C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

C O U R T O F A P P E A L

Nº: C.A.M. 500-09-
S.C.M. 500-17-108353-197

ICHRAK NOUREL HAK, an individual domiciled and residing at 2694 rue Legendre East, in the city of Montréal, province of Québec, H1Z 1N1

- and -

NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM), having a place of business at 200 – 440 Laurier Avenue West, in the city of Ottawa, province of Ontario, K1R 7X6

- and -

CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION, having a place of business at 90 Eglinton Avenue East no. 900, in the city of Toronto, Province of Ontario, M4P 2Y3

APPELLANTS / Plaintiffs

v.

THE ATTORNEY GENERAL OF QUÉBEC, having a place of business at 1 Notre-Dame Street East, Suite 8.01, in the city and district of Montréal, Province of Québec, H2Y 1B6

RESPONDENT / Defendant

APPLICATION FOR LEAVE TO APPEAL
(Arts. 31, 357 *C.C.P.*)

imk
avocats • advocates

TO ONE OF THE HONOURABLE JUSTICES OF THE COURT OF APPEAL, THE APPELLANTS SUBMIT:

1. This case involves an application for a stay of Sections 6 and 8 of the *Act respecting the laicity of the State* (the "**Act**") (**Exhibit R-1**), an unprecedented law that, in the name of the Government's view of laicity, attempts to create a state religion of secularism whose purpose and effect is to deny certain Quebecers the right to fully participate in Quebec society. Among other things, the Act requires that those who work in or for a wide range of public institutions do so without wearing religious symbols, even if they are invisible. The Government has sought to shield the Act from judicial scrutiny by invoking the "notwithstanding" clauses of the Canadian and Quebec Charters.

2. The impact of Sections 6 and 8 of the Act is widespread, significant, and immediate, striking at the heart of affected individuals' ability to obtain and keep employment or advance in their careers. Hundreds and potentially thousands of Quebecers are now barred from obtaining jobs in many public institutions, changing functions, or receiving promotions. That is the intention and the effect of the sections of the Act that the Appellants seek to stay.

3. The Appellants therefore seek leave to appeal the decision of the Honourable Michel Yergeau, J.S.C. (the "**Judge**") of July 18, 2019 (the "**Judgment**") (**Exhibit R-2**), which refused their application for a stay of Sections 6 and 8 of the Act pending a determination of its constitutional validity, a question on which the Judge agreed that there is a serious issue to be tried.

4. Appellants submit that leave should be granted because the Judge made important errors of law which led him to erroneously conclude that a stay could not issue:

    a. First, the Judge made an error of law when he concluded that the harm alleged arose *only* from Charter breaches that could not constitute

irreparable harm because the Government had invoked the notwithstanding clauses. He then compounded this error by finding that the *probable* harm that will result from the Act's application was theoretical;

b. Second, the Judge made an error of law when he examined the criterion of urgency *only* from Ms. Nourel Hak's perspective rather than based on the evidence as a whole, and ignored clear legal precedents that there is urgency in situations such as the one at bar; and

c. Third, the Judge made an error of law a the balance of convenience stage by failing to apply the actual test established in the jurisprudence.

5. While a stay of a statute is an exceptional request, the Judgment raises exceptional and novel issues that require this Court's attention. In particular, the Judge's analysis is coloured by his incorrect perception that, since the Government invoked the notwithstanding clauses, it is more difficult for applicants to fulfill the conditions of a stay, even if the grounds of invalidity alleged do not depend on the Quebec or Canadian Charters. This too is an error of law.

6. With respect, this erroneous perception led the Judge to make fundamental legal errors that fatally tainted his analysis of irreparable harm, urgency, and the balance of convenience. When these legal errors are corrected, the evidence in this case clearly militates in favour of granting a stay.

A. PROCEDURAL CONTEXT

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

7. On June 17, 2019, the Appellants filed their *Application for Judicial Review (Declaration of Invalidity)* (the "**Application**") and an *Application for an Interim Stay* (the "**Stay Application**") (**Exhibit R-3**). The Application alleges, *inter alia*, that the Act, and in particular Sections 6 and 8, is unconstitutional because (1) it is *ultra vires* the Quebec legislature since regulating religion for moral reasons can only be done under the federal criminal law power; (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 such time as a court rules on the Act's constitutional validity. It was supported by numerous affidavits (**Exhibit R-4, *en liasse***).

8. The Stay Application proceeded before the Judge on July 9, 2019.

B. THE JUDGMENT

9. Although the Judge accepted that the Application raises serious constitutional issues (paras. 58-89), he denied the Stay Application because he found that:

   a. the Appellants failed to establish that the application of the Act would cause irreparable harm (paras. 90-126);

   b. the Stay Application was premature in that the Appellants had not proven that there was urgency requiring the issuance of a stay (paras. 137-139); and

   c. the balance of convenience, and particularly the presumed public interest, weighed against suspending application of the Act (paras. 127-136).

C. GROUNDS OF APPEAL

a) The Harm Alleged is not Hypothetical and is Clearly Irreparable

10. The Judge erred in law in concluding that the legislator's recourse to the notwithstanding clauses made the evidence of actual and immediate harm (e.g. stress, impact on dignity, fear of being fired[1]) irrelevant, since such harm resulted from the discriminatory impact of the Act (paras. 117, 120-125).

11. This is wrong. The *only* effect of the notwithstanding clauses is to preclude a court from issuing a declaration of invalidity under section 52 of the *Constitution Act, 1982* (on the basis of specific provisions of the Canadian Charter only), or section 52 of the Quebec Charter. There is no support in the jurisprudence for the proposition that the notwithstanding clauses may also change the test for irreparable harm, which requires applicants to establish the existence of "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[2] The harm that individuals are experiencing already as a result of the Act's violation of their fundamental rights clearly meets this standard.

12. Moreover, even were the Judgment correct that the notwithstanding clauses precludes an examination of harm arising from Charter violations, the damage to career opportunities, dignity, psychological security, and sense of self-worth also result from the Act's breach of fundamental constitutional norms such as the rule of law and the constitutional architecture, which are in no way impacted by the notwithstanding clauses. Had the Judge recognized this, he would properly have characterized the harm that emerges from the evidence as irreparable.

[1] See e.g. Exhibit R-4: E.E. Affidavit, paras. 1, 7-11, 15.
[2] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, p. 341

13. The Judge further erred in law by characterizing harm that is the highly probable, indeed intended, consequence of Sections 6 and 8 as "hypothetical" (para. 118). In so doing, he applied the wrong legal standard to the evidence, conflating the notion of hypothetical harm with that of anticipated probable harm. The Judge so concluded despite simultaneously acknowledging that the intended purpose of Sections 6 and 8 is to prevent employees of many public institutions from wearing religious symbols, including face coverings (para. 36), and thus to prevent them from working in various public institutions, and that diverse measures, including disciplinary measures, are available to enforce these prohibitions (para. 39).

14. A stay is meant precisely to *prevent* such harm from occurring in the first place. The consequences that multiple affiants invoke – denial of jobs and career advancement, being forced to make an unacceptable choice between economic opportunity and personal identity and being subject to disciplinary sanctions or even being fired[3] – are not hypothetical or speculative. To the contrary, these consequences *will* result, because they are precisely what the Government intended. The jurisprudence recognizes that courts should not wait for these types of perfectly predictable consequences to occur before concluding that there is irreparable harm that must be prevented. Had the Judge applied the correct test to this evidence, he should have recognized that the harm alleged is not only irreparable, but highly probable and thus satisfies the second criterion for a stay.

b) There is Urgency

16. The Judge's conclusion that there is no urgency is in part a tributary of his legal error that the Act does not have any immediate impact. This is at odds with the jurisprudence: in the second stay application related to Bill 62, the Superior Court found that there was urgency even though no one had yet been denied a service

[3] See Exhibit R-4 : Hariri Affidavit, paras. 3-5, 14-15, 20-21; Nourel Hak Affidavit, paras. 8-12, 17, 19, 22; Ahmad Affidavit, paras. 1-6, 16-18; E.E. Affidavit, paras. 1, 7-11, 15.

because their face was covered. Rather, the Court found that since "the Act [comes] into force on July 1st this criterion is met by the applicants."[4]

17. The Judge also erred in law in only considering the situation of Ms. Nourel Hak in his urgency analysis. As the Supreme Court noted in *RJR-MacDonald,* the Court should "reject an approach which excludes consideration of any harm not directly suffered by a party to the application."[5] Accordingly, whether Ms. Nourel Hak in particular is in an urgent situation is not determinative (although her employment opportunities were immediately curtailed by the adoption of the Act). Urgency must be analyzed by looking at the totality of the evidence in the record.

18. This includes the affidavit of E.E., who is currently employed in a position that is not protected by the "grandfather clause" and lives in daily fear of losing her job and will be unable to complete her education if she does so. It also includes the case of Hakima Dadouche, who is immediately barred from being promoted or even moving laterally within the Commission scolaire de Montréal;[6] and Ghadir Hariri, who is applying for jobs right now and immediately risks being denied work as a teacher because she wears the hijab.[7] In short, once the proper legal standard is applied to the evidence, it is clear that people are affected by the Act *now*, making the courts' intervention an urgent matter.

c) Issuing a Stay is in the Public Interest

19. The Government generally benefits from a presumption that its laws are in the public interest. However, the Judge imposed a higher standard on the Appellants at the balance of convenience stage because the Government had invoked the notwithstanding clause. This was wrong in law: where the Government invokes the

[4] *National Council of Canadian Muslims (NCCM) v. Attorney General of Quebec*, 2018 QCCS 2766, para. 25
[5] *RJR-MacDonald*, p. 344
[6] Exhibit R-4 : Dadouche Affidavit, paras. 10-11
[7] Exhibit R-4 : Hariri Affidavit, paras. 14-15

notwithstanding clause to avoid judicial scrutiny of legislation that on its face violates fundamental rights, the decision to do so should be given a restrictive interpretation, rather than the overbroad application the Judge adopted.

20. The Judge moreover failed to acknowledge that the public interest includes not only the concerns of the government or of society generally, but also, as the Supreme Court has noted, the particular interests of identifiable groups.[8] As a result of this legal error, the Judge did not consider whether and how the effect of the Act on religious individuals impacts the public interest, or indeed, the fact that the public interest does not always militate in favour of the Government's legislative choices.[9] This error was once again compounded by his incorrect conclusion that the Act does not have any impact that is relevant to the stay analysis.

21. Moreover, the presumption that a validly enacted law serves the public good is rebuttable. While the jurisprudence does not contain many examples of what this means in practice, the Appellants submit that this case raises precisely the types of circumstances where this presumption is rebutted. While the Government is not obliged to prove that a contested law has the effect of promoting the public interest, courts must consider clear evidence that the law is *not* doing so.

22. In the Appellants' submission, this must be particularly true in cases where the Government has sought to escape the obligation to establish that a law serves a pressing and substantial concern by invoking the notwithstanding clauses.

23. In fact, the evidence demonstrates that there is no social harm from people wearing religious symbols while working in public institutions;[10] that the only

[8] *RJR-MacDonald*, p. 344
[9] *RJR-MacDonald*, p. 344
[10] Exhibit P-4: *Résultats préliminaires de l'Enquête sur la gestion en contexte de diversité ethnoculturelle, linguistique et religieuse 2018 – Synthèse et retour sur la section 3*; Exhibit P-5: *Nombre de plaintes concernant le port de signes religieux par des enseignants*, document filed by the Centrale des syndicats du Québec with the Committee on Institutions on May 8, 2019

immediate, actual impact of the Act is a prejudicial one;[11] and that the Act is impossible to apply in practice.[12] This is sufficient evidence to rebut the presumption that the Act serves a public good.

24. In addition, the fact that the Act is not enforced immediately with respect to most current employees because of the "grandfather clause" demonstrates that there is no significant public interest in having the law applied right away. Indeed, as the Superior Court held in the first stay of Bill 62, "[r]religious neutrality, while perhaps a lofty goal, is not time sensitive."[13] Accordingly, a stay would not in any way harm the public interest.

25. To conclude, as the Judge did, that *any* evaluation of whether the Act actually responds to any real problem amounts to improperly questioning the efficacy of legislative choices (para. 134), is ultimately to treat the presumption that the public interest militates in favour of applying the Act as absolute. If the Judge's reasoning is correct, there is little, perhaps even nothing, that litigants could do to convince a court that an impugned law does not serve a public good and that the public interest weighs in favour of a stay. This contradicts the clear caselaw of the Supreme Court.

D. THE JUDGMENT CAUSES THE APPELLANTS IRREMEDIABLE INJURY

23. The Judgment refuses to stay an Act whose immediate impact is to exclude hundreds of people from a wide spectrum of positions in public institutions within the province. The prohibitions contained in Sections 6 and 8 are in effect, and as demonstrated above and in the Affidavits filed in support of the Application, their effect causes an irremediable injury. In addition, the violation of a constitutional right in a constitutional democracy is by definition an irremediable injury.

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[11] See, generally, the Affidavits referred to above at para. 15
[12] See Feldman Affidavit; Exhibits EML-8 and EML-9
[13] *National Council of Canadian Muslims (NCCM) v. Attorney General of Quebec*, 2017 QCCS 5459, para. 48

24. The impact of the Act is to curtail economic and social opportunities to hundreds of Quebecers, many of whom are suffering the attendant emotional and psychological consequences of being suddenly rendered ineligible for these opportunities. This is precisely the type of harm that is considered irremediable.

25. Since the refusal to grant a stay means that the Act is in effect, the Judgment also causes irremediable injury to these individuals, which cannot be alleviated by an eventual judgment on the merits should leave to appeal not be granted. An eventual declaration of constitutional invalidity will do nothing to compensate the people who will be denied jobs or advancement or compensate them for the anxiety and financial insecurity they suffer in the interim.

E. IT IS IN THE INTEREST OF JUSTICE FOR THIS COURT TO GRANT LEAVE

27. The Appellants recognize that the Court of Appeal generally defers to first instance judgments in interim applications such as this one. However, in the present case the Judge committed multiple legal errors that fundamentally tainted his analysis with respect to nearly all the criteria for a stay. This Court therefore does not owe deference to the Judge's conclusions. When Appellants' evidence is evaluated on the basis of correct legal standards, it will be clear that the Appellants meet the criteria for a stay. Accordingly, this appeal has a strong chance of success.

28. Moreover, this Court underscored in *Québec (Procureure générale) c. D'Amico*, 2015 QCCA 2058, the importance of its role in reviewing decisions of the Superior Court, particularly in constitutional matters that raise questions of fundamental importance both to individuals and to society at large. This is such a case.

29. The questions raised by the Appellants about the criteria for the issuance of a stay of legislation generally, and particularly when the notwithstanding clause is invoked, are serious and in some cases, novel. There appear to be no authorities

in Quebec, or indeed in Canada, addressing the impact of notwithstanding clauses on the analysis of the stay criteria. Give the Judge's reliance on section 33 of the Canadian Charter in his analysis, a decision of this Court on these important issues is clearly required.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

I. **GRANT** the present Application for Leave to Appeal;

II. **AUTHORIZE** the Appellants to appeal the judgment rendered by the Honourable Michel Yergeau, J.S.C. on July 18, 2019 in Superior Court file no. 500-17-108353-197;

III. **ORDER** Appellants to file their memorandum within fourteen days of the decision on the leave to appeal;

IV. **ORDER** Respondents to file their memorandum within fourteen days of the filing of the Appellants' memorandum;

V. **FIX** a date for hearing as soon as possible after September 6, 2019;

VI. **RENDER** any such further order that the Court deems appropriate;

THE WHOLE with costs.

(Signatures on the next page)

MONTREAL, July 22, 2019

(S) IMK LLP

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