**C A N A D A**

**PROVINCE OF QUÉBEC**
**DISTRICT OF MONTRÉAL**

**S U P E R I O R C O U R T**

**Nº 500-17-108353-197**

**ICHRAK NOUREL HAK**

- and -

**NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)**

- and -

**CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

- and -

**WORLD SIKH ORGANIZATION OF CANADA**

- and -

**AMRIT KAUR**

Plaintiffs

v.

**THE ATTORNEY GENERAL OF QUÉBEC**

Defendant

**RE-AMENDED APPLICATION FOR JUDICIAL REVIEW (DECLARATION OF INVALIDITY) AND APPLICATION FOR AN INTERIM STAY**
(Articles 49 and 529(1) C.C.P.)

**IN SUPPORT OF THIS RE-AMENDED APPLICATION, THE PLAINTIFFS STATE AS FOLLOWS:**

## I. OVERVIEW

1. On June 16, 2019, the National Assembly adopted *An Act respecting the laicity of the State*, SQ 2019, c. 12 (the "**Act**"), a copy of which is produced as **Exhibit P-1**.

2. The Act explicitly sets out to regulate the relationship between the state and religions in Québec. In particular, the goal of the Act is to prohibit individuals who work for a wide variety of positions in the public sector from wearing “religious symbols” while at work. The effect of the Act is to prohibit those individuals from working for public institutions.

3. Without question, the Act violates freedom of religion and discriminates against religious minorities by asking potentially thousands of people to choose between their faith, identity, and self-expression, and their right to participate in provincial public institutions.

4. Were the Government of Québec (the “**Government**”) required to justify these infringements before the courts, it would not be able to do so. There is no evidence that individuals who work for the state while wearing “religious symbols” cause any sort of problem that could justify the adoption of a law that is so blatantly exclusionary and discriminatory.

5. As a result, the Government invoked notwithstanding clauses to ensure that the Act would operate notwithstanding the protections found in the Québec and Canadian Charters. In so doing, it has attempted to shield the Act from judicial scrutiny and avoid the responsibility of justifying its discriminatory actions.

6. These measures cannot, however, shield the Act from judicial review.

7. The Constitution of Canada encompasses, but is broader than, the Canadian Charter and its protections of individual rights and freedoms. It sets out a range of rules that apply to public institutions across the country, and that limit state power in various ways.

8. The Act violates a number of these constitutional rules.

9. First, the Act is in pith and substance criminal legislation and therefore *ultra vires* provincial jurisdiction. The courts have long recognized that only Parliament may adopt laws with the moral purpose of enforcing religious observance; the same must be true of laws that seek to enforce religious non-observance.

10. In attempting to regulate the relationship between religion and the state by prohibiting a significant number of those who work for the state from wearing “religious symbols” at work, the Act contravenes the constitutional division of powers.

11. Second, the Act violates the basic requirements of the rule of law, since the ban on “religious symbols” is impermissibly vague and impossible to apply consistently. The definition of “religious symbols” contained in the Act contains both a subjective and an objective religious test, neither of which is sufficiently precise to provide any real guidance to those who are supposed to comply with the ban or enforce it.

The Act also does not contain any guidelines regarding the specific sanctions that must be imposed if the ban on “religious symbols” is contravened.

12. Given the number of institutions and individuals who will apply the ban, it will also necessarily be applied arbitrarily, contrary to the principle that the law must be equally applied to all. This renders the Act invalid and inoperative.

13. Finally, the Constitution contains an internal architecture that protects the qualities and characteristics inherent to Canada’s public institutions. Among these qualities is the fact that participation in these institutions must be open to everyone, regardless of personal attributes. This quality is guaranteed by, among other things, the unwritten constitutional principles of democracy and the protection of minorities.

14. Any effort to close off public institutions to certain social groups would therefore result in a modification of the Constitutional architecture that could not be accomplished unilaterally by any order of government.

15. Yet this is precisely what the Act does. It excludes visibly religious individuals from participating in a range of important public institutions, and thus keeps Québec’s public institutions from reflecting the communities they are meant to serve. As a result, the Act marginalizes people of faith and others for whom symbols of faith are of fundamental importance and makes it more difficult for members of these communities to be properly represented in the public sphere and by their governing bodies.

16. As a result of these and other constitutional failings, the Act must be declared invalid. Moreover, until this Court can render such declarations on the merits of this case, it should stay the Act’s operative provisions to prevent their application from causing immediate, significant, and irreparable harm in the interim.

## II. THE PLAINTIFFS

### *A) Ichrak Nourel Hak*

17. Ichrak Nourel Hak came to Canada from Morocco in 1994 and has lived in Montréal ever since. She was educated exclusively in the province of Québec and is currently completing a Bachelor’s degree in teaching French as a second language at the University of Montréal. She expects to receive her degree in 2020, upon finishing her mandatory internship this coming winter.

18. Ms. Nourel Hak considers teaching to be a vocation – a means of giving back to her community and contributing to the development of the next generation. She wants to have the opportunity to be a force for positive change in the lives of young students by giving them the best education possible.

19. Prior to the introduction of the Act, Ms. Nourel Hak had intended to seek work teaching French to newly immigrated secondary school students, or teaching French to elementary school students in an anglophone school.

20. However, the adoption of the Act has seriously disrupted these plans, because Ms. Nourel Hak is also a practicing Muslim whose faith forms and integral part of her identity. As an expression of that faith, she wears the Islamic veil known as the hijab.

21. To Ms. Nourel Hak, wearing the hijab is a form of spirituality and identity. It makes her feel comfortable in her own skin and assists her in fighting against stereotypes that are perpetuated about Muslim women. She seeks to participate actively in Québec society in part to send the message that Muslim women who wear the hijab are not oppressed and can in fact thrive in the province.

22. Having made the choice to wear her hijab independently, as a means of acting in accordance with her religious convictions, Ms. Nourel Hak cannot imagine removing it just because a law forces her to choose between her religious practices and her right to teach in the province. However, this means that the Act bars her from pursuing the career of her dreams.

23. Ms. Nourel Hak is shocked, hurt, and insulted that the Government would tear her sought-after career away from her simply because she wears the hijab. She fails to see how acting in accordance with her faith poses a problem to her ability to teach. In her view, wearing clothing that demonstrates and reflects her faith has nothing to do with her ability to be a good teacher and, more generally, to contribute to Québec society.

24. Of course, the Act does not simply impact Ms. Nourel Hak's professional aspirations. It makes her feel deliberately excluded from Québec society, sending her the message that the only way she can truly belong and demonstrate that she shares Québec's values is by taking on the appearance of the majority. The Act thus constitutes a form of psychological pressure, indicating that Ms. Nourel Hak's right to her religion and her way of expressing it make her unacceptable for important roles in the province.

### ***B) National Council of Canadian Muslims***

25. The National Council of Canadian Muslims ("**NCCM**") is a federally incorporated independent, non-partisan, non-profit organization dedicated to protecting the human rights and civil liberties of Canadian Muslims, and by extension, all Canadians. It operates across the country, including through an office in Québec, where it advocates on behalf of Québec's Muslim communities on these issues.

26. The NCCM fights against discrimination and builds community education and outreach, media relations, and public advocacy initiatives with the aim of

representing the public interests of a broad and diverse range of Canadian Muslims.

27. The NCCM has a robust track record spanning 19 years of advising and advocating on behalf of Canadian Muslims and others who have experienced human rights and civil liberties violations. In particular, as detailed in the Affidavit of Mustafa Farooq, the NCCM has provided Muslims across Canada with support before the courts and government institutions.

28. The NCCM has intervened before various levels of court on issues relating to fundamental rights and civil liberties, particularly insofar as they affect the Canadian Muslim community. The NCCM has appeared frequently before the Supreme Court of Canada, most recently in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, a human rights case concerning the interpretation of the Québec Charter.

29. The NCCM is also active before Parliament and provincial legislatures. In Québec, in 2010, 2013, and 2017, the NCCM submitted briefs to the National Assembly pertaining to proposed legislation that would limit individuals from wearing religious clothing or symbols in certain contexts.

30. The NCCM has long been intimately involved in ensuring that state action respects the human rights guarantees enshrined in the Constitution and in provincial human rights legislation. Most recently, it was co-plaintiff in the case *National Council of Canadian Muslims et al. v. Attorney General of Québec et al.*, court file no. 500-17-100935-173, which concerned a challenge to the validity of certain sections of the *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.

31. Given the immediate and significant impact of the present Act not only on Québec Muslims, but also on the much broader community of religious individuals impacted by the restrictions contained in the Act, the NCCM has a direct interest in ensuring that the Government of Québec respects the human rights and fundamental freedoms of members of these communities.

32. As a result of its national reach and extensive experience with human rights matters, the NCCM has the expertise and required resources to move this constitutional claim forward. The NCCM's longstanding involvement with the Québec and Canadian Muslim communities will furthermore enable it to bring a broader, national perspective to this litigation.

### *C) Canadian Civil Liberties Association*

33. The Canadian Civil Liberties Association ("**CCLA**") is an independent, national non-profit, non-partisan, nongovernmental organization. Since its creation in 1964,

CCLA has been Canada's national civil liberties organization, defending and promoting the rights and freedoms of people in Canada. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster their recognition.

34. The CCLA has extensive experience advising government bodies, both in the legislative and policymaking context, on issues relating to religious freedoms and equality rights.

35. In particular, in 2013 the CCLA appeared before a committee of the National Assembly to make submissions on Bill 60, or the *Charter affirming the values of State secularism and religious neutrality and of equality between women and men*. In 2016, the CCLA similarly made submissions to a committee of the National Assembly on Bill 62, the draft form of the *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.

36. The CCLA is also actively involved in litigation concerning the vindication or protection of fundamental rights and freedoms, including the freedom of religion and the right to equality.

37. As set out in greater detail in the accompanying affidavit of Noa Mendelsohn Aviv, the CCLA has intervened before all levels of court in different provinces to present oral and written argument on a range of issues relating to civil liberties, human rights, and democratic freedoms. Its contribution to the development of the law in relation to these issues has been acknowledged explicitly by the courts.

38. The CCLA has frequently intervened before the Supreme Court of Canada to make submissions on the question of how to reconcile religious freedoms with other state imperatives.[1]

39. The CCLA has been involved in litigation about fundamental rights and freedoms as a party on multiple occasions. It was granted party standing to litigate questions relating to freedom of religion in *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 OR (2d) 341 (CA). In *Corporation of the Canadian Civil Liberties Association v. Attorney General (Canada)*, 2019 ONCA, the CCLA acting as plaintiff recently succeeded in obtaining a declaration that certain provisions in the *Corrections and Conditional Release Act*, SC 1992, c. 20 relating to "administrative segregation" in Canadian correctional institutions are unconstitutional.

[1] See, for instance, the CCLA's interventions in *Loyola High School v. Québec (Attorney General),* 2015 SCC 12, *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16, and *R. v. N.S.,* 2012 SCC 72, all cases involving an assessment of the limits of religious freedoms.

40. The CCLA was also co-plaintiff with the NCCM in *National Council of Canadian Muslims et al. v. Attorney General of Québec et al*. (Court File No. 500-17-100935-173).

41. The CCLA's mandate as a public interest organization devoted to the protection of civil liberties, its legal resources and institutional capacity, and its past experience acting as a plaintiff in Charter claims all make it well-placed to advance the present litigation in the interest of safeguarding fundamental rights and freedoms more broadly across Canada.

## III. THE FACTS

### *A) Background*

42. On October 3, 2018, the Member of the National Assembly for Borduas, Simon Jolin-Barrette, indicated that the newly elected Government would introduce legislation to prohibit certain public employees from wearing "religious symbols". He stated at that time that the Government would defend its legislation before the courts prior to invoking the notwithstanding clauses contained in the Canadian and Québec Charters, as appears from an article published in Le Soleil on October 3, 2018, **Exhibit P-2**.

43. In November of 2018, the Ministry of Education sent a questionnaire to school principals across the province that sought information about which employees at which schools, if any, wore "religious symbols"; as well as what types of requests for religious, "ethnocultural", or linguistic accommodation had been made, the whole as appears from an article published in the Montréal Gazette, **Exhibit P-3**.

44. The existence of this survey was the cause of controversy in many schools and school boards, and some refused to respond to it at all.

45. However, the survey results do indicate that, at the schools that did respond, there are hundreds of employees who wear "religious symbols" – including hundreds of teachers and administrators, as appears from a copy of the results of the survey, **Exhibit P-4**.

46. At the same time, the vast majority of responding schools – 93 per cent – also said that there were no tensions caused by people wearing "religious symbols" at these schools. Indeed, the results indicate that there has only been *one* complaint at all responding school boards about what a religious individual wore, as appears from a breakdown of these results dated May 9, 2019, **Exhibit P-5**.

47. On March 25, 2019, the Fédération autonome de l'enseignement took legal action to prevent the Government from conducting any further surveys of this kind, alleging that the mere fact of doing so was discriminatory and violated teachers' rights under the Québec Charter, as appears from a copy of the proceedings in court file no. 500-17-107204-193, **Exhibit P-6**.

48. On March 28, 2019, the Government introduced Bill 21, *An Act respecting the laicity of the State* ("**Bill 21**" or the "**Bill**"), **Exhibit P-7**.

49. Bill 21 announced the principle of the "laicity" of the State, which the Bill defined as encompassing the separation of State and religions, the religious neutrality of the state, the equality of all citizens, and freedom of conscience and religion.

50. Bill 21 proposed the requirement that people who work for provincial public bodies exercise their functions with their faces uncovered (unless a covering was necessary because of working conditions or occupational or task-related requirements). The Bill also prohibited persons holding certain positions in public institutions from wearing "religious symbols" while on the job.

51. The Bill contained a "grandfather clause" providing that the prohibition on wearing religious symbols would not apply to certain individuals, including teachers, who already occupied their functions as of the date of the Bill's introduction – as long as they did not change "functions". No definition of "function" was provided, leaving it entirely unclear what would happen if, for instance, a teacher switched school districts or began teaching a different course.

52. However, contrary to Mr. Jolin-Barrette's prior statements, the Government also attempted to preclude judicial scrutiny of the Bill altogether through immediate recourse to section 33 of the Canadian Charter and section 52 of the Québec Charter.

53. Québec's Premier, François Legault, stated that the purpose of invoking these notwithstanding clauses up front was to avoid long debate before the courts, as appears from an article published in La Presse on March 31, 2019, produced as **Exhibit P-8**.

54. The introduction of Bill 21 was met with immediate and widespread consternation. Religious individuals, academics, lawyers, and even philosophers Gérard Bouchard and Charles Taylor – the authors of the Bouchard-Taylor Report that the Government claimed it was responding to – condemned the Bill, stating in public and before the Committee on Institutions that the Bill targeted religious minorities by abrogating their freedom of religious expression and discriminating against them on the basis of their faith, the whole as appears from news articles produced *en liasse* as **Exhibit P-9** and the written submissions made by Mr. Bouchard and Mr. Taylor before the Committee, produced *en liasse* as **Exhibit P-10**.

55. There was moreover a widespread concern that the adoption of Bill 21 would seriously curtail employment opportunities for religious minorities in Québec. In response to this concern, Mr. Legault simply stated: "*Il y a d'autres emplois de disponibles*", as appears from an article published in the Journal de Montréal on April 3, 2019, **Exhibit P-11**.

56. In addition to provoking condemnation for its blatant violation of fundamental rights, the introduction of Bill 21 also caused great confusion about how the ban on "religious symbols" would be applied.

57. The Bill initially did not contain a definition of what a "religious symbol" is. Nor did the Bill contain any provisions that could instruct the many institutions that would be required to apply the ban about its application.

58. The Bill also did not contain explicit sanctions for a failure to comply with the ban on "religious symbols" or the obligation to uncover one's face when providing public services. However, this does not mean that there were *no* sanctions for noncompliance.

59. Rather, the Bill delegated responsibility for taking the necessary measures to ensure compliance with Sections 6 and 8 – presumably through the imposition of sanctions such as termination of employment – to the highest administrative authority responsible for religious accommodation in each public body.

60. The Government itself provided divergent answers when posed basic questions about how Bill 21 would work in practice.

61. From the outset, neither Mr. Legault nor the Bill's sponsor, now-Minister of Immigration, Diversity and Inclusiveness Mr. Jolin-Barrette, could explain what constituted a "religious symbol" or who would be responsible for deciding whether an article of clothing was being worn for a religious reason.

62. For instance, during a press conference held on March 28, 2019 following the introduction of the Bill, Mr. Jolin-Barrette objected to the idea that wedding bands would be subject to the ban on "religious symbols", even though a ring exchanged during a religious wedding ceremony could have religious significance to the wearer, as appears from an official transcript of that press conference provided by the National Assembly, **Exhibit P-12**.

63. Likewise, Mr. Jolin-Barrette indicated that a body part, such as hair, would not be subject to the ban, even though some people, such as Sikhs or Muslim men, do in fact grow long hair for religious reasons.

64. In fact, rather than providing any clarity as to what constituted a "religious symbol", Mr. Jolin-Barrette indicated simply that "*c'est le sens commun des choses*".

65. Additionally, according to a spokesperson for Mr. Jolin-Barrette, the spiritual symbols of First Nations are not "religious symbols" in the "*sens commun des choses*", despite the fact that Mr. Jolin-Barrette refused to explain the difference between "religion" and "spirituality", as appears from an article published by Radio-Canada on April 17, 2019, **Exhibit P-13**.

66. Furthermore, neither Mr. Legault nor Mr. Jolin-Barrette could explain what Bill 21 meant for items worn underneath clothing for a religious reason. At the press conference held on March 28, Mr. Jolin-Barrette indicated that "*Le projet de loi prévoit que le port de signe religieux, il est interdit, il est proscrit. Donc, tout port de signe religieux est interdit. … Il n'y a pas de question de grosseur, de caractère visible ou non. Le port de signes religieux est interdit*."

67. During that same press conference, while Mr. Jolin-Barrette claimed that "*c'est sûr que, le matin, il n'y aura pas de fouille à nu pour vérifier si la personne porte un signe religieux*," he simultaneously could not clarify how invisible "religious symbols" would be detected; how the Government would respond to reports that someone was wearing a hidden symbol; or how a ban on invisible "religious symbols" would be enforced, as appears from Exhibit P-12.

68. With respect to the application of the "grandfather clause", the Bill stated that it would cease to apply as of March 27, 2019. This means that individuals hired after that date would not benefit from an acquired right to wear a "religious symbol" once the Bill was adopted into law.

69. Accordingly, someone who was hired after the Bill was introduced who wore a "religious symbol" (for instance, a teacher wearing a hijab who was hired on March 28, 2019) – a person whom it would have been *illegal* to refuse to hire on the basis that they wear a "religious symbol" – can presumably be fired if they refuse to remove the "offending" item even if their employment contract or collective agreement without preclude such an action since Section 16 of the Bill provides for the nullity of provisions in employment contracts and collective agreements that are incompatible with the Act.

70. Finally, the Government failed to clarify how Bill 21 would be enforced. When asked about what would be done to enforce compliance with the ban, different Government ministers had different responses. The Minister of Public Security, Geneviève Guilbault, actually stated that the police would be called to enforce the law, as appears from an article published in LaPresse on April 2, 2019, **Exhibit P-14**.

71. On the other hand, the Minister of Justice, Sonia LeBel, said that injunctions might be sought, as also appears from Exhibit P-14.

72. Mr. Legault himself contradicted both his ministers and simply stated that public bodies that did not ensure compliance with the prohibition on "religious symbols" would face "*des conséquences, qui peuvent être de plusieurs ordres*," without however specifying what these consequences might be, as appears from an article published in Le Devoir on April 2, 2019, **Exhibit P-15**.

73. These contradictory statements did nothing to reassure the public or the individuals who would be affected if and when Bill 21 was enacted into law.

### *B) Adoption of the Act*

74. The Bill was adopted in principle on June 4, 2019, and the Committee on Institutions began studying the Bill that same day in order to perform the usual clause-by-clause analysis. On June 11, 2019, the Government made an abrupt about-face and proposed an amendment to the Bill that would define the term "religious symbols".

75. In its rush to adopt the Bill before the National Assembly's summer break, the Government ultimately invoked closure to shut down debate, even though the Committee on Institutions was still in the middle of its clause-by-clause analysis. As a result, debate on multiple major aspects of the Bill – such as the modification of the Québec Charter and the use of the two "notwithstanding" clauses – did not occur in committee and was seriously curtailed in the National Assembly.

76. The Government did, however, introduce and adopt a number of last-minute amendments to the bill, which were not subject to any real debate since closure had been invoked. A copy of all adopted amendments is produced as **Exhibit P-24**.

77. The *Act respecting the laicity of the State* was adopted and received assent on June 16, 2019.

78. Sections 2 through 4 of Act purport to set out general principles relating to state laicity. In particular, Section 4 provides that everyone has the right to "lay" Parliamentary, governmental, and judicial institutions as well as "lay" public services.

79. Section 5 states that it is incumbent on the Conseil de la magistrature to establish rules translating the requirements of State laicity (which includes the obligation to abstain from wearing "religious symbols") and ensuring their application with respect to judges of the Court of Québec, the Human Rights Tribunal, the Professions Tribunal, and municipal courts.

80. Section 6 prohibits the persons listed in Schedule II of the Act from wearing "religious symbols" in the exercise of their functions. Schedule II provides a long list of individuals affected by Section 6, including but not limited to:

- The President and Vice-President of the National Assembly and the Minister of Justice;
- Members of various administrative tribunals and adjudicative bodies, including the Administrative Tribunal of Québec;
- Commissioners and arbitrators appointed by the Government or one of its ministers;
- Court staff, including clerks, special clerks, deputy clerks, sheriffs and deputy sheriffs acting under the Courts of Justice Act or the Act respecting municipal courts;

- Public-sector lawyers and notaries;
- Private-sector lawyers or notaries acting under a legal services contract entered into with a number of Government or public institutions;
- Peace officers who exercise their functions mainly in Québec; and
- Principals, vice-principals and teachers in public educational institutions.

81. Section 6 defines a “religious symbol” as any object that is either worn as a result of a religious conviction, or can be reasonably considered as referring to the wearer belonging to a religious group.

82. Mr. Legault has himself admitted that this definition is “perfectible”; he was unable to explain whether an object such as a wedding band would fall within this definition, instead demurring that “*On ne commencera pas à rentrer dans les détails*”, as appears from an article published in the Journal de Montréal on June 12, 2019, produced as **Exhibit P-16**. Mr. Jolin-Barrette, for his part, stated that a wedding band would not be captured by this definition.

83. Section 8 of the Act requires personnel members of a public body listed in Schedule I to provide services with their faces uncovered. Schedule I is extremely broad and includes (although is not limited to) the following public bodies:

- Government departments;
- Municipalities, metropolitan communities, intermunicipal boards and municipal housing bureaus;
- Public transit authorities;
- Most health services institutions, which would cover health services employees such as doctors, nurses and midwives;
- Childcare centres and subsidized day cares;
- Public schools and school board commissioners;
- Private and international schools which receive public funding;
- Universities; and
- Elected officials.

84. Section 12 grants ministers the authority to “verify” the application of certain other measures of the Act, notably the requirement of providing services with one’s face uncovered set out in Section 8. A minister can likewise delegate this authority to some other person who will then be responsible for ensuring compliance with Section 8, including by forcing an organization to take corrective measures, or by engaging in “surveillance and accompaniment”.

85. Section 13 delegates the responsibility for ensuring compliance with sections 6 and 8 to persons exercising the highest administrative authority in each organization. It provides that persons subject to Section 6 may face disciplinary measures for non-compliance, or may be subject to other sanctions stemming from the application of rules relating to the exercise of that person’s functions.

86. Section 14 provides that no accommodation, or other derogation, or adaptation may be granted in connection to the prohibition on “religious symbols” and the obligation to provide services with one’s face uncovered.

87. Section 15 of the Act integrates the prohibition on wearing “religious symbols” into legal services contracts between the Government and private organizations.

88. Section 16 overrides contracts of employment and collective agreements that are incompatible with the Act’s other provisions.

89. Section 31 is the “grandfather clause” which provides that Section 6 does not apply to persons referred to in paragraphs 2 through 10 of Schedule II, as long as they exercise the same function within the same organization or until the end of their mandate (with no continuation of the grandfathering if a mandate is renewed). However, this protection only applies to those who were occupying that function as of March 27, 2019 – not to an individual who wears a “religious symbol” who was hired on March 28 or later.

90. Individuals hired after March 27, 2019 but before the adoption of the Act are therefore still subject to the prohibition on wearing “religious symbols”.

91. Finally, the Act contains two “notwithstanding” clauses: section 33, which states that the Act applies notwithstanding sections 1 through 38 of the Québec Charter; and section 34, which states that the Act applies notwithstanding sections 2 and 7 through 15 of the Canadian Charter.

92. The Act does not address the fundamental concerns that were raised with respect to the Bill as it was first tabled. In particular:

    a. The Act’s definition of a “religious symbol” will either capture things that are not being worn for religious reasons or will require administrators of the Act to engage in deeply intrusive inquiry into employees’ personal practices;

    b. The Act’s ban on “religious symbols” applies to objects or articles worn under clothing, without any explanation for how that prohibition is to be operationalized, including whether and how individual privacy is to be maintained;

    c. The Act still delegates the authority to impose sanctions to each individual organization without sufficient precision as to the nature of the sanctions that may be imposed;

    d. The Act still does not clarify when its “grandfather clause” will or will not apply; and

    e. Through recourse to notwithstanding clauses, the Act still seeks to preclude meaningful scrutiny of its validity under the Québec Charter and most of the Canadian Charter.

### *C) The Impact of the Act*

93. It is obvious that the Act will have a serious and immediate negative impact on thousands of individuals working or hoping to work in various areas in the public sector, as well as on religious individuals and those who are perceived to be religious in Québec more generally.

94. As appears from the affidavits filed in support of this proceeding, people who wear "religious symbols" and who are currently employed in positions affected by the Act now find themselves stuck in these positions without the possibility of advancement or even lateral movement, unless they "choose" to stop wearing their religious symbols. Individuals such as affiants Carolyn Gehr and Gregory Bordan make it very clear that for them, this is no choice at all.

95. Individuals such as the Plaintiff, Ms. Nourel Hak, who wear items or articles of clothing for a religious or spiritual purpose, and who are, or soon will be, looking for work in one of these positions also face the impossible "choice" of acting in accordance with their faith – which many affiants describe as forming an integral part of their personal identity – or working in the field they trained for. The same is true for people who wear such clothing or items and who were hired into an affected position after March 27, 2019.

96. Beyond the immediate impact on religious individuals' ability to work in a wide range of public sector jobs, as many affiants point out, the Government has sent an explicit signal to religious persons that their right to their faith and their ability to practice it simply do not matter and are not worthy of equal dignity or equal protection from the State. To the contrary, the Act indicates to the public that there is something fundamentally wrong or harmful about religious practice – and certain kinds of practice in particular – from which the public needs to be protected.

97. The message of the Act is thus explicitly exclusionary: thousands of people are being told to forget about participating in the public institutions of the State, based purely on who they are.

98. This is inconsistent with the Constitution of Canada.

## IV. THE *ACT RESPECTING THE LAICITY OF THE STATE* IS INVALID

99. The Act attempts to remove or at least severely curtail religious individuals' ability to participate in important sectors of the public sphere. In so doing, the Act modifies the underlying inclusive and egalitarian nature of public institutions as is guaranteed by the very existence of a multicultural, democratic Canadian federation.

100. Sections 6 and 8 of the Act violate the division of powers established by sections 91 and 92 of the *Constitution Act, 1867* (Part A, below). They are also both void

for vagueness and contravene the most basic requirements of the rule of law (Part B, below).

101. Furthermore, the National Assembly of Québec lacks the unilateral authority to adopt these kinds of fundamental changes to public institutions which form part of the architecture of the Constitution of Canada (Part C, below).

102. The application of Sections 5 and 6 of the Act to judicial bodies and court officers violates the constitutional guarantee of judicial independence (Part D(i), below), while the application of Section 8 to elected officials unjustifiably violates section 3 of the Canadian Charter (Part D(ii), below).

103. As a result of these multiple constitutional failings, either the Act as a whole or its impugned provisions must be declared invalid, inoperative, and of no force or effect.

### *A) Sections 6 and 8 are* ultra vires *section 92 of the* Constitution Act, 1867

104. In pith and substance, Sections 6 and 8 of the Act constitute criminal legislation pursuant to section 91(27) of the *Constitution Act, 1867* and are therefore *ultra vires* the jurisdiction of the province of Québec.

105. The purpose of the Act is to affirm the laicity of the State, and as a result of Quebec's "distinct social values", to "determine the principles according to which and manner in which in which relations between the State and religions are to be governed in Quebec", as is evident from the preamble of the Act.

106. Indeed, on March 28, 2019, Mr. Jolin-Barrette stated explicitly that "*ça appartient aux élus de la nation québécoise de décider comment les rapports s'exercent au Québec entre l'État et les religions*," as appears from Exhibit P-12.

107. He reiterated this position on multiple occasions during the parliamentary hearings on Bill 21, as appears from extracts of transcripts of those hearings, **Exhibit P-17**.

108. During final debate on the passage of the law on June 16, 2019, Premier Legault stated, while explaining why they had invoked the notwithstanding clause, « *On a le droit de l'utiliser, car il y a des droits collectifs. Les Québécois ont le droit de dire au reste du Canada : voici comment, nous, on vit au Québec* », the whole as appears from an article published by LaPresse on April 16, 2019, **Exhibit P-18**.

109. Moreover, the Act fulfils the formal requirements of a criminal law. Sections 6 and 8 both contain prohibitions, the former on wearing "religious symbols", the latter on providing public services with a covered face. The Act also provides for sanctions for noncompliance: Section 13 delegates the power to "take necessary measures to ensure compliance" with these prohibitions to highest administrative authority in a body affected by Sections 6 and 8, and provides that "disciplinary measures" or other sanctions may be imposed for non-compliance. Section 12, meanwhile,

actually provides that individual ministers may police compliance with the ban on face coverings, even to the extent of engaging in surveillance of the different bodies subject to that ban and imposing "corrective measures" on these bodies.

110. The purpose underlying the Act as well as the prohibitions and sanctions it creates together clearly indicate that the pith and substance of the Act is the imposition of a moral vision of Québec society, one that entails the eradication of religious practice from public bodies.

111. The Supreme Court has held, in jurisprudence such as *Samur v. City of Québec*, [1953] 2 SCR 229; *Henry Birks & Sons v. City of Montréal*, [1955] SCR 799; and more recently in *R. v. Big M Drug Mart*, [1985] 1 SCR 295, that regulation of religious observance for a moral purpose is the exclusive jurisdiction of Parliament pursuant to its criminal law jurisdiction under section 91(27) of the *Constitution Act, 1867*. In pith and substance, the present Act thus impermissibly tranches on federal jurisdiction and is ultra vires the province.

### *B) Sections 6 and 8 contravene the basic requirements of the rule of law*

112. It is a fundamental tenet of the rule of law, which is both a written and unwritten principle of the Constitution of Canada, that laws must be intelligible. This is the only way to ensure that an exercise of public power finds its source in a legal rule, that the relationship between the state and individuals is governed by law, and that the law is in fact supreme over both government and private persons in equal measure.

113. The Act fails this basic requirement in several respects, but chiefly in that it invites arbitrary application.

114. The definition of a "religious symbol" in Section 6 is vague, inherently self-contradictory, and likely to be arbitrarily administered.

115. Despite Mr. Jolin-Barette's statement that a "religious symbol" must be understood in "*le sens commun des choses*," individuals can wear the same items or articles of clothing for different reasons – some secular, some religious.

116. For instance, someone might wear a scarf on their head for a religious purpose, or for a medical reason, or just because they like how it looks; a wedding band may have religious symbolism to a Catholic person, and no religious meaning to someone else; the Star of David may have a religious meaning to some but constitute a marker of identity to others.

117. To a Jewish man, a hat or even a baseball cap may be a religious symbol since covering his head is a tenet of his faith. As a sign of faith, some Sikh women wear both a turban – arguably an "easily recognizable" religious symbol, but not necessarily so – and bracelets which, to non-practicing Sikhs, can appear to be

purely decorative. To a Muslim, Jewish, Mormon, or Christian woman, simply dressing modestly can constitute religious expression.

118. These are but a few examples of the extent to which what is a “religious symbol” differs among people and among faiths and is ultimately often in the eye of the beholder.

119. According to the definition of a “religious symbol” established by Section 6, however, any one of these items or ways of dressing might be captured by the prohibition *either* because it is actually being worn for a religious purpose, *or* because something is “reasonably considered” as referring to the wearer’s belonging to a religious group.

120. This is inherently problematic, as Members of the National Assembly from Québec Solidaire have attempted to demonstrate by creating a “quiz” containing a variety of items that may or may not have religious significance and asking whether each of these items would be captured by Section 6. A copy of that “quiz” is produced as **Exhibit P-19**.

121. As is evident from this document, some items or signs may be more immediately perceived by members of the public than others as connoting a religious belief (even if they are being worn for an entirely secular purpose).

122. Moreover, according to Statistics Canada data, over 108 “religions” existed in Canada in 2011, each of which likely has its own symbols and signs, the whole as appears from **Exhibit P-20**. The “objective” portion of the definition of a “religious symbol” is therefore in fact necessarily subjective, as it will depend on the “reasonable person’s” knowledge of different religious practices well as their personal perception of why a given item is being worn.

123. Accordingly, it will be difficult if not impossible for organizations to prohibit all “religious symbols”, as both the Fédération des commissions scolaires du Québec and the Centrale des syndicats du Québec noted in their submissions to the Committee on Institutions, the whole as appears from **Exhibit P-21**, *en liasse*.

124. Despite this difficulty in arriving at a common understanding of what a “religious symbol” is, it will be left to employees within each separate organization to decide what constitutes a “religious symbol” and why. This in turn will inevitably lead to unpredictability, a chaotic range of possible and potentially shifting interpretations even within a single workplace depending on its leadership, and an asymmetrical application of Section 6 to public employees depending on the nature of the item worn and the job in question.

125. Yet when amendments to Bill 21 were proposed to oblige the Minister to establish guidelines for the application of the law and also more specifically for Section 6, those amendments were rejected, as appears from a copy of all rejected proposed amendments to the Bill, **Exhibit P-22**.

126. As for the subjective element of the definition in Section 6 – determining that something is worn because of a religious belief or conviction – it will be impossible for organizations to determine without invading an employee's privacy (which is protected by the *Civil Code of Quebec*), since it will necessarily require asking intrusive questions about why that employee is wearing a particular object or article of clothing – or even whether the employee is wearing something under their clothing.

127. Some organizations might be willing to invade employees' privacy in this manner; others may refuse to engage in such intrusive questioning. This will also lead to an uneven and arbitrary application of the law.

128. Moreover, the Act delegates the responsibility to ensure compliance with the prohibitions in both Sections 6 and 8 to each individual public body, and fails to provide for any common standards of compliance or common consequences for noncompliance – except for the possibility of "disciplinary measures" which are not defined, and the authority for which is unclear. Consequently, it is all but certain that these prohibitions will be enforced arbitrarily across the dozens if not hundreds of institutions to which the Act applies.

129. Sections 6 and 8 will therefore have different meaning and different application depending both on what a given individual wears and on the leadership of the organization that employs the individual at a given time.

130. As a result, Sections 6 and 8 of the Act are vague to the point of unintelligibility. There is not enough precision in these provisions to allow even courts to engage in an interpretive exercise about what constitutes a "religious symbol" and how the ban on such symbols is to be enforced.

131. At the very least, the rule of law requires people to know in advance whether a given practice is permitted or prohibited, and what sorts of consequences they may face for engaging in that practice. A law that is so vague that it fails to provide this very basic precision contravenes the most elementary requirements of the rule of law and is consequently unconstitutional.

### *C) The Act alters the structure of the Constitution of Canada by purporting to modify the legally inclusive nature of Québec's public institutions*

132. The effects of the Act are not limited to violations of the individual rights protected by the Canadian and Québec Charters, although there is no question that this is one consequence of Sections 6 and 8.

133. The Act's ultimate impact is institutional: the imposition of a vision of secularism that precludes religious individuals from participating in the work of the state alters the legally inclusive nature of public institutions in Québec. This results in a modification of the architecture of Canada's Constitution, which cannot be accomplished unilaterally by a province.

134. In the *Secession Reference*, the Supreme Court recognized the role of certain organizing constitutional principles – including democracy, constitutionalism and the rule of law, and respect for minority rights – that "dictate major elements of the architecture of the Constitution itself"[2] and provide a foundation for understanding the fundamental qualities inherent in the institutions of public life in the Canadian democratic state.

135. In short, these underlying constitutional principles establish that certain characteristics of public institutions form part of the architecture of the Constitution as a whole. Unilateral alteration of these characteristics by a single province or by Parliament is therefore impermissible.

136. The principles of democracy and respect for minority rights thus have implications for the constitutional structure that stretch beyond the Charter of Rights and Freedoms. One of these necessary implications is that interference with certain rights may ultimately result in an interference with the basic constitutional architecture. For instance, even in the complete absence of the Charter, a province could not simply abrogate all religious individuals' right to vote without fundamentally altering the underlying quality of democracy within that province and thus within the Canadian federation.

137. In the same vein, a Canadian constitutional democracy that gives life to the principle of respect for minority rights is necessarily one in which citizens and residents of all provinces, regardless of their inherent personal characteristics, are equally represented by, and may equally participate in, the work of the State – work that is carried out by a variety of public institutions, not just legislative bodies.

138. Indeed, the development of public life in Canada ultimately reflects increasing diversity in and access to state institutions, as illustrated by historical markers stretching back to the "*Persons Case*"[3] and the Privy Council's adoption of a "living tree" approach to constitutional interpretation, through to the explicit recognition of multiculturalism and the equality of men and women in sections 27 and 28 of the *Constitution Act, 1982*.

139. The *Act respecting the laicity of the State* overtly seeks to preclude religious individuals from acting as agents of the State and thus participating in the public sphere. That will ultimately be its effect: the Act will deliberately shut minority communities out of participating in the public bodies that are in fact intended to represent, serve, and reflect these communities.

140. In so doing, the Act purports to modify the fundamentally inclusive nature of Canadian public institutions. It seeks to transform Québec's public bodies from

[2] See *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 51.
[3] *Edwards v. Canada (AG)*, 1929 UKPC 86.

being open to all citizens, to excluding certain individuals based purely on their inherent personal characteristics.

141. This type of alteration would not have been constitutional in Canada prior to the enactment of the Canadian Charter, and it remains impermissible to this day.

142. Much like a ban on religious minorities voting, the transformation of public agencies into bodies that are only open to participation from a (majoritarian) subset of society seeks to modify the inherently inclusive nature of these institutions and thus the underlying structure, or architecture, of the Constitution of Canada itself.

143. Neither Québec, nor any other province, nor Parliament, has the constitutional authority to effect such a change unilaterally, even if otherwise acting squarely within its own jurisdiction. In this vein, a province or Parliament could no more deny religious persons the right to participate in public life than they could deny this right to women or racialized individuals: all such denials would transform the nature of public life itself within that jurisdiction.

144. Ultimately, Québec's attempt to unilaterally modify the architecture of the Constitution of Canada through the adoption of Sections 6 and 8 of the Act is unconstitutional, and these sections must accordingly be declared invalid.

### *D) The Act is inapplicable to certain public officials*

#### *i. The application of Sections 5 and 6 to courts and court officials violates the principle of judicial independence*

145. Section 5 of the Act states that it is incumbent upon the Conseil de la magistrature to translate the requirements of State laicity and to ensure their implementation with respect to judges of the Court of Québec, the Québec Human Rights Tribunal (which is composed of Court of Québec judges), the Professions Tribunal, as well as municipal courts. According to Section 4, the "requirements of State laicity" in question include the prohibition on the wearing of "religious symbols".

146. Mr. Jolin-Barrette stated in the National Assembly that the purpose of Section 5 was to ensure that judges of the Court of Québec, along with judges on other tribunals, did not wear religious symbols – and that the Government expected the Conseil de la magistrature to establish rules accordingly.

147. Section 3 of the Act also states that "judicial institutions" – namely the Court of Appeal, the Superior Court, the Court of Québec, the Human Rights Tribunal, the Professions Tribunal and the municipal courts – must comply with the principles of State laicity.

148. Yet Section 5 then intervenes to exempt judges of the Court of Appeal and Superior Court from the requirement of complying with the principles and requirements of State laicity.

149. Section 6 in turn explicitly extends the prohibition on wearing “religious symbols” to certain employees acting within the court system: justices of the peace, clerks, deputy clerks, sheriffs, and deputy sheriffs referred to in the Courts of Justice Act and the Act respecting municipal courts; as well as peace officers who work in courthouses across the province.

150. The imposition of the requirements of Sections 5 and 6 infringes both the individual and the institutional requirements of judicial independence.

151. The individual infringement results from the attempt to indirectly impose behavioural guidelines on judges subject to discipline by the Conseil de la magistrature. This amounts to an attack on the security of tenure guaranteed to all judges by s. 100 of the *Constitution Act, 1867*.

152. Only the Conseil de la magistrature has the authority to discipline judges by evaluating whether their behaviour has breached judicial codes of conduct and, if so, recommending their removal to the National Assembly. The National Assembly and the Government cannot attempt to impose behavioural conditions that might impact a judge’s security of tenure by obliging the Conseil de la magistrature to adopt rules that reflect the National Assembly’s normative vision of the relationship between religions and the state.

153. Any attempt to do so constitutes a violation of the principle of judicial independence.

154. The institutional infringement, in turn, arises from the imposition of criteria that will necessarily affect the hiring, retention, and employment conditions of court staff such as clerks and special clerks, as well as actors in the legal system such as sheriffs, deputy sheriffs, and peace officers within courthouses.

155. All of these actors carry out functions that are indispensable to the administration of justice and therefore to the constitutionally guaranteed administrative independence of the courts. The attempt to unilaterally interfere with the employment conditions of these actors entails an intrusion on the direction and control of court staff, which in turn violates that guarantee.

### *ii. The application of Section 8 to elected officials infringes section 3 of the* Canadian Charter of Rights and Freedoms *in a manner that is not justified in a free and democratic society*

156. An override of rights under section 33 of the Canadian Charter cannot be applied to the rights that are protected by section 3. This includes a right to be qualified for membership in the House of Commons or a provincial legislative assembly.

157. Section 8 infringes this right insofar as it applies to elected officials. Because Section 8 applies to *all* Members of the National Assembly (paragraph 1 of Schedule III), it effectively disqualifies any individuals who cover their faces for *any*

reason, including a religious reason, from candidacy in a provincial election. A clearer infringement of section 3 of the Charter is difficult to envision.

158. This infringement cannot be justified under section 1 of the Charter.

159. The underlying objective of the infringement – the establishment of a "lay state" through the eradication of religious individuals from so-called positions of authority in the province of Québec – is not in and of itself sufficiently important to warrant overriding the constitutionally protected right to stand for election.

160. Even if this Court concludes that this objective is legitimate, a total ban on standing for election in a democracy is an extreme measure whose justification is difficult to imagine. The ban on standing for election in this case is unsupported by any evidence that there is any problem or risk of a problem arising if this ban were not in place, and it is not minimally impairing of individuals' protected section 3 rights. There are clearly less impairing ways to achieve the objective of state religious neutrality, which in any event is not violated by an individual expression of faith.

161. Finally, it is not clear what sort of salutary effects would be achieved by limiting certain religious individuals from standing for office. There is no indication that preventing people who cover their faces for religious reasons from acting as democratically elected representatives will have any impact on the quality of the work of the National Assembly.

162. In any event, if members of the voting public consider that a candidate will not properly represent them – for whatever reason – they are obviously not obliged to vote for that person.

163. On the other hand, a complete bar on the right to stand for public office represents a serious curtailing of the most basic democratic freedoms to which Canadian citizens are entitled and is itself a significant deleterious effect.

## E. Sections 6 and 8 infringe s. 28 of the *Canadian Charter of Rights and Freedoms* and s. 50.1 of the *Charter of human rights and freedoms*

163.1 Section 28 of the Canadian Charter provides that the rights of this Charter are guaranteed equally to male and female persons, "[n]otwithstanding anything in this Charter." The language of the provision, coupled with the legislative history underlying its inclusion in the Charter, both indicate that section 28 is not subject to override through the invocation of the notwithstanding clause.

163.2 The Quebec Charter has an effectively identical provision, s. 50.1, which was adopted for the same purpose.

163.3 Sections 6 and 8 violate both provisions. They disproportionately restrict women's ability to practice their religion (as guaranteed by s. 2(a) of the Canadian Charter

and s. 3 of the Quebec Charter) and their right to equality (as guaranteed by s. 15 of the Canadian Charter and s. 10 of the Quebec Charter).

163.4 While the Government has claimed that the Act is gender-neutral insofar as it applies to both men and women who wear religious symbols, in reality, the enforcement of the Act has been clearly disproportionately gendered.

163.5 As appears from the affidavits in the record, the only application of Section 6 of the Act is thus far by school boards across the province to their teaching staff. This evidence demonstrates that Section 6 has been applied overwhelmingly, if not exclusively, to women, who make up a significant majority of the provincial teaching profession. In fact, Section 6 is only truly being applied to Muslim women who wear the hijab.

163.6 Accordingly, the real impact of Section 6 is to disproportionately – or solely – deny Muslim women the right to practice their freedom of religion; in practice, Section 6 discriminates against Muslim women, not the population at large. This is a clear violation of the Canadian and Quebec Charters' guarantee of gender equality both generally speaking, and in the context of women's ability to practice their faith.

163.7 Section 8, for its part, patently applies only to Muslim women who wear the niqab, a religious face covering. The same ban existed in section 10 of the *State Neutrality Act*, which Blanchard J. of this Court found could only apply to Muslim women. 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. This is once again a violation of ss. 28 and 50.1 of the Canadian and Quebec Charters, respectively.

163.8 Even were the Government permitted to attempt to justify a violation of section 28 under section 1 of the Canadian Charter, a question that has never been decided by the courts, no justification exists in the present case.

163.9 The Government has not pointed to the existence of any pressing and substantial purpose that could support a flagrant denial of the fundamental freedoms of, and an overt invitation to discriminate against, Muslim women in Quebec. As explained above, the creation of a "lay" state is not a pressing and substantial objective, particularly because it amounts to an express intent to violate freedom of religion. The Supreme Court recognized in *Big M Drug Mart* that a law whose purpose is to violate freedom of religion can never be justified under section 1.

163.10 Even if this Court holds otherwise, the Act's infringement of the right to gender equality and the disproportionate impact on Muslim women's right to religious freedom are not minimally impairing. A neutral or secular state, as defined in the jurisprudence, may be achieved in other ways that do not single out Muslim women for targeted discrimination.

163.11 Finally, when the severity of the Act's effects on Muslim women's ability to hold a job and participate fully in Quebec society – its detrimental impact on their social, psychological, and economic equality – is contrasted with the absence of any salutary impact, it is clear that the violations of s. 28 and s. 50.1 caused by Sections 6 and 8 cannot be justified.

## V. STAY OF ENFORCEMENT OF SECTIONS 6 AND 8 PENDING A DETERMINATION OF THE ACT'S VALIDITY

164. The case at bar presents an exceptional situation where the application of a clearly exclusionary and damaging law must be stayed pending a judicial determination on the merits. This is also a case where the question of a stay must be dealt with urgently, as the risk and manifestation of irreparable harm increase with every day that passes.

165. As established in *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, a court may stay the application of a law pending review of its validity if (a) there is a serious issue to be tried; (b) irreparable harm will occur if the stay is not granted; and (c) the balance of (in)convenience favours granting the stay. All three criteria are met in the present case.

166. The vast scope of Sections 6 and 8 of the Act, the significance of the effects of these provisions on individuals' ability to work in Québec, the stigma and harm they will cause to the dignity of many individuals from minority religious and ethnic backgrounds, the confusion relating to their interpretation and application, and the complete lack of evidence that these prohibitions address a real or pressing problem all point to the necessity of staying their operation pending a resolution of this case on the merits.

### *A) The Application for an Interim Stay must be determined urgently*

167. Sections 6 and 8 of the Act have immediate effect. This means that as of this moment, any individual who wears a "religious symbol" is barred from applying to a wide range of public sector employment positions in the province.

168. Anyone who covers their face for a religious reason cannot work *anywhere* in the public sector, even in a position that does not require them to have any contact with the public.

169. Any individual who has been hired as of March 28, 2019 who wears a "religious symbol", who wishes to begin wearing a "religious symbol", or even who simply wears something their supervisor *considers* to be a "religious symbol", can only do so at the potential risk of losing their job. In practice, this impact will be felt by thousands of people.

170. Meanwhile, employees who are covered by the "grandfather clause" find themselves effectively frozen in their positions at their jobs, suddenly ineligible for any kind of promotion or even lateral move.

171. The magnitude of the further irreparable harm caused by Sections 6 and 8 is set out in greater detail below. The potential for its immediate manifestation speaks palpably to the need to swiftly resolve the question of these provisions' application for the time it takes for this Court to rule on their validity.

### *B) There is a serious issue to be tried*

172. The present challenge to the constitutionality of the Act raises serious issues.

173. Whether Québec has overstepped constitutional bounds by adopting legislation that constitutes criminal law in pith and substance, results in a wholesale alteration of the nature of public institutions themselves, or at the very least is unintelligible to the point of unconstitutionality, are all serious questions. The same is true of whether the Act violates the principle of judicial independence and whether Section 8 infringes section 3 of the Canadian Charter.

174. In these circumstances, the first requirement for a stay is satisfied by these proceedings.

### *C) Failure to stay the Act will cause irreparable harm*

175. The application of Sections 6 and 8 of the Act will cause serious and irreparable harm to individuals who wear "religious symbols" or who cover their faces and who work, or wish to work, in a wide range of positions in various public institutions.

176. Most obviously, individuals who wear "religious symbols" – however defined – and who are already employed in a position affected by Section 6 find their careers effectively stalled. They cannot change jobs without being required to remove their "religious symbols". If they refuse, they risk being sanctioned, potentially even with dismissal.

177. The same is true for anyone hired after March 27, 2019 who either already wears something that is deemed to be a "religious symbol" or who decides to begin wearing such an item in the future.

178. Of course, individuals who wear symbols of their faith and who are currently looking for work in affected institutions, or who will be in the future, have essentially been shut out of employment in key areas of the public sector.

179. Québec courts have consistently indicated that impinging on an individual's right to work constitutes irreparable harm.

180. This harm will of course be worsened by the fact that the Act will not be operationalized uniformly, which will result in arbitrary and divergent application of

both the ban on “religious symbols” or face coverings, and of any punishments that may be meted out to those who do not comply with the ban.

181. These practical impacts of Sections 6 and 8 are moreover compounded by the immediate and serious effect of this exclusionary legislation on the privacy and dignity of affected individuals. As appears from the affidavits filed in support of this application, the possibility of being interrogated by employers about one’s personal religious behaviour and then sanctioned for that behaviour causes great distress to the people who are targeted by Sections 6 and 8.

182. The exclusion of religious minorities from employment and participation in public institutions also has damaging long-term effects, including negative impacts on these minorities’ ability to integrate and participate in society. Contrary to Mr. Jolin-Barrette’s statements that the Act will apply equally to men and women, this effect will in practice be particularly grave for women, for whom economic independence is key to their social and economic equality. This will be especially true for women seeking employment as teachers, since women make up a significant majority of teachers in Québec’s public school system, as appears from statistics provided by the Minister of Labour, Employment and Social Solidarity, produced as **Exhibit P-23** *en liasse*.

183. Finally, broader social harm, which should not be underestimated in assessing the criteria for a stay, results from the application of Sections 6 and 8 and the Government’s indication that religious persons have no place in the province’s public institutions. The ban on “religious symbols” in public sector workplaces ultimately constitutes a fundamental violation of the Canadian public order.

184. Far from facilitating social cohesion, permitting Sections 6 and 8 to operate pending a review of their constitutional validity will isolate certain religious individuals, prevent them from participating fully in Québec’s institutions, and ultimately create a two-tiered society that privileges some citizens over others and sends the message that religious individuals are not worthy of equal respect and protection from the state.

185. This type of harm to religious individuals is clearly both serious and impossible to compensate by damages, meaning that it is irreparable.

### *D) The balance of convenience favours granting a stay*

186. The balance of convenience militates toward issuing a stay in the present circumstances, particularly since a stay would not harm the public interest – to the contrary, a stay would safeguard that interest.

187. The Government has failed to identify *any* problem or difficulty that the Act is intended to address and that would justify such a blatant violation of fundamental civil rights and such a severe alteration of the relationship between State institutions and religious minorities.

188. In fact, as the study conducted by the Government demonstrates, there is no issue with accommodation of persons, such as teachers, who currently wear something that is deemed to be a religious symbol in public positions. This also clearly emerges from the affidavits filed in support of this motion.

189. Moreover, the Government's choice of positions that are subject to Section 6 does not demonstrate any real underlying concern about the impact that people in these positions will have if they continue to wear "religious symbols" at work. For instance, the Act only applies to public school teachers, even though private school teachers are arguably just as influential and important to their students. Likewise, affiant Christina Smith points out that public officials in obvious positions of authority – such as municipal mayors – are exempt from the Act.

190. Most tellingly, by incorporating a "grandfather clause" into the Act which permits individuals who wear "religious symbols" to remain in their current jobs, the Government is admitting that absolutely no problem or harm will result if the ban on "religious symbols" is not immediately put into effect.

191. There is thus no suggestion that operationalizing the Act would result in any benefit, besides the assumed benefit of giving effect to any enacted legislation. This assumed benefit is not and cannot be a trump card preventing a stay of legislation in all circumstances, particularly not where the irreparable harm that would flow from such legislation is as severe as in the present case.

192. Constitutional litigation is not a rapid process, particularly not in an already strained court system. The only way to ensure that the Act does not inflict significant, widespread, and irreparable harm to a broad segment of Québec's population for the lengthy period during which its legality will be debated in the courts is to suspend its application. This would simply amount to maintaining a *status quo* that has existed for years, under which the principle of the religious neutrality of the state is already recognized.

193. At the same time, maintaining this *status quo* would protect the dignity of all religious individuals in the province and would safeguard affected individuals' ability to find work in Québec, an outcome that itself serves the public interest.

194. In these circumstances, the balance of convenience exceptionally but clearly favours this Court granting the present Application to stay the operation of Sections 6 and 8 of the Act pending a resolution of this case on the merits.

**WHEREFORE, MAY IT PLEASE THE COURT TO:**

**I.** **GRANT** the present Application;

**II.** […]

On the merits:

**III.** **DECLARE** the *Act respecting the laicity of the State*, SQ 2019, c. 12, invalid and inoperative pursuant to s. 52 the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; or, in the alternative,

**IV.** **DECLARE** Sections 5, 6, and 8 of the *Act respecting the laicity of the State*, SQ 2019, c. 12, inoperative pursuant to s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11;

**V.** **DECLARE** Sections 6 and 8 of the *Act respecting the laicity of the State*, SQ 2019, c. 12, inoperative pursuant to s. 52 of the *Charter of human rights and freedoms*, CQLR c C-12;

**THE WHOLE** with costs.

**MONTRÉAL**, September 30, 2019

*(S) IMK LLP*

**TRUE COPY**

imk LLP

**IMK LLP**

Me Catherine McKenzie | Me Olga Redko
cmckenzie@imk.ca | oredko@imk.ca
**IMK LLP**
3500 De Maisonneuve Boulevard West
Suite 1400
Montréal, Québec H3Z 3C1
T : 514 934-7727 | 514 934-7742
F : 514 935-2999
Lawyers for the Plaintiffs
ICHRAK NOUREL HAK
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
Our file: 5176-1
BI0080