500-09-028470-193

COURT OF APPEAL OF QUEBEC

(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on July 18, 2019 by the Honourable Michel Yergeau, J.C.S.

No.: 500-17-108353-197

ICHRAK NOUREL HAK
-and-
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM) /
CONSEIL NATIONAL DES MUSULMANS CANADIENS (CNMC)
-and-
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION (CCLA) /
ASSOCIATION CANADIENNE DES LIBERTÉS CIVILES (ACLC)

APPELLANTS –
(Plaintiffs)

v.

THE ATTORNEY GENERAL OF QUEBEC

RESPONDENT –
(Defendant)

APPELLANTS' MEMORANDUM
Volume 1, pages 1 – 22
Dated September 20, 2019

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PART I: OVERVIEW AND FACTS

A. Overview

1. The Appellants seek a stay of Sections 6 and 8 of the *Act respecting the laicity of the State* (the "***Act***"), a law that effectively establishes a state religion of "laicity" and bars employees in many parts of the public sector from wearing anything that might indicate their faith.

2. The Government has invoked the "notwithstanding" clauses of the *Canadian* and *Quebec Charters* to shield these flagrant breaches of religious freedom and the right to equality from judicial scrutiny. Invoking the notwithstanding clauses does not, however, bar assessment of the *Act*'s validity altogether, since – as the first instance judge rightly acknowledged – the Appellants have raised serious non-*Charter* challenges to the *Act*'s constitutionality.

3. The Appellants submit that, contrary to that judge's conclusions, they also satisfy the other criteria for an interim stay: Sections 6 and 8 cause serious and irreparable harm, and the balance of convenience favours a stay.[1] The judge only concluded otherwise as a result of multiple and related legal errors.

4. Moreover, the judgment below was based principally on findings that the Appellants' application was premature and that the *Act* did not yet have any proven effect. Notwithstanding that the Appellants consider these conclusions to be legally wrong, the evidence of how the *Act* has been applied since the judge's decision demonstrates unquestionably that the *Act* does have serious, irreparable, and immediate impacts.

5. When the judge's legal errors are corrected, and when the evidence of recent developments is considered, it becomes manifest that a stay should issue.

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[1] *Manitoba (A.G.) v. Metropolitan Stores Ltd*., [1987] 1 SCR 110 ("***Metropolitan Stores***"), pp. 128-129; *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 ("***RJR-MacDonald***"), pp. 334, 337.

B. Facts

i. Procedural context

6. The *Act* was adopted on June 16, 2019. It contains two prohibitions applicable to those who work in or for a variety of public institutions, including teachers, police officers, and lawyers: (1) one on wearing "religious symbols" at work (Section 6), and (2) one on covering their faces while exercising their functions (Section 8).

7. On June 17, 2019, the Appellants filed an *Application for Judicial Review (Declaration of Invalidity)* (the "**Application**") and an *Application for an Interim Stay* (the "**Stay Application**"). The Application alleges, *inter alia*, that the *Act* is unconstitutional because (1) it is *ultra vires* Quebec, since regulating religion for a moral purpose falls under federal jurisdiction to adopt criminal laws; (2) it is impermissibly vague and therefore violates the rule of law; and (3) the exclusion of persons from public institutions on the basis of personal characteristics violates the constitutional structure. The Stay Application seeks to stay Sections 6 and 8 until a court rules on the *Act*'s validity. It was supported by numerous affidavits.

8. The Stay Application was presented on July 9, 2019 before the Honourable Michel Yergeau, J.S.C. (the "**Judge**"), who refused it on July 18, 2019 (the "**Judgment**").

ii. The Judgment

9. The Judge accepted that the Application for Judicial Review raises serious constitutional issues.[2] He nevertheless denied the Stay Application because the Appellants had not established that the *Act* would cause irreparable harm, since the Judge considered that the harm alleged was hypothetical.[3] The Judge also

[2] Judgment, para. 89 (**AR Vol II**, p. 41).
[3] Judgment, para. 118 (**AR Vol II**, p. 48).

considered that this harm was only caused by breaches of fundamental freedoms which, in his view, could not be invoked because of the notwithstanding clauses.[4]

10. The Judge then held that the balance of convenience weighed against suspending the *Act*.[5] He reached this conclusion principally because he failed to conduct any assessment of the interests of people affected by the *Act*, or the other evidence factors that demonstrates that a stay would be in the public interest. Finally, the Judge found that there was no urgency and that the Stay Application was premature, because Ms. Nourel Hak had not yet herself been denied a job.[6]

PART II: QUESTIONS AT ISSUE

11. As a preliminary matter, the Appellants will address whether the Court should permit them to file new evidence, namely new affidavits and Exhibits P-25 through P-34.

12. On the merits, this appeal raises the following questions:

    a. Did the Judge err by concluding that irreparable harm had not been demonstrated?

    b. Did the Judge err by concluding that the balance of convenience does not weigh in favour of a stay?

    c. Did the Judge err by concluding that the Stay Application was premature?

13. On request of the Chief Justice, the Appellants will also address whether the *Act* violates s. 28 of the *Canadian Charter* and if so, how that affects the stay analysis.

[4] Judgment, paras. 117, 124-125 (**AR Vol II**, pp. 48-49).
[5] Judgment, paras. 127-136 (**AR Vol II**, pp. 49-52).
[6] Judgment, paras. 137-139 (**AR Vol II**, p. 52).

PART III: STATEMENT OF ARGUMENT

A. The Motion to Adduce New Evidence

14. On September 10, 2019, the Appellants made an *Application for Permission to Adduce New Evidence* (the "**Application for New Evidence**"), asking the Court's permission to add certain exhibits to the file, which they amended on September 19, 2019 to request permission to file several additional affidavits.

15. The proposed new evidence falls into two categories. The exhibits consist of a series of extracts of the legislative record for Bill 21.[7] The affidavits detail the factual developments in how the *Act* has been applied since the Judgment was rendered and its impact on individual women in the teaching profession.

i. The legislative materials

16. This Court most recently set out the test for determining whether a party should be allowed to file new evidence on appeal in *Jalbert*: the evidence must be new, in the sense of not being available prior to the initial hearing; it must be indispensable, in the sense of being capable of influencing the outcome of the litigation; the circumstances must be exceptional; and the interest of justice must require the Court of Appeal to accept it.[8]

17. That said, these criteria should not be applied rigidly in the context of constitutional litigation when the new evidence consists of legislative facts.[9] This is in part because the Court may take judicial notice of legislative facts such as Hansard evidence.[10]

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[7] Exhibits R-3 to R-12 of the Application for New Evidence, to be filed as Exhibits P-25 through P-34 (see **AR Vol IV**).
[8] *Commission des droits de la personne et des droits de la jeunesse (Jalbert) c. Ville de Montréal (Service de police de la Ville de Montréal),* 2019 QCCA 1435, paras. 29-30; *Droit de la famille — 191159*, 2019 QCCA 1096, para. 4; *Droit de la famille — 171068*, 2017 QCCA 814, paras. 10-11.
[9] *Imperial Tobacco Canada ltée c. Canada (Procureur général)*, 2004 CanLII 76633 (QC CA), paras. 3-4; *Danson v. Ontario (AG)*, [1990] 2 RSC 1086, p. 1099.
[10] See *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, paras 55-58; *Agence du revenu du Québec c. Jenniss*, 2014 QCCA 2262, paras. 35-36.

18. In the present case, Exhibits P-25 through P-34 provide the Court with context about the issues raised during the debates about Bill 21 – namely, the anticipated impact of Sections 6 and 8 of the *Act* on women. They therefore constitute legislative facts of which the Court may take judicial notice.

19. This Court has previously suggested that the possibility of taking judicial notice of such materials may dispense the parties from having to obtain permission to file them.[11] Even if such permission is needed, however, the Appellants submit that at the very least, the Court should not rigidly apply the first criterion for "new" evidence. Given the constitutional nature of the litigation, the flexibility called for in *Imperial Tobacco* and *Danson* is in order, particularly in light of the fact that this evidence is being filed in response to the Chief Justice's request that the parties address arguments about the applicability of s. 28 of the *Canadian Charter*, and legislative fact evidence is normally filed in *Charter* claims.

20. Moreover, the exhibits in question may influence the outcome of the litigation, insofar as they provide support for the argument that the *Act* violates s. 28. If the Court concludes that s. 28 is violated, this would also constitute irreparable harm and weigh in the balance toward granting a stay.

21. In this context, it is in the interest of justice for the Court to permit the Appellants to file Exhibits P-25 through P-34.

ii. The Affidavits

22. The proposed affidavits, in turn, fulfill all the criteria to be accepted as new evidence, in addition to also being relevant to an analysis of s. 28 of the *Charter*. These affidavits detail events that took place after the Judgment was rendered and were not, therefore, available during the initial hearing.

[11] *K.J. c. N.P.*, 2006 QCCA 1054, para. 26; *Pilote c. Hôpital Bellechasse de Montréal*, 1989 CanLII 1062 (QC CA), para. 7.

23. The affidavits are also indispensable and can clearly have an impact on the outcome of this litigation.[12] The Judge concluded that the *Act* did not cause irreparable harm and that the Stay Application was premature because no one had, as yet, been denied a job as a result of the application of the *Act*.[13]

24. Although the Appellants submit that these conclusions are wrong in law, should this Court accept them, the new affidavits demonstrate unequivocally that there is no longer any question of the *Act*'s impact being hypothetical. This evidence is from and about individuals who have been denied jobs and who are, at this very moment, prevented from working as teachers because of the *Act*'s requirements. This necessarily alters the analysis of irreparable harm and urgency, such that the evidence will clearly have an impact on the outcome of the litigation.

25. The circumstances in this case are moreover exceptional: the situation has evolved significantly from the time the *Act* came into force, with various school boards first taking the position that they would not apply the law, then making an about-face and rapidly adopting different strategies to enforce Sections 6 and 8. In that context, the Court deserves the benefit of the fullest appreciation possible of the effects of the *Act*. A request for a stay of legislation should not be taken lightly; but nor should it be evaluated based on what has, through the passage of time, become an incomplete record. It is accordingly in the interest of justice to admit this evidence.

B. Standard of Review of the Judgment Below

26. The applicable standard of review is the one established in *Housen*: questions of fact or mixed fact and law are reviewed on a standard of palpable and overriding error, while questions of law are reviewed on a standard of correctness.[14]

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[12] *Droit de la famille — 18911*, 2018 QCCA 691, para. 8.
[13] Judgment, paras. 118, 137-139 (**AR Vol II**, pp. 48, 52).
[14] *Housen v. Nikolaisen*, 2002 SCC 33, paras. 8, 10, 36.

27. In the present case, the Judge committed fundamental errors of law that tainted his conclusions on irreparable harm, the balance of convenience, and urgency.

C. Irreparable Harm

i. The Judge applied the wrong legal standard

28. Questions about the applicable legal test are questions of law, reviewed on a correctness standard.[15] The Judge applied the wrong legal test to the evidence, which led him to conclude that the harm alleged was hypothetical.

29. The Judge assumed that all harm that has not yet occurred is hypothetical.[16] If this were correct, it would be impossible for a party to obtain injunctive relief to prevent irreparable harm from occurring, contrary to the preventive function of injunctions that has long been recognized by this Court.[17] Rather, the correct legal standard required the Judge to ask whether the evidence establishes a "high degree of probability that the harm will in fact occur."[18]

30. Applying this standard, courts have granted injunctions and stays of laws to ward off anticipated, probable harm. In *Kelron Montreal Inc.*, for instance, the Superior Court issued an injunction against ex-employees even in the absence of any evidence that confidential information had been transmitted to their new employer, so as to avoid an "evident and immediate" risk that the former employees would transmit such information.[19]

31. In *NTI*, a case relating to the application of the federal law creating a firearms registry to certain Aboriginal groups, the harm alleged was likewise future harm: affected persons might not be able to register their firearms and consequently might not be

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[15] *St-Jean v. Mercier*, 2002 SCC 15, paras. 33-34
[16] Judgment, para. 116 (**AR Vol II**, p. 48).
[17] *9055-6473 Québec Inc. v. Montréal Auto Prix inc.*, 2006 QCCA 627, paras. 44, 46; *Plantons A et P inc. c. Delage*, 2015 QCCA 7, para. 93, citing *Operation Dismantle v. The Queen*, [1985] 1 SCR 441, para. 35.
[18] *Operation Dismantle v. The Queen*, [1985] 1 SCR 441, para. 35.
[19] *Kelron Montreal inc*. *c. Comitini*, 2012 QCCS 4710, para. 37.

able to hunt. This was nevertheless sufficient to constitute irreparable harm for the purpose of a stay, since the anticipated harm was highly probable.[20]

32. Finally, in his judgment staying the *State Neutrality Act*, Barin J. accepted that there was irreparable harm even though no individual had yet been denied a service as a result of the law.[21]

33. Here, the effect of Sections 6 and 8 of the *Act* is to prevent those who wear religious symbols or who cover their faces for religious reasons from working in certain professions. This is not a hypothesis; it appears from a plain reading of the *Act*, and the Judge acknowledged that this was how the *Act* was intended to operate.[22]

34. Despite this, the Judge held that the alleged harm was hypothetical. In doing so, he not only ignored the immediate psychological harm alleged by multiple affiants,[23] he also held that Ms. Hak, and others in a similar situation, must wait to be denied a job, a promotion, or a lateral move in order to benefit from a stay. Had he applied the correct legal standard, however, he should have concluded – as this Court now should – that the evidence demonstrates a "high degree of probability" that Sections 6 and 8 will result in a serious disruption of affected individuals' ability to work.

35. The Supreme Court has recognized that "for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions."[24] Thus, the inability to work has been recognized as serious or irreparable harm sufficient to give rise to an injunction,[25]

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[20] *NTI v. Canada (Attorney General)*, 2003 NUCJ 1 ("***NTI***"), paras. 24-26, 30.
[21] *National Council of Canadian Muslims (NCCM) c. Attorney General of Quebec*, 2017 QCCS 5459, paras. 40-42.
[22] Judgment, paras. 36, 40, 132 (**AR Vol II**, pp. 30, 51).
[23] Kaur Affidavit, para. 26 (**AR Vol II**, p. 240); Naqvi Affidavit, para. 10 (**AR Vol II**, p. 118); E.E. Affidavit, paras. 15-17 (**AR Vol II**, p. 247); Hariri Affidavit, paras. 26-30 (**AR Vol II**, p. 251); Nourel Hak Affidavit, paras 32-35 (**AR Vol II**, p. 136); Melab Affidavit, paras. 12-15 (**AR Vol II**, p. 126).
[24] *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701, para. 94 (emphasis added); see also *Beau-T Stop Distribution inc. c. Mailhot*, 2001 CanLII 25376 (QC CS), para. 27: "*Rappelons d'abord que la liberté d'emploi est considérée comme une valeur fondamentale dans notre société libérale moderne, au même titre d'ailleurs que la liberté de commerce et de mouvement*."
[25] *Beaumier v. XIT Telecom*, 2019 QCCA 490, paras. 19-20.

as have even mere changes to job conditions.[26] This being the case, the highly probable harm alleged in the evidence is clearly both serious and irreparable.

ii. The Judge erred in holding that recourse to section 33 of the *Canadian Charter* impacts the analysis of irreparable harm

36. The Judge also erred in dismissing the evidence of the more generalized harm to individuals affected by the *Act* by characterizing it as harm that flowed only from the violation of fundamental rights, which could not be considered because the notwithstanding clauses had been invoked.[27]

37. First, the harm to affiants' dignity, psychological security, and sense of self-worth and belonging to Quebec society[28] (not to mention loss of employment opportunities) is not only a result of *Charter* violations. Such harm is caused by the alleged violations of other constitutional norms, and it is a direct consequence of the *Act*'s reduction of these affiants' employment opportunities and their ability to participate fully in Quebec society.

38. This harm is both serious and irreparable, in that it cannot be cured or quantified in monetary terms.[29] In *NTI*, for instance, the court recognized that where a law's impact would be to "impair a core or defining social value, and so diminish Inuit culture, the loss to Inuit would be incalculable."[30] The same is true of the harm alleged in the present case.

39. In any event, there is no legal support for the proposition that use of the notwithstanding clauses prevents courts from considering harm caused by a law's violation of fundamental rights, where the law is being challenged on other grounds that are not subject to s. 33 of the *Canadian Charter*. The only effect of s. 33 is to

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[26] *Association des procureurs aux poursuites criminelles et pénales c. Procureure générale du Québec*, 2019 QCCS 1125("***Association des procureurs aux poursuites criminelles et pénales***"), paras. 68-72.
[27] Judgment, paras. 124-125 (**AR Vol II**, p. 49).
[28] See evidence referenced at note 23.
[29] *RJR-MacDonald*, p. 341
[30] *NTI*, paras. 42-43.

preclude a court from issuing an operative declaration of invalidity under s. 52 of the *Constitution Act, 1982* where a law violates ss. 1-7 or 15 of the *Canadian Charter*. This appears clearly from the text of s. 33 itself.[31]

40. Thus, even if this Court accepts the Judge's characterization of the harm to affiants' dignity, self-worth, and acceptance in society as "merely" flowing from a violation of their fundamental freedoms, this does not make such harm irrelevant to a stay analysis.

iii. The new evidence demonstrates irreparable harm

41. Finally, although the Appellants maintain that the Judge erred in concluding that the harm alleged at first instance was hypothetical, the new evidence demonstrates without a doubt that the immediate application of the *Act* has caused and continues to cause irreparable harm.

42. The teachers and teachers in training who signed new affidavits, all of whom are Muslim women, were all denied employment opportunities or internships by Montreal school boards because they wear religious symbols. This is causing them immediate financial hardship, but also enormous uncertainty about their ability to pursue the careers they have spent years training for, as well as stress and the sense of being singled out among their peers. This is immediate, severe, irreparable, and unacceptable prejudice.

iv. A violation of s. 28 of the *Canadian Charter* causes irreparable harm

43. The Chief Justice has asked the parties to address whether the *Act* breaches s. 28 of the *Canadian Charter* and if so, how that impacts the stay analysis.

44. This Court may consider legal arguments that were not raised at first instance, provided that they do not require new evidence (or where the Court allows new

[31] See also Peter W. Hogg, *Constitutional Law of Canada*, Vol 2, 5th ed. Supp. (Toronto: Carswell, 2016) (loose-leaf updated 2017), p. 39-2.

evidence).[32] The record at first instance in conjunction with the additional evidence the Appellants seek to file before this Court (much of which the Court can take judicial notice of) are sufficient to permit the Court to determine on a *prima facie* basis that s. 28 of the *Canadian Charter* is breached.

45. Section 28 provides that, "notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." The language of s. 28 makes it clear that it cannot be overridden by s. 33.[33] This is supported by the legislative history underlying the inclusion of that provision in the *Canadian Charter*.[34]

46. At the very least, Section 6 disproportionately affects female teachers and therefore unequally limits those teachers' ability to practice their religion (as guaranteed by s. 2(a) of the *Canadian Charter*) and their right to equality (as guaranteed by s. 15) vis-à-vis male teachers. Section 8, in turn, will unequally limit Muslim women's rights to religious freedom and equality, vis-à-vis the rights of men of any other faith.[35]

47. Evidence of gender-based discrimination need not always be direct, simply because there is often *no* direct evidence that a person or law intended to discriminate. Courts will therefore sometimes be required to rely on circumstantial evidence[36] and serious, precise, and concordant presumptions[37] to support the conclusion that a law has a discriminatory impact. Courts may moreover rely on judicial notice or

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[32] See e.g. *T.D. c. R.N.*, 2008 QCCA 1968, paras. 30-34, 56, 68-74; *P. Talbot inc. c. Genivar inc.*, 2014 QCCA 1831, paras. 9-12; *Autorité des marchés financiers c. Lacroix,* 2009 QCCA 1559.
[33] Henri Brun and Guy Tremblay, *Droit constitutionnel*, 4th ed, Cowansville, Éditions Yvon Blais, 2002, p. 934; *Boudreau v. Lynch* (1985), 16 DLR (4th) 610 (NS CA), para. 12.
[34] See *Syndicat de la fonction publique du Québec inc. c. Procureur général du Québec*, 2004 CanLII 656 (QC CS), paras. 1408-1432, appeal discontinued (CA 2004-03-11, 500-09-104189-047). See also s. 50.1 of the *Quebec Charter* which is the parallel provision in Quebec.
[35] Section 28 of the *Charter* has been interpreted *both* as guaranteeing absolute gender equality under s. 15 of the *Charter*, *and* gender equality in the exercise of *other Charter* rights and freedoms, such as the freedom of religion: see Hogg, *Constitutional Law of Canada*, p. 55-65.
[36] See e.g. *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, paras. 84, 88; *Peel Law Association v. Pieters*, 2013 ONCA 396, paras. 111-112.
[37] Art. 2849 *C.C.Q.*; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, para. 71, citing M.L. Larombière, *Théorie et pratique des obligations* (ed. 1885), Vol 7, p. 216.

reason and logic to draw conclusions about a law's impact even in the absence of scientific or empirical proof.[38]

48. In the present case, both the evidence and reason and logic point to the same conclusion: Sections 6 and 8 will have a disproportionate impact on women's right to equality and their freedom of religion. Since this evidence is serious, precise, and concordant, it meets the bar to allow this Court to draw the presumption that Sections 6 and 8 violate s. 28 of the *Canadian Charter*.

49. The preamble of the *Act* is itself telling: it refers to the importance the Quebec nation attaches to the "equality of men and women". Since all laws apply equally to men and women by default, the inclusion of this statement in the context of this *Act* indicates that the *Act* is intended, among other things, to apply in a particular way to women in pursuit of the Government's conception of equality. This is in fact the view reflected in the legislative debates, where Mr. Jolin-Barrette explicitly linked the importance of state neutrality with the Government's notion of the equality of men and women, i.e. that it is achieved through the absence of religious symbols.[39] This Court may, then, draw the conclusion that Sections 6 and 8 are aimed primarily at affecting women's behavior and dress.

50. With respect to Section 6, the evidence suggests that its application will, at the very least, disproportionately impact women in the teaching profession. In 2016, women made up the overwhelming majority of the nearly 100,000 teachers in Quebec,[40] composing 88% of primary school and 61% of secondary school teachers.[41]

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[38] *A.B. v. Bragg Communications Inc*., 2012 SCC 46, para. 16. See also *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, paras. 77-78, on courts using logical reasoning and taking judicial notice of facts necessary to underpin a discrimination claim.
[39] Exhibit PGQ-1, p. 3 (**AR Vol III**, p. 599);
[40] Exhibit P-23A (**AR Vol III**, p. 579) (55,000 primary school teachers); Exhibit P-23B (**AR Vol III**, p. 580) (41,000 secondary school teachers).
[41] Exhibit P-23A (**AR Vol III**, p. 579); Exhibit P-23B (**AR Vol III**, p. 580).

51. Assuming for the purpose of argument that male and female teachers are equally likely to wear religious symbols,[42] significantly more female teachers than male teachers will be impacted by Section 6. The evidence in the record in fact plainly demonstrates that the *Act* affects Muslim, Jewish, and Sikh female teachers or would-be teachers who cover their hair for religious reasons.[43] Indeed, the new affidavit evidence further demonstrates that, thus far, the only people to whom Section 6 appears to have been applied are Muslim women teachers who wear the hijab.[44]

52. Moreover, interveners before the Committee on Institutions in the National Assembly pointed out that the teaching profession is predominantly female and raised concerns about Bill 21's likely disproportionate impact on female teachers and on Muslim women more generally.[45] In fact, a study of the effects of a similar law in France, which was tabled before the National Assembly, demonstrates that the impact of "religious symbol" bans falls disproportionately on Muslim women who wear the hijab – even if the law does not explicitly single out Muslims or hijabs.[46]

53. Despite being made aware of these serious concerns, the Government expressly refused to obtain evidence about the relative impact of Section 6 on men and women. During the debates over Bill 21, interveners[47] and MNAs called on the Government to conduct a gender-based impact analysis of the Act. The Government did not even allow debate on the issue to take place.[48]

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[42] A logical assumption given that there is no reason to believe, and no evidence demonstrating, that male teachers are overwhelmingly more likely than female teachers to wear religious symbols.
[43] See e.g. Gehr Affidavit (**AR Vol II**, pp. 128-130); Dadouche Affidavit (**AR Vol II**, pp. 164-167), Kaur Affidavit (**AR Vol II**, pp. 237-240).
[44] See generally, new affidavits at **AR Vol IV.**
[45] See e.g. Exhibit P-21B, pp. 14, 16 (**AR Vol III**, pp. 540, 542); Exhibit P-21C, pp. 8, 12 (**AR Vol III**, pp. 552, 556); see also Exhibit P-17, p. 8 (**AR Vol III**, p. 443); Exhibit P-25, p. 63, 67, 82-83 (**AR Vol IV**, pp. 853, 858, 873-874); Exhibit P-26, pp. 8-9 (**AR Vol IV**, pp. 890-891); Exhibit P-28, p. 12 (**AR Vol IV**, p. 915); Exhibit P-29, p. 2 (**AR Vol IV**, p. 930); Exhibit P-32, p. 3 (**AR Vol IV**, p. 1022).
[46] See Exhibit P-30 (**AR Vol IV**, p. 1020).
[47] Exhibit P-21C, p. 8 (**AR Vol III**, p. 552).
[48] Exhibit P-33, p. 2 (**AR Vol IV**, p. 1031).

54. This refusal is telling. When it is taken together with the intentions underlying the *Act*'s preamble and the fact that the overwhelming number of teachers in Quebec are women, as well as the new evidence that demonstrates that the law has only been applied to Muslim women, the Appellants submit that there is sufficient evidence that allows this Court to conclude that Section 6 disproportionately restricts the right of women to equality and to religious freedom. Accordingly, it violates s. 28 of the *Canadian Charter*.[49]

55. As for Section 8, its infringement of s. 28 is self-evident. The ban on public sector workers exercising their functions with their faces covered applies only to Muslim women who wear the niqab, a religious face covering.[50] This same ban existed in section 10 of the *State Neutrality Act*,[51] which Blanchard J. rightly found could only apply to Muslim women.[52]

56. As a result, it is evident that Section 8 prevents Muslim women from exercising their freedom of religion and benefiting from the right to equality in the same manner that men of any religion can. As the Supreme Court has already acknowledged, breach of a fundamental *Charter* right constitutes irreparable harm.[53] A finding that s. 28 is breached in the present case would therefore constitute another ground on which to issue a stay.

D. Urgency

57. The Judge erred in law by concluding that there was no urgency merely because Ms. Nourel Hak was not immediately impacted by the *Act*, having not yet been

[49] To the extent the Government is permitted to justify a breach of s. 28 under s. 1 – an open question given the language of s. 28 – such justification belongs in the analysis on the merits, not the stay analysis: *Harper v. Canada (Attorney General)*, [2000] 2 SCR 764 ("***Harper***"), para. 4.
[50] Indeed, Section 8 does not prevent covering one's face for health reasons or a handicap, or because of a job requirement – i.e., any reason but a religious one: *An Act respecting the laicity of the State*, s. 9.
[51] *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies*, SQ 2017, c. 19
[52] *National Council of Canadian Muslims (NCCM) v. Attorney General of Québec*, 2018 QCCS 2766, paras. 5, 45-46.
[53] *143471 Canada Inc. v. Québec (Attorney General); Tabah v. Québec (Attorney General)*, [1994] 2 SCR 339, pp. 380, 381-382.

denied a job. He did so even though the Attorney General did not even contest this criterion.

58. Urgency means both that there is a need to act swiftly, and that there is urgency in preserving the *status quo* from imminent alteration.[54] Urgency therefore exists not only when harm has already occurred, but also when it is anticipated.[55] Again, this is consistent with the preventive function of injunctive relief.

59. Accordingly, in *Association des procureurs aux poursuites criminelles et pénales*, the Superior Court concluded that there was urgency because lawyers' working conditions would soon change.[56] Likewise, in *National Council of Canadian Muslims* (2018), the Superior Court found that there was urgency even though no one had yet been denied a service: rather, the criterion of urgency was met since the *State Neutrality Act* would soon come into force.[57]

60. Urgency is moreover not to be assessed based only on the plaintiff's own case, but rather based on an evaluation of all the evidence in the file.[58] Otherwise, a stay application brought exclusively by an organization with public interest standing which is not directly impacted by a law could never succeed.

61. The Judge thus erred in law in failing to recognize that many affiants' jobs or job prospects are affected *right now*. Sections 6 and 8 came into effect on June 16, 2019. Since then, some affiants have been frozen in their current jobs and cannot change functions or be promoted without running afoul of Section 6.[59] Others are precluded from working in positions they spent years training for.[60] Some even live

[54] *Association des procureurs aux poursuites criminelles et pénales*, para. 53.
[55] *Zorah Bio Cosmétiques inc. c. 7774672 Canada inc*., 2017 QCCS 5436, para 18.
[56] *Association des procureurs aux poursuites criminelles et pénales*, para. 54.
[57] *National Council of Canadian Muslims (NCCM) v. Attorney General of Quebec*, 2018 QCCS 2766, para. 25
[58] See *RJR-MacDonald*, p. 344.
[59] Gehr Affidavit, para. 16 (**AR Vol II**, p. 129); Dadouche Affidavit, para. 10 (**AR Vol II**, p. 165).
[60] Kaur Affidavit, paras. 3-4, 20 (**AR Vol II**, pp. 237-239); Hariri Affidavit, paras. 1-4, 6 (**AR Vol II**, pp. 248-249).

in daily fear of being fired because they are not covered by the *Act*'s grandfather clause.[61] To conclude that this is not an urgent situation strains credulity.

62. Moreover, if the Court accepts the Appellants' new affidavits, there can no longer be any question of this not being an urgent situation. To the contrary, the *Act* has clearly already caused significant harm to individuals who have been denied teaching positions because they wear religious symbols. The urgency has now become in preventing *further* harm from occurring as time wears on.

63. Finally, were this Court to conclude that s. 28 of the *Canadian Charter* is violated, there is an evident urgency in halting violations of fundamental freedoms. That being the case, this criterion for an interim stay is clearly met.

E. The Balance of Convenience

64. In concluding that the balance of convenience favours the application of the *Act*, the Judge focused exclusively on the fact that the *Act* was adopted by a democratically elected legislature and is consequently presumed to serve a public good.[62] He failed to consider whether or how the public interest – the key criterion at the balance of convenience analysis for a stay of legislation[63] – is affected by other considerations.

65. This was an error of law. The presumption that a validly enacted law serves the public good "weighs heavily in the balance",[64] but it cannot be determinative. Otherwise, it would be impossible to obtain an interim stay of legislation.

66. In fact, the Government does not have a monopoly on the public interest; there is a general social interest in protecting a multicultural and inclusive Canadian society. Moreover, as the Supreme Court has said, the public interest includes not only the

[61] E.E. Affidavit, paras. 1, 8, 15-16 (**AR Vol II**, pp. 245-247).
[62] Judgment, paras. 128-132 (**AR Vol II**, pp. 49-51).
[63] *Metropolitan Stores*, pp. 129-130, 146.
[64] *Harper*, para. 9.

concerns of the government or society generally, but also the interests of identifiable groups:

> It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.
>
> We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application.[65]

67. The Judge's failure to consider the interests of anyone besides the Government was in part a tributary of his erroneous view that the *Act* does not have any immediate or relevant effects. This view appears to flow from the Judge's opinion that affiants had "voluntarily adhered to" religious practices (and could presumably choose not to adhere to them),[66] such that the *Act* was not itself responsible for any inconvenience they suffered. This is clearly wrong in law: religion, like sex or race, is not a "choice" but is rather "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity."[67]

68. Had the Judge recognized that the *Act* has, and will have, a severe impact on hundreds of individuals, partly because it forces them to "choose" between holding a job and casting aside a characteristic "the government has no legitimate interest in expecting [them] to change,"[68] he should have assessed how their interest in a stay affects the balance of convenience. This Court must now do so.

69. First, the Court must consider the exclusionary message that the *Act* sends about the place of religious individuals in Quebec society, particularly given that many are

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[65] *RJR-MacDonald*, p. 344 (emphasis added).
[66] Judgment, para. 117 (**AR Vol II**, p. 48).
[67] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, para 13.
[68] *Ibid*.

from racialized, ethnic, and immigrant communities. Multiple affiants in this case attested to the fact that the Government's adoption of the *Act* made them feel excluded, unworthy of public participation, and as though they were second-class citizens[69] – which the Judge did not consider at the balance of convenience stage.

70. In this context, the public interest in a democratic society rooted in multiculturalism[70] and respect for minorities[71] weighs in favour of staying legislation that treats certain members of society as undesirable and unworthy of public life.

71. Second, when the *Act*'s impact on employment is considered, the Court should – as courts commonly do – come down in favour of the rights of current and future employees. The Superior Court in *Rompré*, for instance, refused to prohibit an employee from working at a given company because that would cause not only direct monetary damages but also significant long-term harm to the employee's career.[72] Similarly, the application of Sections 6 and 8 will prevent hundreds of individuals from accessing careers for which they trained, or will stall their career progression indefinitely. There is clearly a public interest in preventing this outcome.

72. Furthermore, while the Government has no obligation to prove that the *Act* serves a public good, the Court should nevertheless consider clear signals that the public interest would be better served if the *Act* were stayed,[73] which the Judge failed to do. The severity and scope of the harm that has already been, and will continue to be, caused by the *Act* is one such indicator. But other indicators likewise point to an overriding public interest in a stay.

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[69] Nourel Hak Affidavit, paras. 32-34 (**AR Vol II**, p. 136); Melab Affidavit, paras. 13-15 (**AR Vol II**, p. 126); N.P. Affidavit, para. 28 (**AR Vol II**, p. 122); Gehr Affidavit, paras. 14, 16 (**AR Vol II**, p. 129); Ahmad Affidavit, para. 25 (**AR Vol II**, p. 141); Dadouche Affidavit, para. 8 (**AR Vol II**, p. 165).
[70] See e.g. section 27 of the *Canadian Charter of Rights and Freedoms*.
[71] *Reference Re: Secession of Québec*, [1998] 2 SCR 217, paras. 79-82.
[72] *Groupe biscuits Leclerc inc. c. Rompre*, REJB 1998-05815 (C.S.), paras. 48-49. See also *MBI Acquisition Corp. v. Bournival*, 2008 QCCS 2232, paras, 87, 89-90.
[73] *RJR-MacDonald*, p. 343-344; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29, paras. 45-49.

73. The inclusion of the "grandfather" clause that permits existing employees to continue wearing religious symbols as long as they stay in their current function[74] demonstrates that the Government itself does not consider that the imposition of its vision of state laicity is a pressing matter. That is, it is the Government's own estimation that the public interest will not be harmed if religious symbols do not disappear from public institutions overnight.

74. This is consistent with Barin J.'s finding that "[r]eligious neutrality, while perhaps a lofty goal, is not time sensitive."[75] The debate about what stance Quebec society should take toward religious expression has been ongoing for decades. While it is the Government's prerogative to adopt legislation addressing that debate as it sees fit – provided this legislation is constitutional – the years that have passed between the beginning of this debate and the adoption of the *Act* demonstrates that this is not a case where the public interest will suffer if the implementation of Sections 6 and 8 is postponed until a court pronounces on their validity.

75. To the contrary, the evidence demonstrates that no harm will result from the issuance of a stay. When the Government sought proof of problems with religious accommodation or employees wearing religious symbols in schools, the results of its survey indicated that there has only been one complaint. 93% of respondents said there had not been any tensions resulting from teachers wearing religious symbols.[76]

[74] *An Act respecting the laicity of the State*, s. 31.
[75] *National Council of Canadian Muslims (NCCM) c. Attorney General of Quebec*, 2017 QCCS 5459, para. 58.
[76] Exhibit P-4 (**AR Vol II**, pp. 304-307); Exhibit P-5 (**AR Vol II**, p. 308).

76. When this evidence is contrasted with the serious real harm that has already occurred and will continue to occur, coupled with the proof that the *Act* is confusing and difficult to apply consistently,[77] it is evident that the true damage to the public interest comes from the *Act*'s application and enforcement. In short, all these factors taken together demonstrate that this is a "clear case" where an interim stay against a law should issue.[78]

PART IV: CONCLUSIONS SOUGHT

77. The Judge's adoption of incorrect legal standards led him to make fundamental errors with respect to irreparable harm, the balance of convenience, and urgency. When the evidence in the record is assessed based on the appropriate legal standards, all of the criteria for an interim stay have been met.

78. The Appellants consequently request that this Court:

GRANT the appeal;

STAY the application of Sections 6 and 8 of the *Act respecting the laicity of the State,* SQ 2019, c. 12, pending final determination on the merits of the Application for Judicial Review;

THE WHOLE with legal costs, in both first instance and on appeal.

MONTRÉAL, September 20, 2019

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[77] See Feldman Affidavit (**AR Vol II**, pp. 241-244); Exhibits EML-8 and EML-9 (**AR Vol II**, pp. 193-200); inconsistent application of the *Act* to student teachers, as detailed in the affidavits in **AR Vol IV**.
[78] *Harper*, para. 9.

PART V: LIST OF AUTHORITIES

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