun des choses ».

- **Pièce P-12**: Transcription officielle de la conférence de presse de M. Jolin-Barrette, 28 mars 2019, p. 7.

26. Ainsi, selon ce « sens commun des choses », il appert que les signes spirituels des peuples autochtones ne seraient pas des « signes religieux » visés par la Loi. Malgré l'incompréhension entourant cette assertion, M. Jolin-Barrette a refusé d'expliquer quels seraient les motifs qui justifieraient une telle différence de traitement en vertu de la Loi.

- **Pièce P-13** : *Laïcité : le gouvernement ne viserait pas les « signes spirituels autochtones »,* Radio-Canada, 17 avril 2019.

**b. L'adoption de la *Loi sur la laïcité de l'État***

27. Le 4 juin 2019, l'Assemblée nationale a adopté le principe du Projet de loi et la Commission des institutions a entamé l'étude détaillée. Le 11 juin 2019, le gouvernement a fait volte-face et a proposé d'amender l'article 6 du Projet de loi afin de « définir » l'expression « signes religieux ».

28. Afin d'adopter le Projet de loi avant la pause estivale de l'Assemblée nationale, le gouvernement a eu recours à une procédure d'exception, le bâillon, pour mettre fin aux débats, et ce, alors que la Commission des institutions effectuait l'étude détaillée du Projet de loi.

29. En conséquence, l'étude par la Commission de certains aspects majeurs du Projet de loi – tels que la modification de la Charte québécoise et l'utilisation des deux dispositions dérogatoires – n'a pas eu lieu. Vu l'utilisation d'une procédure d'exception, les débats sur le sujet ont donc été considérablement limités à l'Assemblée nationale.

30. Toutefois, le gouvernement a proposé et fait adopter une série d'amendements à la toute dernière minute. Ces amendements n'ont pas fait l'objet d'un véritable débat devant l'Assemblée nationale vu l'utilisation du bâillon.

- **Pièce P-24** : Copie de l'ensemble des amendements adoptés.

31. La Loi a été adoptée et sanctionnée le 16 juin 2019.

32. Les articles 2 à 4 de la Loi énoncent les principes généraux régissant la « laïcité » de l'État selon le gouvernement. Plus spécifiquement, l'article 4 prévoit que toute personne a droit à des institutions parlementaires, gouvernementales et judiciaires laïques ainsi qu'à des services laïques.

33. L'article 5 prévoit que le Conseil de la magistrature doit établir des règles traduisant les exigences de la laïcité de l'État (ce qui comprend l'interdiction de porter des « signes religieux ») et s'assurer de leur mise en œuvre à l'égard des

juges de la Cour du Québec, du Tribunal des droits de la personne, du Tribunal des professions, des cours municipales et des juges de paix magistrats.

34. L'article 6 interdit à certaines personnes de porter un « signe religieux » dans l'exercice de leurs fonctions :

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| **6**. Le port d'un signe religieux est interdit dans l'exercice de leurs fonctions aux personnes énumérées à l'annexe II.<br>Au sens du présent article, est un signe religieux tout objet, notamment un vêtement, un symbole, un bijou, une parure, un accessoire ou un couvre-chef qui est : | **6**. The persons listed in Schedule II are prohibited from wearing religious symbols in the exercise of their functions.<br>A religious symbol, within the meaning of this section, is any object, including clothing, a symbol, jewellery, an adornment, an accessory or headwear that: |
| 1º soit porté en lien avec une conviction ou une croyance religieuse; | 1º is worn in connection with a religious conviction or belief; or |
| 2º soit raisonnablement considéré comme référant à une appartenance religieuse. | 2º is reasonably considered as referring to a religious affiliation. |

35. À cet effet, l'annexe II énumère une longue liste d'individus touchés par cette interdiction, notamment :

a) le président et les vice-présidents de l'Assemblée nationale et le ministre de la Justice;

b) les membres de divers tribunaux administratifs et organismes juridictionnels, dont le Tribunal administratif du Québec;

c) les commissaires et les arbitres nommés par le gouvernement ou par l'un de ses ministres;

d) le personnel des tribunaux, y compris les greffiers, les greffiers spéciaux, les greffiers adjoints, les shérifs et les shérifs adjoints agissant en vertu de la Loi sur les tribunaux judiciaires ou de la Loi sur les cours municipales;

e) les avocats et les notaires du secteur public;

f) les avocats ou les notaires du secteur privé agissant en vertu d'un contrat de services juridiques conclu avec certaines institutions gouvernementales ou publiques;

g) les agents de la paix exerçant leurs fonctions principalement au Québec; et

h) les directeurs, les directeurs adjoints et les enseignants dans les établissements d'enseignement publics.

36. L'article 6 de la Loi définit les « signes religieux » de façon à inclure tout objet qui est porté en lien avec une conviction ou une croyance religieuse ou pouvant raisonnablement être considéré comme référant à une appartenance religieuse.

37. M. Legault a lui-même admis que cette définition est « perfectible »; il n'a pas été en mesure d'expliquer si un objet comme une alliance ou bague de mariage était un signe religieux au sens de cette définition, affirmant plutôt qu'« [o]n ne commencera pas à rentrer dans les détails ». De son côté, M. Jolin-Barrette a affirmé que la bague de mariage était exclue du champ d'application de l'interdiction.

- **Pièce P-16** : *Signes religieux : valse-hésitation entourant la bague de mariage*, Journal de Montréal, 12 juin 2019.

38. L'article 8 de la Loi exige que les membres du personnel d'un organisme public énuméré à l'annexe I fournissent des services à visage découvert :

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| **8**. Un membre du personnel d'un organisme doit exercer ses fonctions à visage découvert. | **8**. Personnel members of a body must exercise their functions with their face uncovered. |
| De même, une personne qui se présente pour recevoir un service par un membre du personnel d'un organisme doit avoir le visage découvert lorsque cela est nécessaire pour permettre la vérification de son identité ou pour des motifs de sécurité. La personne qui ne respecte pas cette obligation ne peut recevoir le service qu'elle demande, le cas échéant. | Similarly, persons who present themselves to receive a service from a personnel member of a body must have their face uncovered where doing so is necessary to allow their identity to be verified or for security reasons. Persons who fail to comply with that obligation may not receive the service requested, where applicable. |
| Pour l'application du deuxième alinéa, une personne est | For the purposes of the second paragraph, persons are deemed |

| | |
|---|---|
| réputée se présenter pour recevoir un service lorsqu'elle interagit ou communique avec un membre du personnel d'un organisme dans l'exercice de ses fonctions. | to be presenting themselves to receive a service when they are interacting or communicating with a personnel member of a body in the exercise of the personnel member's functions. |

39. L'annexe I a une portée très large qui englobe, entre autres, les organismes publics suivants :

a) les ministères du gouvernement;

b) les municipalités, les communautés métropolitaines, les régies intermunicipales et les offices municipaux d'habitation;

c) les sociétés de transport en commun;

d) la plupart des établissements de services de santé, ce qui comprendrait les employés de services de santé comme les médecins, les infirmiers et les sages-femmes;

e) les centres de la petite enfance et les garderies subventionnées;

f) les écoles publiques et les commissions scolaires;

g) les écoles privées et internationales qui reçoivent du financement public;

h) les universités; et

i) les représentants élus.

40. L'article 12 confie à des ministres le pouvoir de « vérifier » l'application des mesures prévues à la Loi, notamment celles prévues aux articles 6 et 8. Un ministre peut aussi désigner par écrit une personne qui sera chargée de cette vérification et requérir que l'organisme visé apporte des mesures correctrices ou des mesures de « surveillance et d'accompagnement ».

41. L'article 13 délègue la responsabilité d'assurer le respect des articles 6 et 8 aux personnes exerçant la plus haute autorité administrative au sein de chaque organisation. Il prévoit que la personne visée par l'interdiction de l'article 6 s'expose à une mesure disciplinaire en cas de manquement ou à tout autre mesure découlant de l'application des règles régissant l'exercice de ses fonctions.

42. L'article 14 prévoit qu'aucun accommodement ou autre dérogation ou adaptation ne peut être accordé en ce qui a trait à l'interdiction des « signes religieux » ou aux obligations relatives aux services à visage découvert.

43. L'article 15 de la Loi intègre l'interdiction du port de « signes religieux » dans les contrats de services juridiques entre le gouvernement et les organismes privés.

44. L'article 16 prévoit que les dispositions de contrats d'emploi et de conventions collectives qui sont incompatibles avec les autres dispositions de la Loi sont nulles de nullité absolue.

45. L'article 31 est la « clause de droits acquis », qui prévoit que l'article 6 ne s'applique pas aux personnes mentionnées aux paragraphes 2 à 10 de l'annexe II, tant qu'elles exercent la même fonction au sein de la même organisation ou jusqu'à la fin de leur mandat (sans prorogation du droit acquis si un mandat est reconduit). Cependant, ce droit acquis ne s'applique qu'à ceux qui occupaient cette fonction en date du 27 mars 2019. Il ne s'applique donc pas à une personne portant un « signe religieux » qui a été embauchée le 28 mars 2019 ou par la suite.

46. Les personnes embauchées après le 27 mars 2019, mais avant l'adoption de la Loi, sont donc visées par l'interdiction du port de « signes religieux ».

47. Enfin, la Loi comporte deux dispositions dérogatoires : l'article 33, qui prévoit que la Loi s'applique malgré les articles 1 à 38 de la Charte québécoise, et l'article 34, qui prévoit que la Loi s'applique malgré les articles 2 et 7 à 15 de la Charte canadienne.

### c. L'incidence de la Loi

48. La Loi, telle qu'adoptée, ne répond pas aux préoccupations fondamentales qui ont été soulevées depuis la présentation du Projet de loi. Plus particulièrement :

a) En recourant aux dispositions dérogatoires, la Loi tente toujours de se soustraire à un véritable examen de sa nature discriminatoire;

b) L'interdiction de porter des « signes religieux » prévue par la Loi s'applique aux objets portés sous les vêtements, sans toutefois fournir d'explication sur la mise en œuvre d'une telle interdiction, ce qui soulève des inquiétudes quant à la protection de la vie privée;

c) La définition objective de « signe religieux » de la Loi est si large que l'interdiction s'étend à certains objets qui ne sont pas portés pour des motifs religieux. Or, la définition subjective est déjà utilisée comme justification pour

les personnes qui doivent l'appliquer afin de mener des enquêtes intrusives visant à déterminer la nature des croyances des employés[2];

d) La Loi délègue toujours le pouvoir d'imposer des sanctions à la plus haute autorité administrative de chaque organisation, et ce, d'une manière imprécise quant à la nature des sanctions pouvant être imposées. Nécessairement, cela signifie que la Loi sera interprétée et mise en application par des centaines de personnes différentes, qui ne disposent de presqu'aucune ligne directrice pour son application; et

e) La Loi ne clarifie toujours pas les cas où la « clause de droits acquis » trouvera application.

- Pour des exemples de l'incohérence et de la confusion créées par l'application de la « clause des droits acquis », voir : Déclaration sous serment de G.M., paragr. 3-9 ; Déclaration sous serment de Mariam Najdi, paragr. 3-6 ; Déclaration sous serment de M.G., paragr. 7-13 ; Déclaration sous serment de S.E.M., paragr.16.

49. Il est clair que la Loi aura des effets délétères immédiats sur de personnes travaillant ou espérant travailler dans plusieurs sphères publiques, ainsi que, plus généralement, sur les personnes religieuses ou perçues comme étant religieuses au Québec.

50. Des personnes comme la demanderesse Mme Nourel Hak, qui portent un ou des objets pour un motif religieux ou spirituel et qui sont ou seront bientôt à la recherche d'un emploi dans l'une des fonctions visées par l'interdiction de porter un « signe religieux », seront confrontées à un « choix » impossible : soit elles devront délaisser leurs croyances religieuses (faisant partie intégrante de leur identité selon plusieurs déposants), soit elles devront délaisser un emploi dans leur domaine de formation.

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[2] La déclaration sous-serment de Nafeesa Salar démontre que de telles « enquêtes » ont été menées notamment par la CSDM. Dans le cas de cette déclarante, la CSDM avait compris que le hijab porté par Mme Salar relevait de motifs « traditionnels » plutôt que religieux (paragr. 18). Cela n'a pas empêché la CSDM de demander à Mme Salar de se conformer à la Loi puisque son signe pouvait être « raisonnablement considéré comme référant à une appartenance religieuse » (paragr. 18-19 et **pièce NS-3**, p. 12). Bien que la déclaration révèle qu'en fait, la CSDM avait mal interprété les propos de Mme Salar, qui porte effectivement le voile pour des raisons religieuses (paragr. 18), elle constitue également un exemple d'application de la Loi dans des contextes non-religieux. Pour un exemple de telles enquêtes, voir la déclaration sous serment de Nafeesa Salar, aux paragr. 15-16. Cela étant dit, ce ne sont pas tous les centres de services scolaires qui adoptent cette pratique. Le CSSDM a ainsi adopté une approche différente qui cause d'autant plus de confusion. Voir, sur ce point, la Transcription des notes sténographiques de l'interrogatoire de M[e] Louis Bellerose du 25 août 2020, à partir de la ligne 23 de la page 58, jusqu'à la ligne 23 de la page 60. Cette divergence en pratique est discutée en plus de détails ci-dessous, en lien avec la question de l'imprécision de la Loi.

51. Il ne s'agit pas d'un véritable choix :

> En effet, personnellement, retirer mon voile n'est tout simplement pas une option. Me demander d'enlever mon voile pour enseigner, pour moi, c'est comme demander à quelqu'un de se déshabiller devant tout le monde. Il n'y avait donc aucun autre choix qui s'offrait à moi.
>
> J'ai dû me résoudre à trouver un nouvel emploi.
>
> ➢ Déclaration sous serment de F.B., paragr. 22-23.
>
> Si quelqu'un me demande d'enlever mon voile, je ne le ferai pas. Ce n'est pas un choix que je peux faire. C'est pourquoi je n'ai pas soumis ma candidature pour des postes qui ont été affichés en septembre.
>
> ➢ Déclaration sous serment de L.S., paragr. 29.
>
> Or, je ne peux tout simplement pas retirer mon hijab. Ce n'est pas une option.
>
> […]
>
> Je dois me résoudre à abandonner ce poste, qui pourtant m'enthousiasmait. […] Je dois me trouver un emploi, mais je ne peux pas retirer mon hijab.
>
> ➢ Déclaration sous serment de M.G., paragr. 15, 18
>
> *If I had to choose between my employment or complying with the tenets of my faith I would choose to comply with the requirements of my faith. Visible observance of the Jewish faith has been under attack for millennia and keeping to the requirements of our faith is how the Jewish people and the Jewish faith have survived.*
>
> ➢ Déclaration sous serment de Carolyn Gehr, paragr. 7
>
> Maintenant, je ne sais pas quoi faire. J'ai des dettes et deux enfants, j'ai 41 ans, je dois terminer mes études parce que je n'ai pas d'autres options : je ne peux pas toute simplement réorienter ma carrière à ce stade-ci. Cependant, si la *Loi* m'empêche de compléter mes stages obligatoires, je ne pourrais pas terminer mon programme.
>
> Une chose qui est certaine, c'est que je ne vais pas enlever mon voile. Il fait partie de mon identité religieuse.

- Déclaration sous serment de W.B.G.H., paragr. 11-12.

> La Loi m'oblige donc à « choisir » entre ma pratique religieuse et mon travail. Toutefois, il ne s'agit pas d'un véritable choix, car je ne pourrai pas « choisir » de mettre de côté un aspect fondamental de ma pratique religieuse. Je continuerai de porter mon foulard, car il n'y a personne qui m'a obligé à le mettre et personne ne m'obligera à l'enlever.

- Déclaration sous serment de Hakima Dadouche, paragr. 13.

> *I would not remove a head covering or my fringed undergarment in order to meet the requirements of the Act. Doing so would be a betrayal of identity and my sincerely held religious beliefs.*

- Déclaration sous serment de Gregory Bordan, paragr. 16.

52. Les personnes ayant été embauchées pour exercer une de ces fonctions après le 27 mars 2019 sont dans la même situation si elles portent des objets de la sorte. Effectivement, les déclarations sous serment démontrent que plusieurs personnes qualifiées et compétentes avaient été engagées au terme de processus de sélections, mais ont été subséquemment informées qu'elles ne pourraient pas entrer en poste à cause de la Loi, à moins qu'elles s'y conforment.

- Déclaration sous serment de Nafeesa Salar, paragr. 11 et 21-22 ; Déclaration sous serment de F.B., paragr. 12 et 18-21 ; Déclaration sous serment de Mariam Najdi, paragr. 6-7 et 15 ; Déclaration sous serment de M.G., paragr. 8-13 ; Déclaration sous serment de R.M., paragr. 11, 21-22 et 25 ; Déclaration sous serment de S.B.R., paragr. 14-16.

53. De même, les personnes portant des « signes religieux » qui exercent une fonction visée par l'interdiction prévue dans la Loi se retrouvent dorénavant coincées dans cette fonction sans possibilité de promotion ou même de mutation latérale :

> La Loi m'empêche de poursuivre ces démarches et m'oblige à abandonner tout espoir d'obtenir un poste de gestion. Même si je bénéficie actuellement de la clause « grand-père » prévue par la Loi, cette clause ne s'applique pas en cas de promotion ou de changement de poste. […]

- Déclaration sous serment de Bouchera Chelbi, paragr. 19.

> Je ne veux pas retirer mon signe religieux car j'ai la croyance intime et sincère qu'il s'agit d'une pratique religieuse à laquelle je dois adhérer;

> Je vis donc un dilemme déchirant. En raison de mon refus de vouloir retirer mon signe religieux, mes ambitions et mes objectifs de carrière sont fortement réduites. Je ne peux changer de poste, obtenir une promotion ou appliquer à un poste qui correspondrait à mes aspirations professionnelles à l'avenir.

- Déclaration sous serment de Rana El-Mousawi, paragr. 12-13.

54. Finalement, les effets de la Loi ne sont pas limités à l'exclusion des personnes visiblement religieuses d'un vaste éventail d'emplois dans des institutions publiques. Le gouvernement envoie un message explicite à toutes les personnes religieuses que leur liberté de religion et leur capacité à se conformer à leurs pratiques religieuses ne méritent pas de protection de la part de l'État. Au contraire, la Loi indique au public qu'il y a quelque chose de foncièrement nuisible dans l'observance de pratiques religieuses (et particulièrement dans l'observance de certaines d'entre elles) et que le public doit en être protégé.

- Déclaration sous serment de Nafeesa Salar, paragr. 28.

55. Ainsi, le message que la Loi transmet en est un d'exclusion explicite : des personnes se font dire d'oublier la participation aux institutions publiques de l'État, uniquement en raison de leurs croyances sincères. Comme plusieurs le soulignent, elles deviennent des citoyens de deuxième classe.

- Déclaration sous-serment de Nafeesa Salar, paragr. 28 ; Déclaration sous serment de G.M., paragr. 5 ; Déclaration sous serment d'Imane Melab, paragr. 14.

**d. L'historique judiciaire**

56. Le 17 juin 2019, les demanderesses ont déposé un pourvoi en contrôle judiciaire afin de faire déclarer la Loi invalide, ainsi qu'une demande de sursis provisoire des articles 6 et 8 de la Loi.

57. Le 18 juillet 2019, l'Honorable Michel Yergeau, de la Cour supérieure du Québec, refusait la demande de sursis d'application de la Loi. Bien qu'il fût d'avis que la demande présentait des questions sérieuses quant à la constitutionnalité de la Loi, il refusa le sursis au motif que les demanderesses n'avaient pas fait la preuve de l'existence d'un préjudice irréparable, n'avaient pas démontré qu'un sursis serait dans l'intérêt public, et n'avaient pas démontré l'urgence de la situation.

- *Hak* c. *Procureure générale du Québec,* 2019 QCCS 2989.

58. Le 1er août 2019, l'Honorable Nicole Duval Hesler, juge en chef de la Cour d'appel du Québec, prononçait oralement un jugement accueillant la requête pour permission d'appeler de la décision de la Cour supérieure (motifs écrits rendus le 13 août 2019).

- *Hak* c. *Procureure générale du Québec*, 2019 QCCA 1404.

59. Le 12 décembre 2019, l'Honorable Robert Mainville et l'Honorable Dominique Bélanger rejetaient l'appel du jugement interlocutoire rendu par le juge Yergeau. L'Honorable Nicole Duval Hesler, aurait accueilli l'appel en partie et suspendu l'application de l'article 6 de la Loi.

60. Le juge Mainville conclut que bien que la preuve pût permettre de conclure à l'existence de préjudices sérieux et irréparables, de tels préjudices ne pouvaient pas être considérés puisqu'ils découlaient d'atteintes à des droits couverts par les clauses dérogatoires. Il conclut également en l'absence d'un « droit manifeste et incontestable » et détermina que la balance des inconvénients penchait en faveur du gouvernement.

- *Hak* c. *Procureure générale du Québec*, 2019 QCCA 2145, paragr. 103-156.

61. La juge Bélanger, pour sa part, vint à la conclusion que bien que des questions constitutionnelles sérieuses étaient soulevées, il n'était pas manifeste que la Loi était inconstitutionnelle. Elle conclut également qu'un préjudice sérieux et irréparable découlerait du refus d'octroyer le sursis, mais que la balance des inconvénients militait en faveur du gouvernement.

- *Hak* c. *Procureure générale du Québec,* 2019 QCCA 2145, paragr. 85-102.

62. Selon la juge Duval Hesler, le pourvoi soulevait des questions sérieuses, refuser le sursis causerait un préjudice irréparable aux personnes visées par l'annexe II de la Loi, et la balance des inconvénients quant à l'intérêt public penchait en faveur de la protection des droits fondamentaux des personnes visées.

- *Hak* c. *Procureure générale du Québec,* 2019 QCCA 2145, paragr. 6-84.

63. Le 9 avril 2020, la Cour suprême du Canada rejetait la demande d'autorisation d'appel des demanderesses de la décision de la Cour d'appel du Québec.

- *Ichrak Nourel Hak, et al.* c. *Procureure générale du Québec,* 2020 CanLII 26448 (CSC).

## III. LA LOI EST INVALIDE

### a. Introduction

64. L'Assemblée nationale du Québec ne peut modifier unilatéralement certaines caractéristiques fondamentales, qui font partie intégrante de notre architecture constitutionnelle (section b).

65. Les articles 6 et 8 de la Loi violent le partage des compétences établi par les articles 91 et 92 de la Loi constitutionnelle de 1867 (section c).

66. Également, la Loi est invalide pour cause d'imprécision et contreviennent aux exigences les plus fondamentales de la primauté du droit (section d).

67. L'application des articles 5 et 6 de la Loi aux organes judiciaires viole la garantie constitutionnelle d'indépendance judiciaire (section e *i*), ci-dessous), tandis que l'application de l'article 8 aux élus constitue une atteinte injustifiée à l'article 3 de la Charte canadienne (section e *ii*), ci-dessous).

68. En raison de ces nombreuses entraves à la Constitution, la Loi ou, à tout le moins, ses dispositions contestées, doit être déclarée invalide, inopérante et sans effet.

### b. The Act Offends the Architecture of the Constitution

#### i. What is the Architecture of the Constitution?

69. The constitution is not merely a collected guarantee of rights; it implements a structure, or architecture, of government.

- *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, at para. 50..

70. The architecture of our government can be discerned from "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning".

- *Reference re Senate Reform*, 2014 SCC 32, at para. 25; *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, at para. 32.

71. The notion of architecture expresses the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole".

- *Reference re Senate Reform*, 2014 SCC 32, at para. 26, citing *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, at para. 50.

72. The structure of the constitution necessarily coheres with the unwritten principles that the Supreme Court elaborated in the *Secession Reference* and relates in part to the nature and quality of the public institutions within the Canadian polity—ultimately, the "kind of constitutional democracy that our Constitution comprehends."

> ➢ See, generally, *Reference re Senate Reform*, 2014 SCC 32; *Reference re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, para. 100.

73. Courts have recognized that these structural elements of the constitution cannot be modified by any single legislature precisely because these elements are fundamental to the constitution as a *whole*—that is, to the nature of Canadian democratic life.

74. No individual legislature has the power to alter society so fundamentally that it offends the architecture of the constitution.

75. For example, in *OPSEU*, the Supreme Court recognized that the basic structure of the constitution, as established by the *Constitution Act, 1867*, "contemplates the existence of certain political institutions" whose underlying quality is that they are informed by, and derive their efficacy from, a certain degree of free public debate.

76. Because the right of discussion and debate is a crucial element of democracy in the Canadian polity, the Court held that neither a provincial legislature nor Parliament itself could abrogate it: doing so would "substantially interfere with the operation of this basic constitutional structure".

> ➢ *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, p. 57.

77. *OPSEU* concerned a challenge to restrictions on political activity by public servants. It was argued immediately prior to the Canadian Charter coming into force such that no Charter arguments were addressed by the Court. Instead, the appellants claimed that these restrictions on political speech ran contrary to the basic structure of the constitution, which necessarily guaranteed a certain degree of political expression to *all* citizens.

78. The Court found that, although the restrictions in question were not unconstitutional because they were actually consistent with the unwritten principle of responsible government, in principle the logic behind the structural argument was sound:

> I should perhaps add that issues like the last will in the future ordinarily arise for consideration in relation to the political rights guaranteed under

> the *Canadian Charter of Rights and Freedoms*, which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution. However, it remains true that, quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them.
>
> (Our underlining.)

- *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, p. 57.

79. In a similar vein, in the *Provincial Judges Remuneration Reference*, the Court discussed the implication of the various unwritten principles that have, over time, been recognized as forming part of our constitution:

> Political freedoms, such as the right to freedom of expression, are not enumerated heads of jurisdiction under ss. 91 and 92 of the *Constitution Act, 1867*; the document is silent on their very existence. However, given the importance of political expression to national political life, combined with the intention to create one country, members of the Court have taken the position that the limitation of that expression is solely a matter for Parliament, not the provincial legislatures.
>
> The logic of this argument, however, compels a much more dramatic conclusion. Denying jurisdiction over political speech to the provincial legislatures does not limit Parliament's ability to do what the provinces cannot. However, given the interdependence between national political institutions and free speech, members of the Court have suggested that Parliament itself is incompetent to "abrogate this right of discussion and debate". In this way, the preamble's recognition of the democratic nature of Parliamentary governance has been used by some members of the Court to fashion an implied bill of rights, in the absence of any express indication to this effect in the constitutional text. This has been done, in my opinion, out of a recognition that political institutions are fundamental to the "basic structure of our Constitution" and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy.
>
> (Our underlining, citations omitted.)

- *Reference re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, at paras. 102-103.

80. Accordingly, quite apart from the Canadian Charter's protection of freedom of expression, the "basic structure of our Constitution" demands that individuals have a certain degree of freedom of political expression.

81. The following year, the Supreme Court rendered its decision in the *Secession Reference*, holding that democracy is one of the fundamental characteristics of the Canadian polity. The decision recognizes that long before the Canadian Charter was adopted, democracy was a structural feature of the Constitution as a whole. An attempt by one provincial government to unilaterally abrogate that feature within the province – though it might have no effect on federal representative democracy, or democracy in other provinces and territories – would therefore constitute an illegal attempt to unilaterally amend the very architecture of the Constitution of Canada.

- *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, at para. 44.
- *Constitution Act, 1867*, preamble.

82. The Court was clear in emphasizing that the underlying constitutional principles at issue are normative in nature and act as checks on government power:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, *supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada".
>
> (Our underlining.)

- *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, at para. 54.
- See also *British Columbia v. Imperial Tobacco Ltd.*, 2005 SCC 49, at para. 60; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, at para. 59.

83. Finally and more recently, the Court relied on similar logic in *Reference Re Senate Reform* to determine that, among other things, the imposition of term limits for Senators would alter the "fundamental nature and role" of the Senate, namely its ability to serve as a chamber for sober second thought and deliberation. The Court

found that any modification to one of the Senate's key characteristics could not be accomplished by Parliament acting alone.

- *Reference re Senate Reform*, 2014 SCC 32, at paras. 77-79.

84. Where a law is so out-of-step with Canada's constitutional framework that it can be said to offend its architecture, such a law is invalid and cannot stand.

### ii. Constitutional Architecture and the Notwithstanding Clause

85. The constitution's architecture speaks to the fundamental tenets of our society. It is logically prior to – and provides the foundation for – the Canadian Charter. Accordingly, where a law offends the constitution's architecture, it cannot be "saved" through the use of the notwithstanding clause. Reliance on the notwithstanding has no impact on the issue of constitutional architecture.

86. For instance, as seen above, the Supreme Court has held that even without the Charter, neither a province nor Parliament could simply pass a law to prohibit all forms of political discussion. It follows that the notwithstanding clause could not save that law from a finding of invalidity—even though the notwithstanding clause has been relied upon in other circumstances to limit freedom of expression.

- *Reference re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, at paras. 102-103.

- Compare *Ford* v. *Quebec (Attorney General)*, [1988] 2 SCR 712, at paras. 33-34.

87. The notwithstanding clause is not so powerful a tool that it allows a government to alter the basic tenets of our society, just because these basic tenets happen to also be reflected in the Charter.

88. The opposite conclusion would suggest that some of the most fundamental characteristics of Canadian society could be eliminated at the whim of the government in power. It would imply that Canadians are a simple majority vote away from being subject to arbitrary detention (s. 8), torture (s. 12), and indiscriminate murder at the hands of government officials (s. 7).

89. This cannot be what the notwithstanding clause stands for. A legislature does not obtain *carte blanche* to dismantle key democratic protections by simply invoking the magical word "notwithstanding" in the impugned legislative act.

90. The architecture of the constitution reveals a series of norms organized around a core:

a) At the core of our constitutional architecture are the underlying principles that are so basic to our society that they cannot be overridden by any unilateral government act;

b) Next come the fundamental rights that are protected by the constitution in a manner that is not susceptible to override by the notwithstanding clause;

c) Finally come those rights that are protected by the constitution to which the notwithstanding clause could apply.

91. Through its decisions and comments about our constitutional structure, the Supreme Court has recognized the existence of this model. The architectural core layer of our constitution was affirmed in the cases cited above, such as *OPSEU* and the *Secession Reference*. Surrounding that core are the rights noted in the recent decision of *Conseil scolaire francophone de la Colombie-Britannique*, wherein the Supreme Court recognized that the class of rights not susceptible to override had to be reviewed against a particularly stringent standard of justification.

- *Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2 , paras. 40-41 and 151 and *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 50.

- *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 148. See also *Frank v. Canada (Attorney General)*, 2019 SCC 1, at para. 25; and *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, at paras. 11 and 14.

92. Unquestionably, the rights protected by the Charter that fall outside our constitutional core and its surrounding layer are crucial to our democracy. None of the foregoing is meant to diminish their significance in our rights-based society. But when the notwithstanding clause of the Charter is invoked, these are the rights that will be affected.

93. Accordingly, when seized with a use of the notwithstanding clause, a court must determine what rights at issue derive from sections 2 and 7-15 of the Charter, and distinguish them from what rights at issue derive from the architectural core of the constitution. The notwithstanding clause will not immunize against scrutiny for the latter.

94. Put differently, the rights furthest from the core represent “value added” rights protection created through the Charter. When the notwithstanding clause is validly invoked, it applies to the “value added” by sections 2 and 7-15 of the Charter. The fundamental protections that exist even without the Charter remain.

95. Indeed, the Charter, through its notwithstanding clause, cannot be used to eliminate rights that Canadians would otherwise possess.

- Canadian Charter, at s. 26.

96. The Supreme Court's decision in *Chaoulli* provides a good backdrop for an examination of how this works in practice. In that case, a challenge was brought to Québec legislation prohibiting private health insurance, based on the premise that such a prohibition violated the right to life and personal security protected by the Canadian and Québec Charters. A majority of the Court held that the Québec Charter was violated (without addressing the Canadian constitutional issue), while a concurring minority also held that the Canadian Charter was violated. In the wake of the judgment, the Québec government had a choice to make: it could accept that its prohibition on private health insurance would cease to operate, or it could use the provincial and/or federal notwithstanding clause to allow the law to operate despite the Charter violations.

- *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.

97. On the other hand, similar use of the notwithstanding clause could not possibly allow a legislature to violate the right to life and personal security in its more basic forms. It would be inconceivable in our democracy for any order of government to give itself the power to "legally" shoot citizens in the streets for no reason. That is because this more basic manifestation of the right to life and personal security is anchored in our core constitutional architecture.

98. Similarly, the Supreme Court has distinguished the free exchange of ideas through political speech (which is central to our democracy), from the expression inherent in commercial speech, such as the advertising of cigarettes. Both forms of speech engage freedom of expression and are therefore protected by section 2(b) of the Charter, but the first is part of our core constitutional architecture, while the second is not.

- *Canada (Attorney General) v. JTI-Macdonald Corp*., [2007] 2 SCR 610, par. 47, 68, 94 and 128.

99. In the present case, it is not sufficient for the Respondent to plead that freedom of religion and freedom from discrimination, *as enacted pursuant to sections 2(a) and 15 of the Charter*, are subject to override pursuant to the notwithstanding clause. We also need to determine whether the Act infringes the rights located in our core constitutional architecture.

### iii. Constitutional Architecture and Equal Access to Public Society

100. The principle of equal access to public society – the basic assurance that individuals will not be prohibited from participating in public society on account of their religion – is a fundamental part of Canada's constitutional architecture. It goes beyond s. 2(a) and s. 15 of the Canadian Charter and inheres in our constitutional architecture. It is a core element of how our government institutions relate to one another, and to individuals, in our society.

101. This principle coheres with, and relates closely to, the unwritten principle of protection of minority rights that the Supreme Court elaborated in the *Secession Reference*:

- *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, at paras. 79-82.

102. In *Movement laïque québécois*, the Supreme Court held:

> I would add that, in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the *Quebec Charter* and the *Canadian Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at p. 136; *Big M*, at p. 346; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 27; *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at pp. 179 and 181-82; *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at p. 326). The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.
>
> (Our underlining.)

- *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, at para. 75.

103. The "ideal" to which the Supreme Court referred is reflected in the Charter but is not limited to it. It did not arise spontaneously in 1982 when the Charter was adopted. Equal access to public society for members of all religions (as well as all races, genders, etc.) is part of our constitutional core.

104. Certain markers of inclusion were enshrined even before Confederation. Religious tests for public service employment in Quebec were abolished by the *Quebec Act* of 1774, and religious tests for public service in the United Kingdom were abolished altogether in 1829—indicating that the Constitution "similar in principle" to that of the United Kingdom is one that does not exclude individuals from public bodies on religious grounds.

- *Quebec Act,* 14 Geo. III c. 83, as cited in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, p. 343.

- *Roman Catholic Relief Act 1829*, 10 Geo. 4 c. 7.

105. Dating back over a century, Canadian jurisprudence has recognized the principle of equality and inclusion in our democratic architecture. For instance, as early as 1899, when dealing with the case of a Black man denied admission to the orchestra section of a Montréal theatre, the Québec Superior Court wrote:

> Our constitution is and always has been essentially democratic, and it does not admit of distinctions of races or classes. All men are equal before the law and each has equal rights as a member of the community.
>
> […]
>
> I should certainly hold any regulation which deprived negroes as a class of privileges which all other members of the community had a right to demand, was not only unreasonable but entirely incompatible with our free democratic institutions.
>
> (Our underlining.)

- *Johnson v. Sparrow et al.* (1899), 15 C.S. 104, at pp. 107-108. The decision was upheld on appeal, though for different reasons: *Sparrow et al. v. Johnson* (1899), 8 Que. Q.B. 379.

106. In the 1945 decision of *Re Drummond Wren*, the Ontario Superior Court of Justice struck down a restrictive covenant that prohibited the sale of a property to Jews. The Court's reasoning expressly notes that the juridical force of the anti-discrimination principle does not depend on a specific legislative – or even constitutional – enactment. Rather, it is inherent in our society:

> Ontario, and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would

> imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal.
>
> (Our underlining.)

- *Re Drummond Wren*, 1945 CanLII 80 (Ont. S.C.J.).

107. In *Saumur v. City of Québec*, Justice Rand affirmed the constitutional status of the protection of religious freedom:

> From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.
>
> (Our underlining.)

- *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 327.

108. And in 1964 – well before either the Québec Charter or the Canadian Charter were enacted – the legislature of Québec signalled its agreement with this concept, through the *Freedom of Worship Act*:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of Québec, are by the constitution and laws of Québec allowed to all Her Majesty's subjects living within the same.
>
> (Our underlining.)

- R. S. 1964, c. 301, at s. 1.

109. Equality and inclusion are indeed part of our constitutional fabric. As with minority rights, the historic application of these ideals has not been perfect,[3] but the Supreme Court has made it clear that perfection is not the standard required.

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[3] Jurisprudentially, one might refer to the decisions in *Loew's Montreal Theatres Ltd. v. Reynolds* (1921), 30 Que. K.B. 459 and *Christie v. York*, [1940] S.C.R. 139.

> The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter. Undoubtedly, one of the key considerations motivating the enactment of the Charter, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the Charter. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference*, *supra*, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.
>
> ➢ *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, at para. 81.

110. Accordingly, and in coherence with the protection of minorities, our constitutional architecture provides a basic level of access to and participation in the public sphere by all persons, including minorities, regardless of their personal characteristics—which includes religious belief, but which also other characteristics like race and gender.

111. It follows that laws that directly abrogate the right of individuals with certain inherent, immutable characteristics to participate in public life in Canada are fundamentally antithetical to the existing constitutional structure, over and above any Charter protections they might also violate. Indeed, as noted above, this observation has been made even before the Québec Charter (and certainly the Canadian Charter) were adopted.

112. The federal government cannot require elected officials to say a prayer before entering Parliament. A municipality cannot prohibit women from joining the police force. These basic guarantees of equal access to public society are more fundamental than the Charter. They are an integral part of what defines us as a free and democratic society.

### iv. Constitutional Architecture and *Laïcité*

113. The principle of *laïcité* as expressed in the Act is not part of Canada's constitutional architecture. This statement is not meant as a comment on the value of *laïcité*. It is meant as a description of constitutional fact.

114. In his expert report, Professor Yvan Lamonde explains that the central principle of *laïcité* is its conviction in "*la primauté, en démocratie, du civil sur le religieux*". Under the prism of *laïcité*, religion has no place in the public, democratic state.

- Expert report of Y. Lamonde, at p. 2.

- "*Laïcité*" as enacted in the Act may be contrasted with the description of "secularism" that the Supreme Court has adopted. In *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, at para. 19, the Court explained that in a secular system, religion is still recognized to be "an integral aspect of people's lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community." See also *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, at para. 43. Compare also *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, at para. 132

115. That simply is not the case in our version of democracy. *Laïcité* has not been a central governing principle in Québec society—much less a foundational pillar of our constitution.

- See, e.g., **Exhibit P-17**: Extracts of the *Journal des débats* of the National Assembly, June 16, 2019, at p. 42.

116. Even the provincial government has expressly recognized that the principle of *laïcité* is not fully enshrined in Québec society:

> Une réalité s'impose : actuellement, la laïcité demeure inachevée au Québec, en fait comme en droit. Ce projet de loi vise à lui donner corps et à franchir une étape significative. Ce que nous proposons, c'est un modèle de la laïcité à la québécoise qui se distingue autant de la laïcité à la française que du multiculturalisme à la canadienne. De ce modèle québécois découlent des mesures législatives qui sont de nature à spécifier les exigences reliées au choix d'un État laïque par le Québec.
>
> (Our underlining.)

- **Exhibit P-17 :** Extracts of the *Journal des débats* of the National Assembly, June 16, 2019, at pp. 31-32, 34.

117. The status of *laïcité* in Québec contrasts with that of France, to take one example. In France, *laïcité* is enshrined in the very first article of the constitution:

> *La France est une République indivisible, laïque, démocratique et sociale.*

For French society, *laïcité* – as instantiated in its constitution, and as contrasted with *laïcité* as instantiated in the Act – is a core element of its architecture.

- *Constitution de la République française*. Available at: http://www.assemblee-nationale.fr/connaissance/constitution.asp.

118. For Québec society, the legal status of our instantiation of *laïcité* emerges from recent laws enacted by a single legislature, democratically elected and subject to replacement by the electorate at the next general election.

119. When the next government is elected, it may or may not choose to champion *laïcité*. It may or may not choose to champion a particular religion. From a legal perspective, either choice will lead to the same conclusion . And the limits on what a government can force its population to do or not do, in the name of each, is the same. Neither *laïcité* nor particular religious beliefs have superior status as legal norms to justify coercion:

> … the evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief (*S.L.*, at para. 32). It requires that the state abstain from taking any position and thus avoid adhering to a particular belief.
>
> (Our underlining.)

- *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, at para. 72.

120. If the principle of neutrality can be breached by this government to favour *laïcité*, it can also be breached by the next government to favour Catholicism or Hinduism or Islam.

### v. Constitutional Architecture as it Applies to the Act

121. When the purpose of the Act as well as the restrictions on public participation that it creates are examined against our constitutional architecture, it is clear that sections 6 and 8 of the Act are invalid.

122. At its core, the Act denies equal access to public society for those Québecers whose religious beliefs require them to wear religious symbols or face-coverings.

123. The restrictions created by sections 6 and 8 shut the door on public sector employment for individuals across the province, based purely on their deeply-held beliefs—that is, an immutable characteristic ingrained as a part of who they are.

- Affidavit of F.B., at para. 22; Affidavit of L.S., at para. 29; Affidavit of M.G., at paras. 15 and 18; Affidavit of W.B.G.H., at para. 12.

124. There is no question that individuals are suffering harm and exclusion from provincial institutions because of the Act. Without any attempt at being exhaustive, the evidence reveals:

- For Ichrak Nourel Hak, a practicing Muslim woman who wears a *hijab*, the Act prevents her from realizing her career goal of teaching French at a public institution: Affidavit of Ichrak Nourel Hak, at paras. 10-11 and 17-18.

- For Basir Naqvi, a practicing Muslim man who wears a religious head-covering and grows a beard, the Act means that he cannot become a public prosecutor: Affidavit of Basir Naqvi, at para. 11.

- For Imane Melab, a practicing Muslim woman who wears a *hijab*, the Act means altering her professional trajectory and never practicing law in the public sector: Affidavit of Imane Melab, at paras. 18-20.

- For Caroline Gehr, a practicing Jewish woman who wears a religious kerchief, the Act limits her career choices at a public school and undermines her self-esteem: Affidavit of Caroline Gehr, at paras. 14-16.

- For Fatima Ahmad, a practicing Muslim woman who wears a *niqab* in the presence of men, the Act prohibits her from teaching elementary school, and ultimately raises doubts about her ability to stay in Québec: Affidavit of Fatima Ahmad, at paras. 16-17.

- For Gregory Bordan, a practicing Jewish man who wears religious fringes and a head covering, the Act limits his ability to provide legal services to government: Affidavit of Gregory Bordan, at paras. 9-11.

- For Hakima Dadouche, a practicing Muslim woman who wears a *hijab*, the Act limits her mobility and career potential in the public school system: Affidavit of Hakima Dadouche, at para. 10.

- For Amrit Kaur, a practicing Sikh woman who wears a turban, kirpan, iron bracelets, uncut hair, wooden comb and long underwear, the Act prohibits her from teaching in public schools, and led her to accept a teaching position out-of-province: Affidavit of Amrit Kaur, at paras. 20 and 27.

- For E.E., a practicing Muslim woman who wears a *hijab*, the Act precludes her from fulfilling the requirements for her vocational degree: Affidavit of E.E., at para. 12.

- For Ghadir Hariri, a practicing Muslim woman who wears a *hijab*, the Act deprives her of employment as a teacher: Affidavit of Ghadir Hariri, at para. 12.

125. The effect of the exclusion that these individuals experience goes beyond a brute denial of access. It involves a harm to their human dignity. The message these individuals receive is that persons of faith are unwelcome in Québec society and are not worthy of participating in the work of government:

> *Après l'avoir lue et relue, j'ai l'impression d'être une indésirable au Québec. Je me sens comme une citoyenne de seconde classe dans mon propre pays et dans ma propre province.*

- Affidavit of Imane Melab, at para. 14.

> *… la Loi me fait sentir exclue de la société québécoise. Elle m'envoie le message que je dois avoir l'apparence de la majorité pour me conformer aux valeurs québécoises.*

- Affidavit of Ichrak Nourel Hak, at para. 32.

> I have also painfully come to the realization that it is probably best that my children, who are also religiously observant, not bring up their children in Quebec. How could I encourage them to live where they and their children could not aspire to be teachers or make certain other career choices merely because of a religious practice, and where their religious choices will brand them as unsuitable for certain jobs regardless of their competence and professionalism?

- Affidavit of Gregory Bordan, at para. 23.

> *J'ai l'impression d'être une citoyenne de second ordre, malgré le fait que j'ai eu le même cheminement que tout Québécois né de parents « purement québécois ». Je me sens discriminée et opprimée.*

- Affidavit of Ghadir Hariri, at para. 28.

126. Underscoring the message of exclusion was Mr. Legault's message to those who could not participate in the provincial public service: "*[il] y a d'autres emplois de disponibles*".

- **Exhibit P-11** : *Laïcité de l'État : l'opposition en attente de réponses du gouvernement,* Journal de Montréal, April 3, 2019.

127. With respect, separate is not equal in our constitutional democracy. Enacting a law that funnels religious practitioners out of the public sector to "other jobs" is a serious breach of our social fabric. As a majority of the Supreme Court stated in *Amselem*:

> Under the circumstances of the instant case, the appellants had no choice but to sign the declaration of co-ownership in order to live at the Sanctuaire. […] <u>It would be both insensitive and morally repugnant to intimate that the appellants simply move elsewhere if they took issue with a clause restricting their rights to freedom of religion</u>.
>
> (Our underlining.)

- *Syndicat Northcrest v. Amselem*, 2004 SCC 47, at para. 98.

128. Troublingly, the evidence confirms concerns that the policy of exclusion found in the Act is being applied disproportionately against society's most vulnerable. Every single person identified by gender and religion, who lost job from a *centre de service scolaire*, has been a Muslim woman.

- Transcript of the examination of M$^{e}$ Louis Bellerose, August 25, 2020, from p. 37, at line 13, to p. 38, line 12, and p. 39, at lines 7-9.

- **Exhibit 52-M-05 :** Access to documents request – answers from the *Commission scolaire des Affluents*: 1 person – a woman wearing a hijab; **Exhibit P-53-S-07**: Access to documents request – answers from the *English-Montreal School Board*: 2 people – both women wearing a hijab; **Exhibit P-53-K-03 and -04**: Access to documents request – answers from the *Commission scolaire de Laval***:** 1 person – a woman wearing a hijab; **Exhibit P-53-KK-01 and -02**: Access to documents request – answers from the *Commission scolaire Marie-Victorin***:** 1 person – a woman whose religious sign is not known; **Exhibit EMSB-28-12.1**: Access to documents request – answers from the *Commission scolaire de la Pointe-de l'île***:** 4 people – all 4 are women who wear the hijab; **Exhibit EMSB-28-11**: Access to documents request – answers from the *Commission scolaire Seigneurie-des-Milles-Îles***:** 1 person – a woman wearing a hijab.

129. The Plaintiffs fully endorse the argument made by the English Montreal School Board in file 500-17-109983-190 concerning the application of section 28 of the Charter. The disparate, adverse impact being suffered by women speaks to their unique harm and the differential limitations on their freedoms.

130. The philosophy of *laïcité* espoused by the ruling provincial government does not sanitize the Act's policy of exclusion. Indeed, if the Act is permitted to alter our core constitutional architecture, it will not be doing so for the unique cause of *laïcité*. Rather, it will open the doors to any exclusionary policy regardless its philosophical underpinnings:

a) No single basis for exclusion is more justifiable than another. If this government can tell religious practitioners to find employment elsewhere, then the next government can do the same to atheists, to people of colour, or to members of the LGBTQ+ community.

b) No distinction can be made between forcing a practitioner to cease religious conduct, and forcing a non-practitioner to engage in religious conduct. Both situations represent acts of coercion from the state that conflict directly with an individual's belief system.

131. The Act strikes at the heart of public life in Québec. It transforms a vast range of public institutions into bodies that exclude certain individuals on the basis of their inherent characteristics.

132. There is no way to maintain a pretense of equality and inclusion when certain members of society are being refused access to employment for their religious practices.

133. This attempt to reconstruct Québec's public sphere amounts to an invalid effort by the province to unilaterally alter the architecture of the constitution.

### c. Sections 6 and 8 of the Act are criminal prohibitions *ultra vires* the Provincial Legislature

134. If their content is constitutionally valid, which is denied as elaborated above, then sections 6 and 8 of the Act fall properly within the jurisdiction of the federal government pursuant to paragraph 91(27) of the *Constitution Act,* 1867, 30 & 31 Victoria, c. 3 (U.K.) (« ***Constitution Act, 1867***»). These sections, as enacted by the provincial government, are invalid pursuant to section 52 of the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (« ***Constitution Act, 1982***»).

135. Indeed, an analysis of the true character of these sections demonstrates that their principal objective is to eliminate the observance of religion in public institutions, in order to protect values that the government views as being fundamental to the Québec state.

136. The federal government's criminal law power covers such matters. As the Supreme Court recently re-affirmed, "[p]rotecting fundamental moral precepts or

social values is an established criminal law purpose". Such a purpose is established not by objective reference to what values are truly fundamental to a society, but by subjective reference to what the enacting legislature considered its goal to be.

- *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, at paras. 90-91.

137. Additionally, a criminal enactment must establish both prohibitions and sanctions, in response to conduct that is contrary to its prescriptions. The Act contains both these elements as well.

- *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 90; *R* v. *Morgentaler*, [1993] 3 S.C.R. 463, at p. 481; *RJR-Macdonald Inc.* v. *Canada (Attorney General),* [1995] 3 S.C.R. 199, at para. 29; *Québec (Attorney General)* v. *Canada (Attorney General),* [2015] 1 S.C.R. 693, at para. 29.

138. Determining the constitutional validity of a law pursuant to the constitutional division of powers is a two-step process.

139. First, the court must characterize the impugned law by reference to its "pith and substance" ("*caractère véritable*"). Second, based on the law's characterization, the court must classify the law based on the division of powers found at sections 91 and 92 of the Constitution.

- *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 26-29; *Québec (Attorney General)* c. *Canada (Attorney General),* [2015] 1 S.C.R. 693, at para. 29; *Rogers communications Inc.* v. *Châteauguay (City)*, [2016] 1 S.C.R. 467*,* at para. 34; *R* v. *Morgentaler*, [1993] 3 S.C.R. 463, at p. 481.

140. In the sections that follow, each of these analyses is performed in turn.

### i. Characterization of the Act

141. When characterizing a law, a court should refer to both is purpose and its effects.

- *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 30.

142. Proper characterization of a law requires flexibility and avoids formalism. An appreciation of legislation's "dominant purpose", though not the sole factor in the analysis, is often the "key to constitutional validity".

- *R* v. *Morgentaler*, [1993] 3 S.C.R. 463, at p. 481-482.

### *1. Purpose*

143. A law's purpose is determined by reference to both intrinsic and extrinsic evidence. Intrinsic evidence will include textual elements, such as the law's preamble. Extrinsic evidence will include elements that fall outside the purview of what was formally adopted by the legislature, such as parliamentary debates.

- *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at paras. 30, 34 and 51; *Rogers communications Inc.* v. *Châteauguay (City)*, [2016] 1 S.C.R. 467*,* at para. 36; *Reference re Firearms Act (Can.),* [2000] 1 S.C.R. 783*,* at paras. 17-18.

144. In the present case, the intrinsic evidence reveals that the dominant purpose of the Act is to eliminate any association of religion or its purpoted practice with Québec's public institutions.

145. The preamble to the Act speaks to both the specific objective that the legislature is pursuing (i.e., enshrining *laïcité* and removing religion from public institutions) and its belief that this objective is fundamental to Québec society:

> AS the Québec nation has its own characteristics, one of which is its civil law tradition, distinct social values and a specific history that have led it to develop a particular attachment to State laicity;
>
> AS the Québec State stands on constitutional foundations that have been enriched over the years by the passage of a number of fundamental laws;
>
> AS, in accordance with the principle of parliamentary sovereignty, it is incumbent on the Parliament of Québec to determine the principles according to which and manner in which relations between the State and religions are to be governed in Québec;
>
> AS it is important that the paramountcy of State laicity be enshrined in Québec's legal order;
>
> AS the Québec nation attaches importance to the equality of women and men;
>
> AS a stricter duty of restraint regarding religious matters should be established for persons exercising certain functions, resulting in their being prohibited from wearing religious symbols in the exercise of their functions;
>
> AS State laicity contributes to the fulfilment of the magistrature's duty of impartiality;

> AS State laicity should be affirmed in a manner that ensures a balance between the collective rights of the Québec nation and human rights and freedoms;
>
> (Our underlining.)

- **Exhibit P-1 :** *Act respecting the laicity of the State,* L-0.3, preamble.

146. Section 14 of the Act further emphasizes the paradigm of *laïcité* as a social value. This section establishes that no duty to accommodate can be used to alleviate the requirements of sections 6 and 8.

147. Additional provisions of the Act ensure that it reaches even private contracts concluded by public entities. Thus section 15 of the Act makes the prohibition in section 6 an "integral part" of legal services contracts for jurists mandated by the State, and section 16 annuls any collective agreement incompatible with the Act.

148. The government's exhaustive approach to removing religion from public institutions speaks to its mindset. It is precisely because the government sees any religious symbols in public institutions as being contrary to secular social values that it has used the Act to comprehensively eliminate it.

149. The extrinsic evidence on this matter further confirms and underscores the legislature's objective.

150. Mr. Jolin-Barrette, who sponsored the Act, has made numerous statements in this regard during debates at the National Assembly, as well as in press conferences dealing with the Act:

> *Ce projet de loi propose d'inscrire la laïcité de l'État comme principe formel, comme valeur fondamentale et comme outil d'interprétation des lois du Québec. Que nos institutions parlementaires, gouvernementales et judiciaires respectent le concept de laïcité de l'État, d'interdire le port de signes religieux aux personnes en situation d'autorité, y compris les enseignants, de faire en sorte qu'au Québec les services publics soient donnés et reçus à visage découvert et qu'il n'existe pas d'accommodement religieux possibles lorsqu'on traite de la laïcité de l'État, notamment pour la réception de services à visage découvert.*
>
> (Our underlining.)

- **Exhibit P-12** : Official transcript of Mr. Jolin-Barrette's press conference, March 28, 2019, p. 2. See also : **Exhibit P-17** : Extracts of the *Journal des débats* of the National Assembly, June 16, 2019, p. 47: "*Il est légitime, et c'est dans l'intérêt public, de faire en sorte que la laïcité de l'État devienne*

*une valeur fondamentale de la société québécoise*." (Our underlining.); **Exhibit P-17** : Extracts of the *Journal des débats* of the National Assembly, June 16, 2019, p. 34 : "*M. Le Président, le Québec est mûr pour affirmer sa laïcité enfin, cette valeur fondamentale, dans ses lois. C'est ce que nous faisons*." (Our underlining.); **Exhibit P-17** : Extracts of the *Journal des débats* of the National Assembly, June 16, 2019, p. 111 : "*Le projet de loi fera en sorte d'inscrire la laïcité de l'État comme principe formel, comme valeur fondamentale et comme outil d'interprétation des lois du Québec dans la Charte des droits et libertés de la personne, que nos institutions parlementaires, gouvernementales et judiciaires respectent le concept de laïcité de l'État, d'interdire le port de signes religieux aux personnes en position d'autorité, y compris les enseignants, qu'au Québec les services publics soient donnés et reçus à visage découvert et qu'il n'existe pas d'accommodement religieux possible lorsqu'on traite de la laïcité de l'État, notamment pour la réception de services à visage découvert*." (Our underlining.).

*Le projet de loi est un geste d'affirmation de la laïcité de l'État, qui s'articule autour de quatre principes : la séparation de l'État et des religions, la neutralité religieuse de l'État, l'égalité de tous les citoyennes et citoyens et la liberté de conscience et de religion.*

(Our underlining.)

- **Exhibit P-17** : Extracts of the *Journal des débats* of the National Assembly, May 29, 2019, p. 31.

*La laïcité assure l'indépendance de l'État par rapport à la religion et favorise l'émergence des droits des femmes et des minorités sexuelles. Peu de gens remettent en question ces constats.*

(Our underlining.)

- **Exhibit P-17** : Extracts of the *Journal des débats* of the National Assembly, May 29, 2019, p. 33-34.

*Ainsi, il est parfaitement légitime qu'un choix de société aussi fondamental que la laïcité de l'État émane du Parlement du Québec. À partir de cet instant, il appartient aux citoyens, par l'intermédiaire de leurs représentants élus, de déterminer selon quels principes et de quelle manière les rapports entre l'État et les religions, au Québec doivent être organisés.*

(Our underlining.)

- **Exhibit P-12** : Official transcript of Mr. Jolin-Barrette's press conference, March 28, 2019, p. 4.

*Le gouvernement, aujourd'hui, répond à son engagement électoral, et le matérialise dans un projet de loi, et inscrit également la laïcité dans nos lois, parce qu'il s'agit d'une valeur fondamentale de la société québécoise.*

(Our underlining.)

- **Exhibit P-12** : Official transcript of Mr. Jolin-Barrette's press conference, March 28, 2019, p. 10. See also: **Exhibit P-17** : Extracts of the *Journal des débats* of the National Assembly, June 16, 2019, p. 12: "*M. le Président, le gouvernement a fait le bon choix en déposant le projet de loi n° 21. Le gouvernement a fait le bon choix en respectant ses engagements qu'il a pris depuis 2013 et en respectant ses engagements qu'il a pris lors de la dernière campagne électorale. Le gouvernement du Québec avait dit qu'il adopterait une loi sur la laïcité de l'État, qu'il interdirait le port de signes religieux chez certaines personnes en situation d'autorité : les policiers, les juges, les agents de services correctionnels, les procureurs, les enseignants. C'est ce que nous faisons*" (our underlining.); **Exhibit P-17** : Extracts of the *Journal des débats* of the National Assembly, June 16, 2019, p. 21: "*On avait dit, M. le Président, en campagne électorale qu'on allait faire une loi sur la laïcité, qu'on allait interdire le port de signes religieux pour certaines personnes en situation d'autorité, que les services publics allaient être donnés et reçus à visage découvert, ce qui est, M. le Président, dans notre société, le minimum, M. le Président*" (our underlining).

151. This objective of protecting « *une valeur fondamentale de la société québécoise* » resonates directly with the Supreme Court's description of a criminal law purpose (i.e., "[p]rotecting fundamental moral precepts or social values").

- *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, at para. 90.

### *2. Effects*

152. The Act does not just espouse a "criminal law purpose"; it gives tangible meaning to this purpose through its effects.

- See *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 64.

153. As noted above, section 6 of the Act prohibits defined individuals exercising their public functions from wearing a "religious symbol". Section 8 of the Act prohibits other defined individuals exercising their public functions from covering their face.

Absent conformity with these prohibitions, such individuals are subject to the sanctions mentioned at section 12 and following.

154. In practice, the Act either compels individuals to remove their religious symbols, or ensures that such individuals are kept out of the public service.

- See paragraph 51, above.

155. Individuals with religious beliefs whose faith involves wearing a religious symbol will fall into the latter category. For them, removal of religious symbols is not truly a "choice". Religion is not limited to one's belief system; it also includes the manifestation of those beliefs through shared practices and observances.

- See *Syndicat Northcrest v. Amselem*, 2004 SCC 47, at para. 137.

- On the lack of real choice, see paragraph 51, above.

156. These practices and observances are not only reflective of faith, but constitutive of it.

*Porter le voile me procure une connexion étroite avec mon Dieu et ma foi.*

- Affidavit of N.P., at para. 18.

*Pour moi, le voile islamique est une forme de spiritualité. Il me fait sentir bien, à l'aise avec moi-même. Le porter fait à présent partie intégrante de moi, de mon identité religieuse.*

- Affidavit of Ichrak N. Hak, at paras. 13-14.

*Je porte ces objets pour différentes raisons en lien avec ma foi, et non par caprice ou par coquetterie. Ces objets me permettent entre autres choses de me rappeler la présence et l'amour de Dieu au quotidien, ainsi que l'importance d'agir avec amour. Ils me servent également à implorer la protection divine dont ils témoignent. Enfin, ces objets permettent de m'identifier à titre de catholique notamment afin de recevoir les derniers sacrements en cas d'urgence.*

- Affidavit of Andréa Lauzon, para. 20.

157. Prohibiting religious practices and observances, even in limited spheres, is tantamount to closing off those spheres to religious adherents.

158. Notably, the Act does not limit itself to the removal of *visible* religious symbols. A religious individual who wears certain garments, jewelry or adornments

underneath other layers of clothing – such that they are completely invisible to others – will still need to remove them pursuant to section 6 of the Act.

159. The targeting of non-visible religious symbols further establishes the nature of the "wrong" that the government is seeking to correct through the Act. The "wrong" is the simple presence of those who derive religious meaning by wearing religious symbols, among the actors of the State.

160. The Act prohibits a Catholic woman from wearing a cross necklace hidden under her blouse.

- Affidavit of Andrea Lauzon, at para. 18.

161. The Act prohibits a Jewish man from wearing *tzitzit* – religious frails worn under the shirt – when performing under a government contract.

- Affidavit of Gregory Bordan, at paras. 14-16.

162. The Act has even made it illegal for a teacher to correct student tests alone at home while wearing a religious head-covering.

- Transcript of the examination of M$^{e}$ Louis Bellerose, August 25, 2020, at p. 75 and p. 76, lines 1-7.

163. As such, section 6 of the Act is about enshrining a new moral code that is violated whenever a religious symbol is worn during public service.

164. Any individuals who are committed enough to their religious observances to wear religious symbols while performing their functions are no longer welcome to work in the public institutions mentioned in the Act.

165. Similarly, those individuals targeted by section 8 must prioritize the *laïcité* of the State (as determined by the Act) over any religious prescriptions to cover their faces.

166. As Mr. Legault says, "*[il] y a d'autres emplois de disponibles*". The fundamental moral code that the Act compels for public institutions is uncompromising.

167. The essential character shared by section 6 and section 8 of the Act is to impose a moral code for designated public institutions that removes the possibility of individual religious observance.

### ii. Classification of the Act

168. Parliament's criminal law power is "broad and plenary" and is not frozen in time. Rather, it has the capacity to adapt to new situations and social issues.

- See *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 69 ; *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, at para. 28.

169. As noted above, legislation will fall within the federal government's criminal law power if it has three essential elements: (1) a criminal law purpose; (2) a prohibition; and (3) a sanction. Each is considered in turn.

- *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 67; *Québec (Attorney General) v. Canada (Attorney General),* [2015] 1 S.C.R. 693, at para. 33*; Reference re Firearms Act (Can.),* [2000] 1 S.C.R. 783, at para. 27; *RJR-Macdonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199*; Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1.

### *1. Criminal law purpose*

170. In an oft-cited passage from the *Margarine Reference*, Justice Rand elaborates the core elements of a "criminal law purpose":

> […] we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> […]
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law […].
>
> (Our underlining.)

- *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1, at pp. 49-50 ; *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 71 ; *Reference re Firearms Act (Can.),* [2000] 1 S.C.R. 783, at para. 31 ; *Reference re Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457, at para. 49.

171. More recently, in the *Reference re Genetic Non-Discrimination Act*, the Supreme Court explained when a "criminal law purpose" will be found:

> [79] Taken together, the requirements established in the *Margarine Reference* and subsequently applied in this Court's jurisprudence mean that a law will have a criminal law purpose if its matter represents Parliament's response to a threat of harm to public order, safety, health or morality or fundamental social values, or to a similar public interest.
>
> (Our underlining.)

- *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 79.

172. Specifically, the Supreme Court reiterated the principle that protecting rules of social values falls within the ambit of a "criminal law purpose", such that these protections will fall within the criminal law power when a legislature considers itself to be acting in such a manner:

> Protecting fundamental moral precepts or social values is an established criminal law purpose: *Margarine Reference*, at p. 50; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, at pp. 932-33; *Reference re AHRA*, at paras. 49-51 and 250. Parliamentarians considered discrimination on the basis of health-related genetic test results to be morally wrong. They viewed such genetic discrimination to be antithetical to the values of equality and human dignity. It is easy to see why. Such genetic discrimination threatens the fundamental social value of equality by stigmatizing and imposing adverse treatment on individuals because of their inherited, immutable genetic characteristics, and, in particular, the characteristics that may help to predict disease or disability. In acting to suppress a threat of that nature, Parliament acted with a criminal law purpose.
>
> (Our underlining.)

- *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 90.

173. Applying the foregoing principles to sections 6 and 8 of the Act, their criminal law purpose is evident.

174. The measures found in these sections of the Act respond to what the Québec legislature has clearly perceived as a threat to the fundamental social values of Québec as it apprehends them.

- Refer to paragraph 151 above. Compare: *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at paras. 75 and 78.

175. Indeed, the passage of the Act is even seen as fulfilling a public "duty", giving juridical effect to what legislators consider an important social value in the form of *laïcité*.

> *Comme parlementaires élus démocratiquement et redevables à la population, nous avons le devoir de répondre aux préoccupations exprimées depuis deux décennies et de traduire la volonté populaire en réponses pragmatiques et pondérées. C'est ce que le projet de loi n° 21 fait et c'est ce qui explique pourquoi il reçoit des appuis aussi nombreux*.
>
> (Our underlining.)

- **Exhibit P-17 :** Extracts of the *Journal des débats* of the Committee on Institutions, June 4, 2019, at p. 42 (M. Jolin-Barrette).

176. Additionally, the historical jurisprudence strongly supports the conclusion that the measures in sections 6 and 8 of the Act fall within the criminal law power. Courts have consistently associated legislation concerning religious matters to be within federal jurisdiction for this very reason.

177. For instance, in *Saumur v. City of Québec*, the Supreme Court had to consider the validity of a municipal regulation that allowed police to prohibit the distribution of pamphlets. While the provincial legislature suggested that the regulation implicated the distribution of pamphlets generally, the proof administered at trial revealed that in fact, the regulation was aimed to target the practices of Jehovah's Witnesses, of which the government disapproved. A majority of the Supreme Court determined that the regulation could not be justified as a provincial matter and in fact fell within the federal government's criminal law power.

- *Saumur v. City of Québec*, [1953] 2 S.C.R. 299, at pp. 329, 351 and 379.

178. Shortly thereafter, in *Henry Birks & Sons (Montreal) v. City of Montreal,* the Supreme Court was seized with a law prohibiting businesses from opening on Catholic holidays. The principal effect of the law was to compel observance of this religious precept. Similar to the holding in *Saumur*, the Court held that the law was criminal in nature, because its objective was to impose religious observance. Justice Rand wrote:

> But these considerations show equally that the statute is enacted in relation to religion; it prescribes what is in essence a religious obligation. We are asked to find that the purpose of the legislation was either to give ease from labour to employees or to prevent the sale of goods as a measure of regulating local trade and commerce; but I regretfully find

> myself unable to treat either of these contentions as having the slightest basis or support in any pertinent consideration. In this aspect, for the reasons given by me in the case of *Saumur v. City of Québec*, as legislation in relation to religion the provision is beyond provincial authority to enact.
>
> (Our underlining.)

- *Henry Birks & Sons (Montreal) Ltd. v. City of Montreal*, [1955] S.C.R. 799, at pp. 813-814.

179. Justice Kellock, concurring, wrote further:

> Even if the true view be that this body of law, apart from Sunday observance legislation, was not introduced into Canada in 1774, legislation after 1867 upon that subject-matter could amount to nothing more than an attempt to give the force of law to ideas of religious morality then current in England and sanctioned by the criminal law. If this is to be done, it can only be done, in my opinion, by Parliament.
>
> (Our underlining.)

- *Henry Birks & Sons (Montreal) Ltd. v. City of Montreal*, [1955] S.C.R. 799, at p. 822.

180. In *R. v. Big M Drug Mart*, the Supreme Court once more determined that a law prohibiting commercial activity on Sunday fell within the federal government's criminal law power. It was again the government's objective of preserving "public morals" that led to this conclusion:

> The *Lord's Day Act* has been held "early, regularly and recently" to be in relation to a criminal law matter because, at risk of penalty, it compels the observance of a religious obligation, specifically the preservation of the sanctity of the Christian Sabbath. The *Lord's Day Act* is legislation in relation to a matter which falls within s. 91(27), one of the classes of subjects reserved to the exclusive authority of Parliament, because it is directed towards the maintenance of public order and public morals. […] There can be no doubt that legislation such as the *Lord's Day Act*, which has as its purpose the compulsion of religious observance, is intended to safeguard public morality. […]
>
> (Our underlining.)

- *R.* v. *Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295, at paras. 146 and 148.

181. Another relevant Supreme Court precedent is *R. v. Mortengaler*. That case dealt with a law prohibiting medical clinics from performing abortions. The law was declared *ultra vitres* the Nova Scotia legislature because its prohibition was not motivated by safety, but rather by a moral concern to "suppress free-standing abortion clinics on grounds of public morals". The problem was not the content of the law *per se*, but its objective rooted in a particular view of social morality.

- *R*. v. *Morgentaler*, [1993] 3 S.C.R. 463, at pp. 504-505.

182. The same reasoning applies to the present case. Divorced from context, the Act – and particularly its prohibition on face-coverings at section 8 – could be seen as an administrative measure. But that is not what the evidence reveals. The evidence reveals that the Act is meant to impose a particular set of social values – based on the fundamental value of *laïcité* in the State and its relationship to religion – on the individuals of Québec.

183. Those who do not adhere to this particular set of morals – whether it is because they want to wear a *hijab* while pleading in Court, or because they want to wear a *kippah* while correcting students' exams – have their conduct declared illegal.

184. The fact that the Act promotes *laïcité* as opposed to Christianity (as in *Big M Drug Mart*) or anti-Jehovah's Witness sentiment (as in *Saumur*) or general "morality" (as in *Morgentaler*) is of no consequence in the division of powers analysis. The particular ideology being espoused does not determine whether the federal or provincial government has legislative jurisdiction.

185. The consistent message emerging from this jurisprudence is that laws compelling or prohibiting certain practices for fundamental social, moral or religious reasons fall within the federal criminal law power under paragraph 91(27) of the *Constitution Act, 1867*.

- See also *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at paras. 79 and 90; *Reference re Assisted Human Reproduction Act,* 2010 SCC 61, at paras. 49, 50.

186. Sections 6 and 8 of the Act have a "criminal law purpose". These sections unambiguously serve to give juridical force to a certain moral vision of society.

### *2. Prohibition and sanction*

187. The Act also contains the essential elements of prohibition and sanction required to fall under the criminal law power.

- *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para. 67; *Reference re Firearms Act (Can.),* [2000] 1 S.C.R. 783, at para. 27.

188. Section 6 expressly prohibits wearing "religious symbols" for those individuals enumerated in Annex 2 of the Act. Section 8 expressly prohibits the personnel from institutions enumerated in Annex 1 (as well as individuals enumerated in Annex 3) from covering their faces while exercising their functions.

189. These prohibitions are sufficient to satisfy the jurisprudential requirement. Notably, total prohibition (i.e., for all individuals in all contexts) is not necessary.

- *Reference re Firearms Act* (Can.)*,* [2000] 1 S.C.R.L. 783, at para. 39.

190. As for the matter of sanctions, this too should not be the object of controversy. While the vagueness of the sanctions envisioned by the Act raises serious questions (as discussed below), the existence of sanctions is beyond dispute. Section 13 of the Act states that the person exercising the highest administrative authority must take "the necessary measures to ensure compliance with the measures set out in those provisions". It further states that:

> The persons referred to in section 6 or the first paragraph of section 8 are, in the event of failure to comply with the measures set out in those provisions, subject to a disciplinary measure or, if applicable, to any other measure resulting from the enforcement of the rules governing the exercise of their functions.

191. The evidence in the present case confirms that sanctions are indeed meted out in connection with the Act.

- Affidavit of Nafeesa Salar, at para. 11 et 21-22 ; Affidavit of F.B., at paras. 12 and 18-21 ; Affidavit of Mariam Najdi, at paras. 6-7 and 15 ; Affidavit of M.G., at paras. 8-13 ; Affidavit of R.M., at paras. 11, 21-22 and 25 ; Affidavit of S.B.R., at paras. 12 and 14-16 ; Transcript of the examination of M$^{e}$ Louis Bellerose, August 25, 2020, at p. 34, lines 7-14, p. 36, lines 22-25, and p. 37, lines 1-12.

192. In all, the criteria of prohibition and sanction are clearly met. Sections 6 and 8 of the Act have all the elements of a criminal law that only the federal government has the jurisdiction to enact.

### iii. The "double aspect" doctrine does not apply

193. There are some instances where both the federal government and the provincial governments can share jurisdiction to regulate matters. The division of powers

found in sections 91 and 92 of the constitution may contain overlap, and at that point, two doctrines – based on the principle of "cooperative federalism" – may come into play.

- *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, at para. 22.

194. First, where the two orders of government legislate inconsistent with each other, the doctrine of federal paramountcy will apply. Accordingly the federal legislation will take precedence and the provincial legislation will be invalid to the extent of the inconsistency.

- *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *Bank of Montreal v. Hall*, [1990] 1 SCR 121, at p. 151.

195. Second, where no such inconsistency arises, the two governments may both legislate over the same subject-matter pursuant to the "double aspect" doctrine:

> [O]ur federalism jurisprudence supports the principle that a subject matter can have both federal and provincial aspects (*Hodge*, at p. 130; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 181; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 65; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 23). In such a case, the double aspect doctrine permits the provinces to legislate in pursuit of a valid provincial objective and Parliament to do the same in pursuit of a separate federal objective.

- *Reference re pan-Canadian securities regulation*, 2018 SCC 48, at para. 114.

196. In this context, for the purposes of the present case, one must therefore ask whether the government of Québec is pursuing a "valid provincial objective" in enacting the Act.

197. The Plaintiffs herein fully support the conclusions reached by the Plaintiffs in the *Lauzon* case, 500-17-109731-193, on this point. The Act does not fall within provincial jurisdiction.

198. In his defence, the Attorney General of Québec argues that the Act falls within s. 92(4) ("The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers"), s. 92(13) ("Property and Civil Rights in the Province"), s. 92(16) ("Generally all Matters of a merely local or private Nature in the Province"), and s. 45 of the Constitution Act of 1982 ("laws amending the constitution of the province"). Most generally, the Attorney General suggests that the Act is a local matter, regulating the conduct of local provincial officials.

199. With respect, such classification confuses the *scope* of the Act with its *objective.*

200. As a general rule, divorced from any *ultra vires* objective, the provincial government can of course legislate various conditions of employment – including a "dress code" – for public employees. Much in the same way, the province can of course legislate opening hours for businesses. But when the government uses these powers to privilege a certain value judgment "in relation to religion", its objective becomes *ultra vires*, and it acts outside its jurisdiction.

201. The true objective of the Act is to establish a new moral code based on *laïcité*, to prohibit conduct that violates this new moral code, and to mete out meaningful sanctions when this new moral code is not respected. The fact that this objective is limited to Québec society in scope does not mean that it becomes a matter for provincial jurisdiction.

202. A focus on scope obscures the real analysis that needs to take place. The Supreme Court had occasion to elaborate this analysis in the successive decisions of *Big M Drug Mart* and *Edwards Books and Art.* Both cases dealt with a day of closing for private businesses, but the first dealt with an objective rooted in religion and morality, while the second dealt with an objective rooted in labour relations and employee rights.

203. The Supreme Court emphasized this distinction in *R. v. Big M Drug Mart*:

> It should be noted, however, that this conclusion as to the federal Parliament's legislative competence to enact the *Lord's Day Act* depends on the identification of the purpose of the Act as compelling observance of Sunday by virtue of its religious significance. Were its purpose not religious but rather the secular goal of enforcing a uniform day of rest from labour, the Act would come under s. 92(13), property and civil rights in the province and, hence, fall under provincial rather than federal competence: *In the Matter of Legislative Jurisdiction Over Hours of Labour*, [1925] S.C.R. 505; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.).
>
> (Our underlining.)

- *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 296, at p. 355.

204. In *Edwards Books and Art*, the Supreme Court gave practical effect to this principle, in upholding provincial jurisdiction over a secular day of rest. The majority remarked:

> The present case involves an entirely different provincial interest, namely the "civil rights" of employees to enjoy a common day of rest and recreation.
>
> ➢ *R. v. Edwards Books*, [1986] 2 S.C.R. 713, at para. 56.

205. The Act does not speak to any such “entirely different provincial interest”. It rests entirely on the boundary between the religious and the profane. It essence is “in relation to religion”.

> ➢ See paragraphs 144-151, above. See *Henry Birks & Sons (Montreal) Ltd. v. City of Montreal*, [1955] S.C.R. 799, at pp. 813-814.

206. With the Act, the government is not regulating the attire of public employees in order to maximize efficiency or improve its delivery of services. It is regulating the attire of public employees in order to impose a certain view of public morality on its workers—and also on the general public that interacts with its workers.

207. Moreover, the status of *laïcité* as a unique value in Québec – as distinct from the other provinces – does not serve to render it a “local” matter, or create jurisdiction for the Québec legislature where it would not have otherwise existed.

208. Indeed, such a definition would result in *any* federal matter falling within provincial jurisdiction so long as the province could make a case that it had a different perspective than the rest of Canada. Differences that may exist between the approach to fishing in British Columbia as compared to Newfoundland do not imply that these provinces can usurp the constitutional jurisdiction given to the federal government over fisheries under section 91(12).

209. To be clear, federal jurisdiction does not imply uniformity. It would fully be within the power of the federal government to enact a different regime in one province as compared to another, when exercising its jurisdiction over a matter under section 91 of the constitution. But the power remains the federal government’s to exercise, not the province’s.

210. While Québec remains free to legislate rules for its public service, and local matters within the province as it wishes, this jurisdiction meets a hard stop when it legislates these rules with the objective of enforcing a public code of morality. Such jurisdiction lies uniquely with the federal government’s criminal law power.

211. Sections 6 and 8 of the Act are *ultra vires* the legislature of Québec.

**d. The Act violates the rule of law**

### i. Overview

212. The rule of law is “a fundamental postulate of our constitutional structure”. Both a written[4] and unwritten[5] principle of the constitution, the rule of law is a pillar of the Canadian juridical system.

- *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142.
- *Re Manitoba Language Rights,* [1985] 1 SCR 721, at paras. 59-64.

213. The Supreme Court has recognized that the rule of law is implicit in the very nature of our constitution:

> The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.
>
> (Our underlining.)

- *Re Manitoba Language Rights,* [1985] 1 SCR 721, at para. 64.

214. One of the fundamental precepts of the rule of law is that ""the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law.”

- *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 71; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, at para. 10.

215. Most simply expressed, “the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action” (our underlining.).

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[4] It appears explicitly at the preamble of the *Constitution Act, 1982*.

[5] It appears implicitly at the preamble of the *Constitution Act, 1867* because of the mention “with a Constitution similar in Principle to that of the United Kingdom”.

- *Reference re Secession of Quebec,* [1998] 2 SCR 217, at para. 70.

216. As an unwritten constitutional principle, the rule of law is "capable of limiting government actions", and imposes constitutional constraints on all members in the Canadian federation, including provincial legislators.

- *Babcock v. Canada (Attorney General),* 2002 SCC 57, at para. 54.

217. On multiple occasions, the Supreme Court has recognized that the rule of law limits the state's exercise of power, and that there are substantive consequences when the state exercises power arbitrarily.

218. In *Roncarelli v. Duplessis*, Rand J. underscored that the rule of law specifically protects against the arbitrary exercise of state power:

> […] that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

- *Roncarelli v. Duplessis*, [1959] SCR 121, at p. 142.

219. Similarly, in *Saumur v. City of Quebec*, the Supreme Court rejected the notion that the City of Québec, as owner of its roadways, had "authority to forbid or permit as it chooses, in the most unlimited and arbitrary manner, any action or conduct that takes place on them."

- *Saumur v. City of Quebec*, [1953] 2 SCR 299, at p. 333.

220. In *Re Manitoba Language Rights*, the Supreme Court relied upon the rule of law to avoid an intolerable situation of chaos and anarchy further to a finding that the province's laws were invalidly enacted.

- *Re Manitoba Language Rights,* [1985] 1 SCR 721, at para. 68.

221. The *Manitoba Language Rights* case required the maintenance of an existing legal standard to avoid a situation of total arbitrariness, but sometimes the reverse is true. The doctrine of vagueness contemplates situations where a legislative enactment itself is so lacking in legal standard that it necessarily woudl result in caprisious application. This doctrine, too, rests on the rule of law.

- *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 SCR 606, at p. 626.

222. In the Charter context, the Supreme Court has recognized that the doctrine of vagueness can be used to declare a law unconstitutional "if it so lacks in precision

as not to give sufficient guidance for legal debate". The standard "conforms to the dictates of the rule of law in the modern State".

- *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, at p. 643.

223. Absolute precision is an impossible goal, and the doctrine of vagueness does not search for it. However, "where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law"." (Our underlining.).

- *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 SCR 927, at p. 983.

224. Indeed, a law that does not "give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements" essentially grants an unlimited discretionary power to whomever applies it. By inviting such arbitrariness, the law violates the principle that individuals are to be governed by the law.

- *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 SCR 606, at p. 642.

225. The foregoing comments are not limited to the Charter context. For instance, in *Roncarelli v. Duplessis*, the Supreme Court clearly guarded against the state giving itself or its actors absolute discretion.

- *Roncarelli v. Duplessis*, [1959] SCR 121, at p. 140.

226. It is the constitution as a whole, and not uniquely the Charter, that provides the anchor for the rule of law. As a matter of architecture, the restrictions on state action that flow from the rule of law are found at the constitutional core.

- *Reference re Secession of Quebec,* [1998] 2 SCR 217, at paras. 70-78.

### ii. Vagueness and the notwithstanding clause

227. There is a particular danger where the notwithstanding clause is used in connection with a vague law.

228. A chief concern with the vagueness of a law is the indeterminacy that it creates. Absent sufficient direction from the legislature, the law can mean anything and everything; individuals subject to the law do not know how to conduct their affairs; and administrators applying the law do not know how to put it into practice.

- See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 639-640. See also *R. v. Levkovic*, 2013 SCC 25, at para. 32.

229. In normal circumstances, however, this concern surrounding indeterminacy is given an important safety net: whatever application is given to the law, it cannot unjustifiably breach Charter rights.

230. The Supreme Court examined this balance between vagueness and the Charter in *Levkovic*. In that case, the appellant challenged the constitutionality of a law that prohibited the disposal of the bodies of babies that died before birth. When it came to the appellant's argument that the vagueness of the law affected women's privacy rights, the Court explained that this argument crossed the line between "vagueness" (as a rule-of-law argument based on lack of guidance) and "overbreadth" (as a Charter argument based on the scope of rights affected). The underlying message was that the Charter was there to protect against rights violations over and above any concerns raised from the mere fact of indeterminacy.

- *R. v. Levkovic*, 2013 SCC 25, at para. 36-41.

231. Where the notwithstanding clause is invoked, however, the Charter safety net may be limited or may not exist.[6] Not only does the legislative act then purport to grant a public authority untrammelled discretion – which is problematic in itself – but even worse, this untrammelled discretion itself is purportedly relieved of scrutiny for Charter violations.

232. When seized of an argument on vagueness in the context of an invocation of the notwithstanding clause, the court should therefore recognize that the stakes are significantly raised. There is no additional backstop to the abuse of discretion that the Charter typically provides.

233. The administrative power unleashed by a legislative act should be limited by both statutory language and applicable constitutional restraints. Where the latter category does not apply, the clarity and precision of the former category becomes all the more important.

234. An unclear, imprecise law purporting to grant untrammelled discretion to administrative actors with no Charter scrutiny cannot stand.

### iii. Section 6 of the Act is unconstitutionally vague

#### *1. The objective component of Section 6*

[6] At least as concerns those sections the notwithstanding clause targets.

235. The prohibition at section 6 of the Act suffers from an inherent uncertainty based on the circular definition provided for “religious symbols”.

236. This definition contains a subjective (paragraph 1) and objective (paragraph 2) component—both of which refer back to the central and undefined notion of “religion”:

> A religious symbol, within the meaning of this section, is any object including clothing, a symbol, jewellery, an adornment, an accessory or headwear, that
>
> 1º is worn in connection with a religious conviction or belief; or
>
> 2º is reasonably considered as referring to a religious affiliation.

- **Exhibit P-1**: *Act respecting the laicity of the State*, L-0.3, s. 6.

237. The government itself seems to recognize the imprecision in section 6 of the Act by evading any attempt to pin down its meaning.

238. When asked by the media, government officials have offered non-answers, such as Mr. Jolin-Barrette’s declaration that the Act refers to the « *sens commun des choses* ».

- **Exhibit P-12**: Official Transcript of Mr. Jolin-Barrette’s press conference, March 28, 2019, p. 7.

239. With respect, when it comes to religion, the “*sens commun des choses*” is a vacuous concept. The only meanings that are common are highly specific to certain backgrounds and traditions. For instance, a pentagram has religious meaning to a Wiccan—to the extent that a US court has held that placing restrictions on its display will violate freedom of religion. But to many non-adherents, a pentagram is just a star with five corners.

- *Lehman v. Elwood Community School Corp.*, (27 April 2000; US District Court for the Southern District of Indiana; Judge S. Hugh Dillin).

240. Information from Statistics Canada shows the existence of over a hundred “religions” in Canada. From the perspective of which of these religions, if any, is the analysis of what is “reasonably considered as referring to a religious affiliation” supposed to depart?

- **Exhibit P-20**: National Household Survey: Data tables (Religion).

241. Does a wig worn by a Jewish woman pursuant to religious prescriptions qualify as an object that would be “reasonably considered as referring to a religious

affiliation"? Within her community, it would almost certainly be identified as such. Outside her community, wearing a wig could be "considered as referring" to countless other motivations, from fashion to cancer treatment.

- Affidavit of Carolyn Gehr, at paras. 4-6 and 8.

- Note also that Mr. Jolin-Barrette has stated that hair is not covered by the prohibition on "religious symbols": see **Exhibit P-12**: Official Transcript of Mr. Jolin-Barrette's press conference, March 28, 2019, p. 32.

242. Conversely, sometimes an object may be perceived as a religious symbol to those outside the religious community, even if it is not a specific article of faith. In France, for instance, a Muslim student was sent home simply because of her modest attire.

- See **Exhibit P-17** : Extracts of the *Journal des débats* of the Committee on Institutions, May 8, 2019, p. 15; **Exhibit EML-2**: *France: une étudiante renvoyée chez elle en raison de sa jupe trop longue*, Journal de Montréal, April 29, 2015.

243. Wedding rings present another indeterminacy. Mr. Jolin-Barrette has declared that such rings are not "religious symbols". His reasoning is opaque. Is it simply because the Christian tradition has so penetrated our popular culture that the "reasonable person" no longer ascribes a religious meaning to these rings? And if so, does this mean that members of religions more dominant in our society will be able to wear religious symbols that members of minority religions cannot?

- **Exhibit P-16**: *Signes religieux : valse-hésitation entourant la bague de mariage*, Journal de Montréal, June 12, 2019.

- Transcript of the examination of M$^{e}$ Louis Bellerose, August 25, 2020, at p. 56, lines 1-25.

- Refer also to **Exhibit P-19**: quiz prepared by Québec Solidaire.

244. Such a suggestion recalls the importance of the Charter acting as a backstop against the abuse that can arise from vague laws. As elaborated above, where the Charter is not available to offer such protection, it is even more important to scrutinize the clarity of laws to preserve the rule of law.

- See paragraphs 231-234, above.

### *2. Practical application*

245. The proof in the present file highlights the significant differences in how various *centres de services scolaires* (formerly school boards) apply the Act. The inconsistent application of the law, while not determinative in itself, provides

evidence that the Act does not provide clear direction to those who need to apply it.

246. First, there is manifest inconsistency in how the phrase “religious symbols” is applied in Québec schools. Some *centres de services scolaires* forbid any “Catholic” symbol from being worn,[7] while others permit a small cross and wedding band,[8] while other still will only allow the wedding band (regardless of whether it does or does not reflect a religious belief).[9]

247. It appears therefore that through the vagueness of the Act, some symbols closely associated with the religious history of Québec are being excluded from the application of the Act, while religious symbols without this history enjoy no such privilege.

248. A further inconsistency emerges with respect to whether « objects » are limited to those items that can be taken off and put back on. Some institutions limit the application of the Act in such a manner, thus excluding beards, long hair and tattoos from the prohibition,[10] while others have signalled that religious tattoos would in fact be covered.[11]

249. When it comes to the practical application of the Act, another problem has arisen in connection with the class of persons to whom it applies. Certain *centres de services scolaires* do not apply the Act to unpaid stagiaires;[12] others rely on the stagiaires’ employment status to determine if the Act should apply;[13] while others appear to apply the prohibitions in the Act to all stagiaires categorically.[14]

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[7] **Exhibit 52-E :** Access to documents request – answers from the *Commission scolaire des Laurentides*.
[8] **Exhibit 52-C :** Access to documents request – answers from the *Commission scolaire de Portneuf*; **Exhibit 52-X :** Access to documents request – answers from the *Commission scolaire des Bois-Francs*.
[9] **Exhibit 52-H :** Access to documents request – answers from the *Commission scolaire du Lac-St-Jean*; **Exhibit 52-L :** Access to documents request – answers from the *Commission scolaire du Pays-des-Bleuets* **; Pièce 52-P** : Access to documents request – answers from the *Commission scolaire de Kamouraska-Rivière-du-Loup*; **Exhibit 52-W :** Access to documents request – answers from the *Commission scolaire des hauts-cantons*; **Exhibit 52-EE :** Access to documents request – answers from the *Commission scolaire de la Seigneurie-des-Mille-Îles*.
[10] **Exhibit 52-O :** Access to documents request – answers from the *Commission scolaire de la Vallée-des-Tisserand*; **Exhibit 52-MM :** Access to documents request – answers from the *Commission scolaire des Hautes-Rivières*; **Exhibit 52-Q :** Access to documents request – answers from the *Commission scolaire de Sorel-Tracy*; **Exhibit 52-L :** Access to documents request – answers from the *Commission scolaire du Pays-des-Bleuets*.
[11] **Exhibit 52-H :** Access to documents request – answers from the *Commission scolaire du Lac-St-Jean*; **Exhibit 52-M :** Access to documents request – answers from the *Commission scolaire des Affluents*; **Exhibit 52-Y :** Access to documents request – answers from the *Commission scolaire du Fleuve-et-des-lacs*.
[12] **Exhibit P-52 G :** Access to documents request – answers from the *Commission scolaire des sommets*.
[13] **Exhibit 52-E :** Access to documents request – answers from the *Commission scolaire des Laurentides***; Exhibit 52-H :** Access to documents request – answers from the *Commission scolaire du Lac-Saint-Jean*.
[14] Affidavit of W.B.G.H, at paras. 1-10; Affidavit of G.M, at paras. 7-9.

250. As one witness put it, it is entirely possible that the same person, with the same function, and the same display of religious symbols, would be treated differently in one *centre de services scolaire* as compared to another.

- Transcript of the examination of M[e] Louis Bellerose, August 25, 2020, at p. 43, lines 15-19: "*Donc, d'une commission scolaire à l'autre, pour les mêmes tâches, les mêmes fonctions, la même présence devant les enseignants (sic), pour une personne la Loi s'applique et l'autre personne la loi s'applique pas*."

251. In brief, the term "religious symbols" opens the door to arbitrary and capricious applications of the Act. Without proper guidance as to how section 6 is to be uniformly applied, the legislator has effectively given public institutions a "plenary discretion to do whatever seems best in a wide set of circumstances".

- *Roncarelli v. Duplessis,* [1959] SCR 121, at p. 140.
- *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 SCR 927, at p. 983.

252. This is precisely the sort of absolute discretion that is contrary to the rule of law, as an unwritten principle found at the very core of our constitutional architecture.

### *3. The subjective component of Section 6*

253. The subjective component of s. 6 adds another element to the analysis, by focusing on the intention of the wearer. One might expect that the additional subjective component would help ground the uncertainty coming from the objective component, providing a check to make sure that coherent and consistent meaning is given to the Act's prohibition.

254. However, any hope that the subjective component of s. 6 would assist in the consistent application of the Act is more illusory than real.

255. First, the subjective component of s. 6 is alternative, not cumulative. There is no requirement in the Act that a person subjectively link their attire to religion in order for the prohibition to take hold. As a consequence, the subjective component does not in any way ground or limit the application of the objective component.

256. The CSSDM, for example, does not even bother trying to apply the subjective component.

- Transcript of the examination of M[e] Louis Bellerose, August 25, 2020, from p. 59, at line 17, to page 60, line 23.

257. Second, the subjective component of s. 6 depends on an investigation into private aspects of a person's life, contrary to s. 5 of the Québec Charter and articles 35 to

41 of the Civil Code. This portends to be both a chaotic and hideous exercise for all involved, with the prospect of arbitrariness being unavoidable.

258. For this reason, certain institutions have indicated that they will not carry out intrusive investigations aimed at determining whether the subjective component of section 6 is met. They have observed that such investigations could violate applicable ethical codes and/or internal policies. Some organizations will not even ask questions when confronted with an object they consider may be worn for a religious purpose.

- Affidavit of Christina Smith, at paras. 4, 10 and 12.
- Affidavit of Julien Feldman, at paras. 10, 12-14 and 16.
- Affidavit of R.M, at paras. 20-22.
- Transcript of the examination of M$^{e}$ Louis Bellerose, August 25, 2020, at p. 59, lines 17-25, p. 60, lines 1-20, and p. 62, lines 7-23.

259. On the other hand, other institutions absolutely engage in such inquiries.

- Affidavit of N.P., at paras. 32-34; Affidavit of G.M, at para. 9.
- **Exhibit EML-1**: *Laïcité: les commissions scolaires s'y plieront*, La Presse, June 17, 2019.
- Affidavit of Nafeesa Salar, at paras. 11 and 21-22 ; Affidavit of F.B., at paras. 12 and 18-21; Affidavit of Mariam Najdi, at paras. 6-7 and 15; Affidavit of M.G., at pars. 8-13 ; Affidavit of R.M., at paras. 11, 21-22 and 25 ; Affdavit of S.B.R., at paras. 12 and 14-16.

260. The case of Andréa Lauzon provides a concrete example of how school boards' inconsistent approach to the subjective element will have real-world effects. Ms. Lauzon has testified as follows:

> *… je choisis de m'habiller de façon conforme à mes valeurs chrétiennes. Ce faisant, par exemple, je porte des vêtements décents et sobres et préfère notamment porter des jupes.*

- Affidavit of Andréa Lauzon, at para. 17.

261. Working for a school board that insists on strict application of the subjective component of s. 6, Ms. Lauzon would be denied employment. On the other hand, working for a school board that relies only on the objective component, Ms. Lauzon

may escape the prohibition—so long as her "modest dress" is not, to the impression of the outside world, tied to religious beliefs.

262. Put simply, the Act creates a world where atheists are permitted to wear more modest attire than religious adherents—and then subjects that absurd standard to unguided scrutiny from a delegated authority that may or may not choose to apply it.

263. Such a process does not merit the stamp of legality and has no resonance with the rule of law. By raising another point of differential application, the subjective component in s. 6 of the Act only exacerbates its arbitrariness.

- Various members of the National Assembly have raised these concerns, going so far as to propose amendments to the Act, only to see these amendments rejected: see **Exhibit P-22** : *Rapport de la Commission plénière sur les amendements proposés à la* Loi sur la laïcité de l'État *ayant été rejetés,* June 16, 2019, at pp. 2, 4.

### iv. Conclusion

264. The vagueness of the Act is not a benign matter of legislative drafting, or a "technicality". For the people subject to the Act, it means a total absence of protection against arbitrariness.

265. This is where the lack of Charter protection becomes most worrisome. Because it is the members of our society who are most vulnerable who will bear the brunt of arbitrariness in the Act.

266. With over a hundred religions in Canada, the number of objects that could conceivably be prohibited by authorities claiming they "refer" to a religious affiliation is staggering. The scope of this prohibition is not meaningfully limited by the Act, and is ripe for discrimination and disparate impact.

267. Every object that has any link to any religion can be targeted. And without Charter oversight (and subject to the argument on constitutional architecture, above), there is no legal standard to stop government authorities from disproportionately applying the Act to certain religions, cultures or races as compared to others.

268. When it comes to sanction, "a disciplinary measure or, if applicable, … any other measure resulting from the enforcement of the rules governing the exercise of their functions" is the only guidance the Act gives. Again, anything and everything can be envisioned, with no meaningful limit susceptible to judicial scrutiny.

269. In practice, a government administrator can define countless objects as being "religious symbols" and then apply draconian sanctions to the wearer.

270. This is not what the rule of law allows in a free and democratic society. Our citizens are entitled to conduct their affairs based on meaningful legal standards, without concern that arbitrary state authority will take away their livelihood.

**e. La Loi est inapplicable à certains fonctionnaires publics**

**i. L'application des articles 5 et 6 de la Loi aux tribunaux et au personnel judiciaire viole le principe constitutionnel de l'indépendance judiciaire**

271. L'indépendance judiciaire est un principe constitutionnel fondamental découlant du préambule et des articles 96 à 100 de la *Loi constitutionnelle de 1867*. Il s'agit d'un « pilier de notre démocratie », et est reconnu comme un « élément vital du caractère constitutionnel des sociétés démocratiques » qui garantit au pouvoir judiciaire une « liberté d'agir sans ingérence de la part de quelque autre entité » (nous soulignons).

- *Ell c. Alberta,* [2003] 1 R.C.S. 857, paragr. 18-19.

272. Le principe de l'indépendance judiciaire garantit l'inamovibilité, la sécurité financière, et l'indépendance administrative des juges.

- *Ell c. Alberta,* [2003] 1 R.C.S. 857, paragr. 28; *Renvoi relatif à la rémunération des juges de la Cour provinciale de I.P.E*, [1997] 3 R.C.S. 3, paragr. 115 et 118.

273. Il est maintenant bien établi que le principe de l'indépendance judiciaire et les garanties qui en découlent ne sont plus l'apanage des cours supérieures, et qu'ils s'appliquent désormais à « tous les tribunaux judiciaires ».

- *Ell c. Alberta,* [2003] 1 R.C.S. 857, paragr. 20.

274. Les articles 5 et 6 de la Loi violent ces garanties constitutionnelles.

275. L'article 5 de la Loi précise qu'il incombe au Conseil de la magistrature d'établir des règles traduisant les exigences de la laïcité de l'État et d'assurer leur mise en œuvre à l'égard des juges de la Cour du Québec, du Tribunal des droits de la personne du Québec (qui est composé de juges de la Cour du Québec), du Tribunal des professions ainsi que des cours municipales. Il appert de l'article 4 de la Loi que les exigences de la laïcité, auxquelles l'article 5 réfère, incluent le respect de l'interdiction de porter un « signe religieux ».

276. Durant les débats de la Commission des institutions, M. Jolin-Barrette a déclaré que l'article 5 avait pour objet de garantir que les juges de la Cour du Québec, ainsi que les juges des autres tribunaux visés par cette disposition, ne portent pas de « signes religieux » – tout en affirmant que le gouvernement s'attendait à ce que le Conseil de la magistrature établisse des règles en conséquence.

> ➢ **Pièce P-55** : Journal des débats de la Commission des institutions, 4 juin 2019, pp. 78, 81.

277. L'article 3 de la Loi stipule également que les « institutions judiciaires » – notamment la Cour d'appel, la Cour supérieure, la Cour du Québec, le Tribunal des droits de la personne, le Tribunal des professions et les cours municipales – doivent respecter l'ensemble des principes de la laïcité de l'État énoncés par à l'article 2 de la Loi. L'article 5 intervient alors pour exempter les juges de la Cour d'appel et de la Cour supérieure de l'obligation de se conformer à ces mêmes principes.

278. Il s'ensuit qu'une femme qui porte un *hijab*, ou un homme qui porte un *kippah*, ne peut pas accepter la nomination d'agir à titre de juge à la Cour du Québec. Qui plus est, pour une personne qui est déjà nommée juge à la Cour du Québec, cela lui sera également interdit de se convertir, ou d'adopter des nouvelles pratiques religieuses, si cela impliquerait le port de « signes religieux ». Pareillement, un ou une juge portant une petite croix au cou et qui serait visé par la clause de droit acquis ne pourrait appliquer pour siéger devant un autre tribunal sans craindre de perdre ce droit.

279. L'article 6 étend explicitement à son tour l'interdiction de porter un « signe religieux » à certains employés agissant au sein du système judiciaire, soit les juges de paix qui travaillent dans les tribunaux à travers la province, greffiers, greffiers spéciaux, greffiers adjoints, shérifs et shérifs adjoints visés par la *Loi sur les tribunaux judiciaires*, L.Q., c. T-16 et la *Loi sur les cours municipales*, L.Q., c. C-72.01.

280. L'imposition des exigences prévues aux articles 5 et 6 de la Loi porte atteinte tant aux dimensions individuelles qu'institutionnelles du principe constitutionnel de l'indépendance judiciaire, garanti par la *Loi constitutionnelle de 1867.*

281. En ce qui a trait à la violation de la composante individuelle de l'indépendance judiciaire, l'article 5 a pour effet d'imposer directement des balises comportementales (c-à-d., de ne pas porter de « signe religieux ») à des juges, qui sont autrement soumis à l'intervention disciplinaire du Conseil de la magistrature. Une telle ingérence constitue une atteinte à la garantie d'inamovibilité protégée par la *Loi constitutionnelle de 1867.*

282. Effectivement, seul le Conseil de la magistrature a le pouvoir d'imposer des sanctions disciplinaires aux juges, en évaluant si leur comportement enfreint les

codes de déontologie judiciaire, et seul le Conseil de la magistrature peut recommander leur révocation à l'Assemblée nationale, le cas échéant. En imposant au Conseil de la magistrature d'adopter des règles conformes aux visées du législateur, ce dernier contourne le principe de l'indépendance judiciaire en s'ingérant directement dans les modalités du pouvoir judiciaire.

283. L'Assemblée nationale ne peut, par le biais d'une Loi, tenter d'imposer des balises comportementales et déontologiques aux juges, si ces balises sont susceptibles de compromettre la garantie d'inamovibilité dont ils jouissent.

- Voir *Valente* c. *La Reine*, [1985] 2 RCS 673, paragr. 31 : « L'essence de l'inamovibilité pour les fins de l'al. 11d), que ce soit jusqu'à l'âge de la retraite, pour une durée fixe, ou pour une charge ad hoc, est que la charge soit à l'abri de toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations. » (nous soulignons).

284. Que le législateur procède via l'imposition d'un devoir au Conseil de la magistrature plutôt que par le biais d'obligations dirigées envers les juges ne change rien : l'effet direct et immédiat sur l'indépendance des juges est exactement le même, et il est inconcevable qu'on permette au législateur de faire indirectement ce qu'il ne peut faire directement. Toute tentative en ce sens constitue une violation du principe de l'indépendance judiciaire.

285. En ce qui a trait à la violation de la composante institutionnelle de l'indépendance judiciaire, les articles 5 et 6 imposent des critères qui affecteront nécessairement « la direction du personnel administratif », soit les conditions d'embauche, de rétention et d'emploi du personnel judiciaire, tels que les greffiers et les greffiers spéciaux, ainsi que des acteurs du système juridique tels que les shérifs, les shérifs adjoints et les agents de la paix dans les palais de justice.

- *Renvoi relatif à la rémunération des juges de la Cour provinciale de I.P.E*, [1997] 3 R.C.S. 3, paragr. 117.

286. Tous ces acteurs exercent des fonctions indispensables à l'administration de la justice. Les décisions administratives prises à leur égard affectent directement « l'exercice des fonctions judiciaires », et donc, doivent être exemptes d'ingérence des autres branches de l'État en vertu de la garantie d'indépendance administrative conférée par la *Loi constitutionnelle de 1867*.

- *Ell c. Alberta,* [2003] 1 R.C.S. 857, paragr. 28; *Renvoi relatif à la rémunération des juges de la Cour provinciale de I.P.E*, [1997] 3 R.C.S. 3, paragr. 117.

287. La tentative du législateur d'interférer unilatéralement avec les conditions d'emploi de ces acteurs entraîne une intrusion dans la direction du personnel judiciaire :

une telle ingérence de la branche législative dans les pouvoirs judiciaires viole la garantie constitutionnelle de l'indépendance judiciaire.

### ii. L'application de l'article 8 aux élus porte atteinte à l'article 3 de la *Charte canadienne des droits et libertés* d'une manière non justifiable dans une société libre et démocratique

288. L'article 3 de la Charte canadienne comprend le droit d'être éligible aux élections législatives fédérales ou provinciales pour siéger à la Chambre des communes ou à une assemblée législative provinciale.

289. Il a pour objectif principal « d'accorder à tous les citoyens le droit de jouer un rôle significatif dans le processus électoral », et doit recevoir une interprétation large, de manière à accroître « la qualité de notre démocratie » et à renforcer « les valeurs sur lesquelles repose notre État libre et démocratique ».

- *Frank c*. *Canada,* 2019 CSC 1, paragr. 26-27.

290. Le recours à la clause dérogatoire prévue à l'article 33 de la Charte canadienne ne peut être appliqué aux droits protégés par l'article 3 de celle-ci.

291. L'article 8 de la Loi porte atteinte à l'article 3 de la Charte dans la mesure où il s'applique aux élus. Étant donné que l'article 8 s'applique à tous les députés de l'Assemblée nationale (paragraphe 1 de l'annexe III de la Loi), il disqualifie effectivement toute personne qui se couvre le visage pour une raison quelconque, y compris une raison religieuse, de la candidature à une élection provinciale. Il est difficile d'envisager une violation plus claire, directe et explicite de l'article 3 de la Charte canadienne.

292. Le Procureur général du Québec a confirmé au tribunal qu'il n'entend pas présenter de preuve ni faire de démonstration quant à une éventuelle justification de cette atteinte au regard de l'article premier de la Charte Canadienne ou de l'article 9.1 de la Charte québécoise.

293. Il s'en suit que dans la mesure où le Tribunal arrive à la conclusion que l'application de l'article 8 aux élus porte atteinte à l'article 3 de la *Charte canadienne des droits et libertés* d'une manière non justifiable dans une société libre et démocratique, la Loi doit être nécessairement déclarée inconstitutionnelle.

**MONTRÉAL**, ce 11 septembre 2020

*(S) IMK LLP*

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Nº 500-17-109731-193
Nº 500-17-109731-193

SUPERIOR COURT
DISTRICT OF MONTRÉAL
PROVINCE OF QUÉBEC

**ICHRAK NOUREL HAK ET AL.**
Plaintiffs

v.

**THE ATTORNEY GENERAL OF QUÉBEC**
Defendant

**WORLD SIKH ORGANIZATION OF CANADA ET AL.**
Interveners

# PLAN OF ARGUMENT OF THE PLAINTIFFS HAK ET AL

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