

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

**ENGLISH MONTREAL SCHOOL BOARD,
MUBEENAH MUGHAL and PIETRO MERCURI**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

**ATTORNEY GENERAL OF QUÉBEC,
JEAN-FRANÇOIS ROBERGE, in his official capacity,
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS
(Appellants on Cross-Appeal)

– and –

**MOUVEMENT LAÏQUE QUÉBÉCOIS
FRANÇOIS PARADIS, in his official capacity**

RESPONDENTS

(Style of cause continued on next page)

APPELLANTS' AMENDED FACTUM

Correcting typographical error at paragraph 59, 4th and 5th lines

ENGLISH MONTREAL SCHOOL BOARD et al

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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(Respondents on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant on Cross-Appeal)

AND BETWEEN:

**ICHRAK NOUREL HAK,
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM),
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

APPELLANTS
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MOUVEMENT LAÏQUE QUÉBÉCOIS
POUR LES DROITS DES FEMMES DU QUÉBEC**

RESPONDENTS

AND BETWEEN:

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AND BETWEEN:

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PART I – OVERVIEW AND STATEMENT OF FACTS¹

A. OVERVIEW

[1] While s. 33 of the *Charter* reserves to Parliament and legislatures the authority to provide that legislation will operate notwithstanding certain *Charter* rights, not all *Charter* rights are within the reach of s. 33. Sections 28 and 23 are two such rights that were deliberately excluded from the scope of s. 33, in order to ensure that gender equality rights and minority language education rights could not yield to the will of insensitive political majorities.

[2] Notwithstanding the unequivocal text, purpose, history, and context of s. 28, the courts below adopted an interpretation that eviscerates the provision’s *raison d’être*: removing gender equality from the ambit of s. 33. Similarly, in a case of unprecedented imposition of cultural values on minority language schools, the Court of Appeal cut down the minority’s management and control rights, frustrating the purpose of s. 23.

B. STATEMENT OF FACTS

[3] The relevant facts for s. 28 are outlined at paragraphs 58 to 63 of this factum and for s. 23 at paragraphs 99 to 103, 108 to 109, and 111 to 113.

PART II – QUESTIONS IN ISSUE

[4] The appeal of the English Montreal School Board, Mubeenah Mughal and Pietro Mercuri (“EMSB et al”) raises the following issues:

A. Does s. 28 contain a substantive guarantee that has effect when the notwithstanding clause has been invoked?

B. Does the *Act respecting the Laicity of the State*, CQLR c L-0.3 (“Bill 21”) infringe s. 28?

C. Are the infringements of s. 28 justified under s. 1?

[5] If the Court does not find a violation of s. 28, then it must address the following issues:

D. Does Bill 21 infringe the s. 23 right to management and control of Québec’s English school boards?

E. Are the infringements of s. 23 justified under s. 1?

¹ A French translation of this factum is being provided to the Court and the parties.

PART III – STATEMENT OF ARGUMENT

A. SECTION 28 CONTAINS A SUBSTANTIVE GUARANTEE THAT HAS EFFECT WHEN THE NOTWITHSTANDING CLAUSE HAS BEEN INVOKED

[6] This Court has not yet had the opportunity to consider the full application and effect of s. 28² and, importantly, has never considered the application of s. 28 when the notwithstanding clause has been invoked.

[7] Section 28 must be interpreted purposively.³ The provision must be considered “in light of its purpose, with due consideration to its text, the *Charter*’s character and larger object, and the provision’s history”⁴ or, put differently, the “language, structure, and history of the constitutional text”.⁵ The text and history of the adoption of s. 28 make clear that the central purpose of s. 28 was to ensure that other constitutional provisions – no matter how important – could not be used to “shelter gender-based discrimination”⁶. Moreover, the structure of the constitutional text and the broader context – including the text and operation of s. 33 and precedents for linked rights in the Canadian and international context – confirm that there is no problem of logical coherence that would prevent s. 28 from serving its purpose. All interpretive indicators confirm that s. 28

² As was the case for s. 25 in *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10](#) at para 106 [*Dickson*]. In *R v Hess*, [\[1990\] 2 SCR 906](#), the Court conducted an independent analysis of ss. 15 and 28 of the *Charter*, rather than assessing s. 28 in the context of its s. 15 analysis, in considering whether statutory rape provisions of the Criminal Code that were only applicable to men amounted to sex discrimination. In *Native Women’s Association of Canada v Canada*, [1992 CanLII 8495 \(FCA\)](#), rev’d on different grounds [\[1994\] 3 SCR 627](#), the Federal Court of Appeal concluded that the federal government had violated both ss. 2(b) and 28 of the *Charter* by providing unequal funding for participation in constitutional negotiations. This Court overturned the Court of Appeal’s decision, based on a lack of evidence that “the funded groups were less representative of the viewpoint of women with respect to the Constitution”, never questioning the idea that s. 28 protects a substantive right.

³ *Dickson* at para 113.

⁴ *Dickson* at para 112; *R v Big M Drug Mart Ltd*, [\[1985\] 1 SCR 295](#) at 344.

⁵ *Reference re Public Service Employee Relations Act (Alta.)*, [\[1987\] 1 SCR 313](#) at 394 (per McIntyre J) [*Re PSERA*].

⁶ *Dickson* at para 173. Section 35(4) of the *Constitution Act, 1982* is further indication that constitutional provisions cannot be used to “shelter gender-based discrimination”.

contains a substantive guarantee that has effect when the notwithstanding clause has been invoked.

(1) The text of s. 28: an unequivocal and unassailable “guarantee” of sex equality

(i) The text of s. 28

[8] Section 28 “guarantees” the rights and freedoms referred to in the *Charter* “equally to male and female persons” (“*sont garantis également aux personnes des deux sexes*”).

[9] The guarantee contained in s. 28 applies “notwithstanding anything in the *Charter*” (“*indépendamment des autres dispositions de la présente charte*”) – language that is unique to s. 28 and indeed constitutes some of the most assertive language found in the *Charter*. In *Health Services*, the Court underscored that freedom of association under s. 2(d) was “cast in broad terms and devoid of limitations”.⁷ In *Sauvé*, the Court insisted on the “broad, untrammelled language” of the right to vote under s. 3.⁸ In the case of s. 28, not only is the guarantee “devoid of limitations” and “untrammelled”, it also contains a positive affirmation that the guarantee applies notwithstanding anything in the *Charter*.

[10] Just as in *Mills*, where the Supreme Court noted, in discussing the meaning of s. 24 of the *Charter*, that “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion”,⁹ in the case of s. 28, it is difficult to imagine a more unequivocal guarantee of sex equality or a more robust affirmation of its primacy.

[11] At minimum, the language of primacy contained in s. 28 (“notwithstanding anything in the *Charter*”), taken together with the historical context (addressed in part A(2) below), indicates that s. 28’s guarantee is shielded from the application of the notwithstanding clause.

[12] Moreover, contrary to what the Court of Appeal suggested,¹⁰ the location of s. 28 under the “General” section of the *Charter* (“*Dispositions générales*”) does not indicate that s. 28 is merely interpretive.

⁷ *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, [2007 SCC 27](#) at para 39 [*Health Services*].

⁸ *Sauvé v Canada (Chief Electoral Officer)*, [2002 SCC 68](#) at para 11.

⁹ *Mills v The Queen*, [\[1986\] 1 SCR 863](#) at 965.

¹⁰ *Organisation mondiale sikhe du Canada c Procureur général du Québec*, [2024 QCCA 254](#) at para 452 [QCCA], **Joint Appellants’ Record [AR], vol 3 at 181-182**.

[13] Only s. 27 has been interpreted as a purely interpretive provision,¹¹ given its explicit language to that effect, i.e., that “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” Other “general” provisions, however, differ. Section 29 preserves constitutional rights to “denominational, separate or dissentient schools”, immunizing the right to certain schools from *Charter* review.¹² This Court also declined to conclude that s. 25 is merely interpretive, despite its interpretive language (“shall not be construed”) – interpretive language that is absent from s. 28. On the contrary, this Court held that when a s. 25 right is affected in a non-incident manner, creating an irreconcilable conflict between two rights, s. 25 will protect the Indigenous right by rendering the individual right ineffective to the extent of the conflict.¹³

[14] The fact that s. 28 may have an interpretive function does not negate its substantive content. Many *Charter* rights influence the interpretation of other rights,¹⁴ while being simultaneously substantive. In other words, the hybridity of *Charter* rights – that is, their substantive and interpretive character – is uncontroversial. To claim, then, that s. 28’s effect ends at the idea of gender equality informing the interpretation of other rights would make it redundant with s. 15(1), which has already been interpreted in that very same manner.¹⁵ Redundant *Charter* interpretations should be rejected.¹⁶

[15] Section 28 is couched in much stronger language than ss. 25, 27 and 29: it refers to rights being “guaranteed”. The only other provision in the *Charter* that “guarantees” rights and freedoms is s. 1: while s. 1 “guarantees” all rights subject to reasonable limits, s. 28 guarantees and gives primacy to their equal enjoyment on the basis of sex.

¹¹ *R v Kapp*, [2008 SCC 41](#) at para 88; *Church of Atheism v Canada*, [2019 FCA 296](#) at para 15.

¹² *Dickson* at para 129, citing *Reference re Bill 30, An Act to amend the Education Act (Ont)*, [\[1987\] 1 SCR 1148](#) at 1198 [*Reference re Bill 30*]. See also *Reference re an Act to Amend the Education Act*, [1986 CanLII 2863 \(ON CA\)](#) at paras 159–171, affirmed in [\[1987\] 1 SCR 1148](#).

¹³ *Dickson* at para 164.

¹⁴ See e.g. *United States v Burns*, [2001 SCC 7](#) at para 57 (s. 12 used to interpret s. 7); *R v Mills*, [\[1999\] 3 SCR 668](#) at para 21 (s. 15 used to interpret s. 7).

¹⁵ See *R v Osolin*, [\[1993\] 4 SCR 595](#) at 669. See also *New Brunswick (Minister of Health and Community Services) v G (J)*, [\[1999\] 3 SCR 46](#) at paras 112–113 (L’Heureux-Dubé J, concurring).

¹⁶ Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 211–212, **Book of Authorities [BOA], Tab B4**.

(2) The historical context confirms that s. 28 can serve to invalidate legislation where s. 33 has been invoked

(i) The role of the historical context in Charter interpretation

[16] Historical context falls on a spectrum in how it is used by courts: on the one hand, a few statements of public servants will be given little weight.¹⁷ On the other hand, an amendment specifically considered and rejected by the framers will be given significance. In interpreting s. 10(b) of the *Charter* in *R v Prosper*, Chief Justice Lamer relied on evidence indicating that the framers of the *Charter* “consciously chose not to constitutionalize a right to state-funded counsel under s. 10”. He stressed: “at issue is a specific clause which was proposed, considered and rejected by our elected representatives. In my opinion, it would be imprudent for this Court not to attribute any significance to the fact that this clause was not adopted”.¹⁸

[17] This Court has also given particular weight to historical context in the area of equality rights. In *Andrews*, Justice McIntyre (for the majority on this point) concluded that the language of s. 15 was “deliberately chosen in order to remedy some of the perceived defects under the Canadian Bill of Rights”, which formed part of the provision’s “linguistic, philosophic and historical contexts”. This historical backdrop, as well as “the expanded concept of discrimination being developed under the various Human Rights Codes” at the time, supported the Court’s interpretation of s. 15 as guaranteeing substantive rather than formal equality.¹⁹

(ii) The original primacy of s. 28

[18] In April 1981, following the recommendations made by the ad hoc conference on Canadian Women and the Constitution, the provision which would become s. 28 was discussed in the following terms by then Minister of Justice, Jean Chrétien:²⁰

When we were sitting in committee, we received a great many representations concerning Clause 15, which deals with the rights of women and sexual equality and which has been the subject of a long debate. That clause has been accepted by virtually all committee members. After the committee had completed its work, the groups representing women kept on making representations to emphasize their eagerness to have absolute equality of the sexes enshrined, representations which I have referred to the cabinet, assuredly with the assistance of the hon. Minister of

¹⁷ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 504, 508.

¹⁸ *R v Prosper*, [1994] 3 SCR 236 at 266-267 [*Prosper*] [emphasis in original].

¹⁹ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 170-171.

²⁰ Canada, House of Commons Debates, 32-1, No 9 (22 April 1981) at 9399 (per Hon Jean Chrétien, Minister of Justice and Minister of State for Social Development) [emphasis added], **BOA, Tab A5**.

Employment and Immigration (Mr. Axworthy) who is responsible for the status of women to Parliament, and we have been glad to allow the New Democratic Party to propose this amendment. [...] [T]his party will gladly vote tomorrow in favour of this NDP amendment which will ensure equal status to women, as requested by many pressure groups.

[19] The amendment to the *Constitution Act*, 1981 was voted on April 23, 1981 with s. 28 added in the following terms:²¹

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

(iii) *Section 28 made subject to the notwithstanding clause*

[20] The notwithstanding clause was agreed to following the provincial ministers' conference of November 2 to 5, 1981. On November 9, 1981, Prime Minister Pierre Elliott Trudeau confirmed that, at that time, the notwithstanding clause was intended to apply to s. 28.²²

[21] In the "Resolution Respecting Constitution Act" of November 20, 1981, ss. 28 and 33 included language explicitly subordinating s. 28 to s. 33:²³

28. Notwithstanding anything in this Charter except section 33, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[...]

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15.

(iv) *Outcry of parliamentarians and removal of s. 28 from the scope of s. 33*

[22] The inclusion of s. 28 "in its application to discrimination based on sex referred to in section 15" in the scope of s. 33 led to an outcry of parliamentarians and women's groups, captured, in particular, in the debates of Friday, November 20 and Monday, November 23, 1981. These debates reflect the framers' desire to restore s. 28 to its full initial force and ensure that gender equality could not be made subject to s. 33.

²¹ Canada, House of Commons Votes and Proceedings, 32-1, No 187 (23 April 1981) at 1775-1776, **BOA, Tab A6**.

²² Canada, House of Commons Debates, 32-1, No 11 (9 November 1981) at 12634, **BOA, Tab A7**.

²³ Canada, House of Commons Debates, "Resolution Respecting Constitution Act", 32-1, No 12 (20 November 1981) at 13023-13024 [emphasis added], **BOA, Tab A8**.

[23] Having just introduced the “Resolution Respecting Constitution Act”, in which the notwithstanding clause applied to s. 28 “in its application to discrimination based on sex referred to in section 15”, Mr. Chrétien stated:²⁴

For those who remain concerned about the override clause, let me remind them that it has been said that ‘The price of liberty is eternal vigilance’. Pressure groups must remain vigilant and we are seeing such vigilance now from women who are arguing for the removal of the override clause in Section 28 and the aboriginal people who are fighting for the reinstatement of their rights.

[...] the charter enumerates equality rights. In this area the government is taking bold steps forward in order to ensure the equality of women before and under the law. I know some would have hoped that we could do even better, and I hope we can in the next few days.

[24] That same day, on November 20, 1981, Joe Clark, Leader of the Opposition (Progressive Conservatives), introduced an amendment to remove s. 28 from the scope of s. 33:²⁵

That the proposed Constitution Act, 1981 be amended

(a) by striking out clause 28 and substituting the following:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

(b) by striking out subclause 33(1), and substituting the following:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

[25] Mr. Clark explained:²⁶

Our first amendment, which I will move later today, will reinstate, without qualification, the guarantee in Section 28 of the equality of male and female persons.

[...] The present resolution [the resolution which on November 20, 1981 made section 28 subject to the notwithstanding clause “in its application to discrimination based on sex referred to in section 15”] will allow Parliament or a legislature to treat women as less equal than men, or men as less equal than women. We intend that the rights

²⁴ Canada, House of Commons Debates, 32-1, No 12 (20 November 1981) at 13043 (per Hon Jean Chrétien, Minister of Justice and Minister of State for Social Development) [emphasis added], **BOA, Tab A8**.

²⁵ Canada, House of Commons Debates, 32-1, No 12 (20 November 1981) at 13050, **BOA, Tab A8**.

²⁶ Canada, House of Commons Debates, 32-1, No 12 (20 November 1981) at 13047, 13050, 13052 [emphasis added], **BOA, Tab A8**.

and freedoms set forth in all the provisions of the resolution will be guaranteed equally to male and female persons.

[...] What must be put right into the Constitution of Canada is the guarantee that male and female persons will be treated equally in relation to the rights and freedoms of Canadians.

[...] The hard reality, however, that we have all encountered is that barriers do stand in the way of women, barriers that do not stand in the way of men. I personally am proud to be able to play some small role, with the introduction of the amendment today, in trying to bring those barriers down and trying to move us, in law and in thought, toward that kind of equality which exists in fact, if one regards the capacities and potential of male and female persons in this country.

[26] Edward Broadbent, leader of the New Democratic Party, stated:²⁷

I ask in all seriousness, would we want children anywhere in Canada to read a document which says, “Men and women are equal except when a group of politicians say they are not”? That is what is in this document. It is neither good for young boys nor for young girls.

In our culture at this time, this kind of symbolism can mean only one thing. It does not mean that males can be discriminated against as well as females. Everyone in this chamber and everyone in Canada knows that it means it is acceptable to discriminate against women, against young women, against girls. We find that totally offensive in this year of 1981.

[27] Mr. Broadbent concluded by declaring: “We must restore the original positive wording of Section 28 which ensures the paramountcy of the principle that men and women are equal. The Leader of the Opposition mentioned his intention of moving an amendment. We had the same proposal, so it would be totally redundant for us to do that. I simply indicate that the amendment will have our full support, if for no other reason than that in the original document we wrote it in the first place”.²⁸

[28] The debates concerning the proposed amendment to s. 28 continued on Monday, November 23, 1981. A member of the Progressive Conservative Party explained that a “tremendous furor has been created over the application of the ‘notwithstanding clause’ to the guarantee that rights should apply equally to men and women”. He stressed: “in reference to Section 28, this party, as proposed by my leader on Friday last [Mr. Clark], insists that Section

²⁷ Canada, House of Commons Debates, 32-1, No 12 (20 November 1981) at 13055-13056 [emphasis added], **BOA, Tab A8.**

²⁸ Canada, House of Commons Debates, 32-1, No 12 (20 November 1981) at 13056 [emphasis added], **BOA, Tab A8.**

28, as it appeared in the resolution which came out of the joint committee, be restored in its full power”.²⁹

[29] The same day, Judy Erola, Minister of State (Mines) asked:³⁰

What is this equality that we women have been fighting for? How many generations of men and women have asked the question: What do women want? Well, for our grandmothers who were not even considered persons and who fought for the vote, and for our mothers who supplied the labour force during the war and since, and for our sisters and daughters and granddaughters, I will tell you what we want. We want the rights in the Charter of Rights and Freedoms guaranteed equally to male and female persons. That means the original wording of Section 28 [...]

[30] For her part, a member of Parliament of the New Democratic Party stated:³¹

That is why a great many of us are distressed by the possibility that eviscerated Clause 28 will remain.

[...] For those who would argue that they can only accept the [e]quality of women conditionally, I believe that they too are saying that they do not believe in the fundamental principle of equality of women with men.

[31] On November 23, 1981, Mr. Chrétien confirmed that there was agreement regarding the amendment proposed by the Progressive Conservatives to have s. 28 “in its application to discrimination based on sex referred to in section 15” removed from the scope of s. 33.³²

[...] Mr. Speaker, I am pleased to be able to inform the House that I have obtained from all provinces which are parties to the accord their agreement that Section 28 on the equality of men and women should apply without the override clause.

[32] The vote on the proposed amendment was held on November 24, 1981.³³ Sections 28 and 33(1) included in the “Resolution Respecting Constitution Act, 1981” of November 25, 1981 read as they do today:³⁴

²⁹ Canada, House of Commons Debates, 32-1, No 12 (23 November 1981) at 13121 (per Jake Epp, Provencher) [emphasis added], **BOA, Tab A9**.

³⁰ Canada, House of Commons Debates, 32-1, No 12 (23 November 1981) at 13123 [emphasis added], **BOA, Tab A9**.

³¹ Canada, House of Commons Debates, 32-1, No 12 (23 November 1981) at 13130 (per Pauline Jewett, New-Westminster-Coquitlam), **BOA, Tab A9**.

³² Canada, House of Commons Debates, 32-1, No 12 (23 November 1981) at 13140. See also Canada, House of Commons Debates, 32-1, No 12 (23 November 1981) at 13141 (per Jake Epp, Provencher) (“restore Section 28 as we had developed that section in the constitutional committee”), **BOA, Tab A9**.

³³ Canada, House of Commons Votes and Proceedings, 32-1, No 262 (24 November 1981) at 4128-4130, **BOA, Tab A11**.

³⁴ Canada, House of Commons Debates, “Resolution Respecting Constitution Act”, 32-1, No 12 (25 November 1981) at 13255, **BOA, Tab A12**.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[...]

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

- (v) *The history of ss. 28 and 33 makes clear that s. 28 was removed from the scope of s. 33 in all its applications, not merely when s. 28 is applied in conjunction with a narrow subset of Charter rights that are themselves not subject to s. 33*

[33] The drafting history and debates surrounding ss. 28 and 33 provide a precise indication of the full scope of s. 28's exclusion from s. 33: on November 23, 1981, s. 28 was removed from the scope of s. 33 in all its applications.

[34] The Court of Appeal cherry-picked one isolated statement from Mr. Clark³⁵ to conclude that s. 28 was removed from the scope of s. 33 only for the purpose of guaranteeing that gender equality in the exercise of a specific subset of rights (such as mobility rights and voting rights, which are not otherwise covered by s. 33) could not cede to legislative majorities.³⁶

[35] This theory is flatly contradicted by the history of the amendments to ss. 28 and 33, by the other statements made by Mr. Clark himself and by all other statements made by all other parliamentarians debating the question.³⁷

[36] The language added to, and then removed from, s. 33 – “section 28 of this Charter in its application to discrimination based on sex referred to in section 15” – leaves no doubt that the central concern and debate in November 1981 regarding s. 28 was whether s. 33 could be used to deny gender equality as protected by s. 15. It strains credulity to suggest that “section 28 of this Charter in its application to discrimination based on sex referred to in section 15” was removed from the notwithstanding clause in order to ensure equal exercise by men and women of a narrow set of non-section 15 rights (including mobility rights and voting rights, which are never mentioned in the debates surrounding s. 28). In fact, if its only role was to guarantee the pre-eminence of gender equality for a narrow subset of non-s.15 rights, the amendment Mr. Clark

³⁵ Canada, House of Commons Debates, 32-1, No 12 (20 November 1981) at 13049-13050, **BOA, Tab A8**.

³⁶ [QCCA](#) at para 484, **AR, vol 3 at 192**. *Reference re Impact Assessment Act*, [2023 SCC 23](#) at para 89 (“it is bad practice to cherry-pick seemingly helpful passages from the record.”).

³⁷ See paragraphs 25 to 31 above.

proposed would have had no effect, since s. 28 was at that time only subjected to the notwithstanding clause “in its application to discrimination based on sex referred to in section 15” – not in its application to any other rights.

[37] The clear intent of the framers of restoring s. 28 to “its full power”, evidenced in the cross section of debates considered above, would not have been met if the removal of s. 28 from the notwithstanding clause meant that the pre-eminence of gender equality was guaranteed only for a very limited set of rights. On the Court of Appeal’s interpretation, the amendment restoring s. 28 to “its full power” would – perversely – have had the effect of further weakening s. 28. Before the amendment, s. 33 applied to s. 28 only in its application to discrimination based on sex referred to in s. 15. On the Court of Appeal’s theory, after the amendment, s. 33 would apply to s. 28 in its application to all *Charter* rights except those not otherwise subject to s. 33.

[38] By giving no meaning to the inclusion of s. 28 in the scope of s. 33 and the subsequent outcry and exclusion of s. 28 from s. 33 in November 1981, the Court of Appeal failed to “attribute any significance to” deliberate decisions made by the framers.³⁸

(3) The text and operation of s. 33 confirm that s. 28 can serve to invalidate legislation where s. 33 has been invoked with respect to the underlying rights guaranteed equally to men and women

[39] As this Court has emphasized, “the Constitution should be viewed as having an ‘internal architecture’”.³⁹ The interpretation of s. 28 must be consistent with the text and operation of other provisions, including s. 33.

[40] Whereas ss. 32(1) and (2) directly define the application and scope of the *Charter*, s. 33 instead governs the operation of legislation. Subsection 32(1) provides that the *Charter* “applies” (“*s’applique*”) “to the Parliament and government of Canada” and “to the legislature and government of each province” within their spheres of competence. In this way, s. 32(1) directly defines the extent of the *Charter*’s application. Further, s. 32(2) provides that s. 15 “shall not have effect” (“*n’a d’effet que*”) until three years after s. 32 comes into force.

[41] Far from directly restricting the scope of *Charter* rights, s. 33 presupposes their existence. The effect of invoking s. 33 is not to deny or curtail *Charter* rights. It is rather to permit the operation of legislation notwithstanding the acknowledged existence of those rights. Section 33

³⁸ *Prosper* at 266-267.

³⁹ *Reference re Senate Reform*, [2014 SCC 32](#) at para 26; *Reference re Secession of Quebec*, [\[1998\] 2 SCR 217](#) at para 50.

allows legislation to operate “as it would have but for” the right. The *Charter* right is not abolished or cut down because s. 33 has been invoked; the statute is merely permitted to operate. The subject of the s. 33 declaration is not the *Charter* right itself, but the statute. As Dean Leckey (as he then was) explains: “if activating the notwithstanding clause made rights inapplicable to a protected law – a formulation absent from the constitutional text – it would be redundant to specify that the law shall have its operation despite those rights: that consequence would arise automatically”.⁴⁰

[42] *Re Boudreau and Lynch* concerned the effect of s. 28 in the first three years of the *Charter*. In that case, the Nova Scotia Court of Appeal drew a crucial distinction between ss. 32 and 33: while s. 28 does not impact s. 32(2) (it could not eliminate the probationary period of three years for the application of s. 15), it prevents the invocation of s. 33 with regard to any form of sexual discrimination: “Section 28 of the Charter was not intended to eliminate the probationary period of three years during which Parliament and the provincial legislatures could determine their course of action under the new Constitution. It was simply intended to prevent any continuation of sexual discrimination by affirmative legislative action once the full Charter had come into force.”⁴¹

(4) Section 28 uses an established device for guaranteeing equality rights: like s. 10 of the Québec Charter, it operates together with the rights it guarantees equally even in the absence of a violation of those rights

[43] Section 28 uses an established device for protecting equality. This has crucial consequences to its proper interpretation: not only is s. 28 a substantive guarantee, but it operates together with the rights it guarantees equally even in the absence of a violation of those rights.

[44] Two distinct types of guarantees against inequality or discrimination can be distinguished at law. The first type, exemplified in s. 15 of the *Charter*, protects against discrimination without

⁴⁰ Robert Leckey & Eric Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts and the Electorate” (2022) 72:2 UTLJ 189 at 195, **BOA, Tab B2**. See also Grégoire Webber, “Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation”, (2021) 71:4 UTLJ 510 at 511, 518, 524, **BOA, Tab B5**.

⁴¹ *Re Boudreau and Lynch*, [1984 CanLII 3055 \(NS SC\)](#) at para 12.

reference to the exercise of other rights or freedoms. A similar provision to s. 15 is found in the International Covenant on Civil and Political Rights (“ICCPR”) at art. 26:⁴²

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[45] A second type of guarantee, exemplified in s. 10 of the *Québec Charter*, treats equality as a matter of equal enjoyment of other rights and freedoms:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

[46] The European Convention of Human Rights (“ECRH”) similarly states at art. 14:⁴³

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁴² International Covenant on Civil and Political Rights, 19 December 1966, [999 UNTS 171](#) art 26 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR]. *Quebec v 9147-0732 Québec inc*, [2020 SCC 32](#) at para 31 [*Québec inc*] (“the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”, citing Dickson CJ in *Re PSERA* at 349) and para 41 (“International instruments that pre-date the *Charter* can clearly form part of the historical context of a *Charter* right and illuminate the way it was framed”); *Imperial Tobacco Canada Ltd c Québec (Procureure générale)*, [2015 QCCA 1554](#) at para 56 (“*Il est vrai que l’historique législatif de la Charte québécoise révèle qu’elle a été adoptée, entre autres, pour harmoniser le Québec aux obligations internationales énoncées dans [...] le Pacte international relatif aux droits civils et politiques de 1966.*”).

⁴³ European Convention on Human Rights, 4 November 1950, [ETS 5](#) art 14 (entered into force 3 September 1953); *Québec inc* at para 36 (“[t]his Court has frequently relied on [non-binding] international law sources to assist in delineating the breadth and content of *Charter* rights”) [emphasis in original].

[47] The ICCPR also contains an example of this second type of guarantee, which addresses equality on the basis of sex in the exercise of other rights and freedoms. In fact, art. 3 contains almost identical language to s. 28 of the *Charter*:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

[48] As the Court of Appeal acknowledged, s. 28's language is not novel; it is "closely related" to art. 3 of the ICCPR.⁴⁴

[49] The ICCPR was ratified by Canada in 1976. In 1980, the Chief Commissioner of the Canadian Human Rights Commission stressed, when discussing the language that would become s. 28 of the *Charter*:⁴⁵

Scholars will know, and deputies and senators will know this is not special language, it comes from international treaties now ratified by Canada.

[50] Just like s. 10 of the 1975 *Québec Charter*, art. 3 of the ICCPR contains a substantive guarantee that grounds causes of action. It is well established that art. 3 is not redundant of the anti-discrimination provisions contained at art. 26 of the ICCPR. In *Türkan v Turkey*, for instance, the Human Rights Committee found that Turkey's prohibition on head coverings in the university setting constituted "intersectional discrimination" and "violated article 26 [general anti-discrimination provision] and article 3 [gender equality], in conjunction with ("lu conjointement avec") article 18, of the Covenant [freedom of religion]".⁴⁶

[51] Section 28 of the *Charter* is another instance of this second type of guarantee: just like s. 10 of the *Québec Charter*, it guarantees equal enjoyment of rights and freedoms, but – unlike s. 10 – it is restricted to the ground of sex.

⁴⁴ [QCCA](#) at para 441, **AR, vol 3 at 179**.

⁴⁵ Canada, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32-1, No 5 (14 November 1980) at 5:9, **BOA, Tab A3**.

⁴⁶ Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2274/2013, UNHRC, 123rd Sess, [UN Doc CCPR/C/123/D/2274/2013](#) at para 7.8 (*Türkan v Turkey*). See *Nevsun Resources Ltd v Araya*, [2020 SCC 5](#) at para 119.

[52] It is well established that s. 10 of the *Québec Charter*, a substantive guarantee of equality, necessarily operates in conjunction with one or more rights and freedoms:⁴⁷

[...] s. 10 requires that the plaintiff prove three elements: “(1) a ‘distinction, exclusion or preference’, (2) based on one of the grounds listed in the first paragraph, and (3) which ‘has the effect of nullifying or impairing’ the right to full and equal recognition and exercise of a human right or freedom”.

[53] In this regard, the Court of Appeal has explained:⁴⁸

Contrairement à la Constitution américaine et à la Charte canadienne qui reconnaissent le droit à l'égalité dans sa généralité, la Charte québécoise ne reconnaît qu'à l'égard des droits et libertés de la personne. L'égalité n'est pas envisagée comme un droit autonome mais comme une simple modalité de particularisation d'un autre droit [...].

[54] Importantly, finding a violation of s. 10 of the *Québec Charter* does not require finding that the underlying right is violated. As the Supreme Court explained in *Bombardier*:⁴⁹

[54] This means that the right to non-discrimination cannot serve as a basis for an application on its own and that it must necessarily be attached to another human right or freedom recognized by law. However, this requirement should not be confused with the independent scope of the right to equality; the Charter does not require a “double violation” (right to equality and, for example, freedom of religion), which would make s. 10 redundant: see, *inter alia*, D. Robitaille, “Non-indépendance et autonomie de la norme d'égalité québécoise: des concepts ‘fondateurs’ qui méritent d’être mieux connus” (2004), 35 R.D.U.S. 103.

[55] Professor Robitaille, cited by this Court in *Bombardier*, explains:⁵⁰

Si la norme d'égalité québécoise n'est susceptible d'aucune application indépendante, elle possède néanmoins une portée autonome. L'article 10 peut ainsi se trouver enfreint par une mesure conforme, en elle-même, aux exigences d'un autre article mais qui crée une inégalité de traitement dans la reconnaissance ou l'exercice du droit ou de la liberté consacrée par cette autre disposition.

⁴⁷ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aéronautique Centre de formation)*, [2015 SCC 39](#) at para 35 [**Bombardier**] [emphasis added]. See also *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021 SCC 43](#) at para 6.

⁴⁸ *Commission scolaire St-Jean-sur-Richelieu c Commission des droits de la personne du Québec*, [1994 CanLII 5706 \(CA\)](#) at para 59 [**Commission scolaire St-Jean-sur-Richelieu**].

⁴⁹ *Bombardier* at para 54 [emphasis added].

⁵⁰ David Robitaille, “Non-indépendance et autonomie de la norme d'égalité québécoise : des concepts ‘fondateurs’ qui méritent d’être mieux connus” (2004) 35 RDUS 103 at 128, 130-131, **BOA, Tab B3**.

Typographical error corrected at paragraph 59, 4th and 5th lines

D’ailleurs, si la violation de l’article 10 nécessitait celle concomitante d’un droit ou d’une liberté de la personne, une constatation de discrimination ne constituerait alors qu’une circonstance aggravante du non-respect du droit ou de la liberté invoqué.

[56] *Commission scolaire St-Jean-sur-Richelieu* confirms the independent scope of the right to equality under the *Québec Charter*: the provision can give rise to a remedy even where the underlying right does not. In that case, the Court of Appeal held that the school authorities’ refusal to pay for a support person for a child with autistic traits did not violate the s. 40 right to free, public education, but did violate the child’s s. 10 right to equal exercise of the s. 40 right.⁵¹

[57] Article 14 of the ECHR operates in the same way, i.e., it does not require a violation of the underlying right.⁵² The European Court of Human Rights has repeatedly held that “the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall ‘within the ambit’ of one or more of the Articles of the Convention”.⁵³

B. BILL 21 INFRINGES S. 28 OF THE CHARTER

(1) The prohibition on the wearing of religious symbols contained in s. 6 of Bill 21 disproportionately impacts Muslim women

[58] As the trial judge found, in light of all the evidence, the religious symbol ban contained at s. 6 disproportionately disadvantages women, in particular Muslim women, notably disproportionately impacting their exercise of freedom of religion and expression, and contributing to feelings of ostracization.⁵⁴

[59] As admitted by the Attorney General of Québec (“AGQ”), since the adoption of Bill 21, every documented case of a person denied employment or having lost their job because they wear religious symbols is of a Muslim woman who wears the hijab (the responses to access to information requests listed in footnote 56⁵⁵ correspond to the cases of loss of employment admitted to in the “Common admissions” document; the affidavits listed in footnote 56⁵⁵ are of

⁵¹ *Commission scolaire St-Jean-sur-Richelieu* at para 87.

⁵² See e.g. *Biao v Denmark* [ECHR], [No 38590/10](#) (24 May 2016) at paras 138-140 [*Biao*] (the Court finds violation of art. 14 of the Convention, read in conjunction with art. 8 (right to private and family life), without finding violation of art. 8).

⁵³ See e.g.: *EB v France* [ECHR], [No 43546/02](#) (22 January 2008) at para 47; *Biao* at para 88.

⁵⁴ *Hak c Procureur général du Québec*, [2021 QCCS 1466](#) at paras 67, 802-807, 1102 [TJ], **AR**, **vol 1 at 170-171, 233**.

confirmed cases in addition to those admitted to in the “Common admissions” document).⁵⁵ To obtain this information, and in addition to relying on evidence introduced through affidavits and through requests for documents addressed to the AGQ, access to information requests were sent with respect to every known organization and person covered by the prohibition on religious symbols (Schedule II of Bill 21),⁵⁶ without limitation to the education sector.⁵⁷ Furthermore, the uncontested evidence is that every documented case of a person who has had to remove their religious symbol in order to work is of a Muslim woman who wears the hijab.⁵⁸

[60] These admissions and uncontested evidence are bolstered in the record by broader evidence of social statistics and extensive qualitative evidence explaining why Muslim women

⁵⁵ **TJ** at para 805, **AR, vol 1 at 171**; “Admissions communes de English Montreal School Board, Mubeenah Mughal, Pietro Mercuri et le Procureur Général du Québec” [**Common admissions**], EMSB-28-19 at para 4, **Record before the Court of Appeal [RCA], vol 20 at 6496-6497**; Commission scolaire de Laval’s response to Access to Information Request dated January 7, 2020, EMSB-28-9, **RCA, vol 18 at 5801-5803**; Commission scolaire des Affluents’ response to Access to Information Request dated December 4, 2019, EMSB 28-8, **RCA, vol 18 at 5796-5800**; Commission scolaire de la Pointe-de-l’Île’s responses to Access to Information Request dated March 9, 2020, and August 13, 2020 and Power Law’s request for details dated July 30, 2020, Filed jointly, EMSB 28-12.1, **RCA, vol 18 at 5827-5839**; Commission scolaire de la Seigneurie des-Mille-Îles’ response to Access to Information Request dated December 5, 2019, EMSB 28-11, **RCA, vol 18 at 5814-5816**; Commission scolaire Marie-Victorin’s response to Access to Information Request dated November 7, 2019, EMSB-28-13.1/CV-1, **RCA, vol 19 at 6158-6162**; Affidavit of C. Vandal (Centre de services scolaire Marie-Victorin), EMSB-28-13.1, **RCA, vol 19 at 6156-6157**; Commission scolaire de Montréal’s response to Access to Information Request dated December 11, 2019, EMSB-28-10, **RCA, vol 18 at 5804-5813**; Affidavit of Ann Watson, EMSB-23-42 at para 5 [**Watson Affidavit**], **RCA, vol 16 at 5163**; Emails (redacted) between A. Watson and teacher applicants, EMSB-23-42-1/AW-1, **RCA, vol 16 at 5166-5170**; Déclaration sous serment de S.B.R., September 18, 2019, **RCA, vol 3 at 494.188-494.194**; Déclaration sous serment de M. Najdi, September 19, 2019, **RCA, vol 3 at 494.202-494.215**; Déclaration sous serment de S.H., September 26, 2019, **RCA, vol 2 at 494.143-494.150**; Examination of Me L. Bellerose, Centre de services scolaire de Montréal [**CSSDM**], August 25, 2020 at 38 (“*huit femmes [...] huit hijabs*”), **RCA, vol 24 at 7744**.

⁵⁶ For which the AGQ had not provided complete responses to requests for Documents.

⁵⁷ Common admissions, EMSB-28-19 at para 2, **RCA, vol 20 at 6495-6496**; “Liste d’organismes auxquels une demande d’accès à des documents a été envoyée au nom d’EMSB et al”, EMSB-28-19/AC-2, **RCA, vol 20 at 6501-6511**; “Liste des personnes pour lesquelles une demande de communication de documents a été envoyée au Procureur général du Québec, au nom d’EMSB et al”, EMSB-28-19/AC-3, **RCA, vol 20 at 6512-6513**.

⁵⁸ Examination of Me L. Bellerose, CSSDM, August 25, 2020 at 34-35, 38-41, **RCA, vol 24 at 7740-7741, 7744-7747**.

are more severely impacted by the law⁵⁹ (as the trial judge found, “[d]e toutes les personnes visées, les femmes de confession musulmane apparaissent particulièrement vulnérables”⁶⁰), specifically:

(a) evidence admitted to by the AGQ regarding persons occupying positions covered by the religious symbol ban and regarding Québec’s teaching population: two times more women than men occupy positions covered by the ban;⁶¹ persons working in the education sector, which is predominantly female, constitute 78% of persons occupying positions covered by the ban;⁶²

(b) uncontested evidence regarding Québec’s religious demographics and religious symbols worn: Muslims constitute the second largest religious group in Québec after Christians and the hijab is worn by around 50% of Muslim women in Québec;⁶³

(c) uncontested evidence regarding the visibility and perception of religious symbols in Canada and Québec: the hijab, unlike the cross around the neck, cannot be concealed;⁶⁴ at the largest organization covered by Bill 21 (the Centre de services scolaire de Montréal),⁶⁵ questions put to human resources about the application of Bill 21 only concern the hijab;⁶⁶ the hijab is considered the most “disturbing” religious symbols in Québec, attracting the most negative

⁵⁹ *R v Sharma*, [2022 SCC 39](#) at 49-57; *Fraser v Canada (Attorney General)*, [2020 SCC 28](#) at paras 42, 57-58 [*Fraser*]; *Withler v Canada (Attorney General)*, [2011 SCC 12](#) at para 43; *Ontario (Attorney General) v G*, [2020 SCC 38](#) at para 43 [*AGO v G*].

⁶⁰ [TJ](#) at para 805, **AR, vol 1 at 171**.

⁶¹ Common admissions, EMSB-28-19/AC-4, Tab A, **RCA, vol 20 at 6515**.

⁶² Common admissions, EMSB-28-19/AC-4, Tab A, **RCA, vol 20 at 6515** [(103 588 / 131 406) * 100 = 78.83%]; see Tab H, **RCA, vol 20 at 6570-6584**); Extracts of statistics concerning school boards’ staff from 2010 to 2019 from the Ministère de l’Éducation et de l’Enseignement supérieur available at the Banque de données des statistiques officielles sur le Québec, EMSB-28-4.2, **RCA, vol 18 at 5735-5738**). See [TJ](#) at para 802, **AR, vol 1 at 170**.

⁶³ Expert report of S. Lefebvre [*Lefebvre Report*], EMSB-28-16 at paras 10, 15, 17 (table), 28, **RCA, vol 31 at 10087, 10089-10090, 10093-10094**; Affidavit of K. Neuman, EMSB-28-14, **RCA, vol 20 at 6163-6165**; Detailed Data Tables from Survey of Muslims in Canada 2016, EMSB-28-14-1/KN-1 at 42 of 255, **RCA, vol 20 at 6207**. See [TJ](#) at para 806, **AR, vol 1 at 171**.

⁶⁴ Lefebvre Report, EMSB-28-16 at para 27, **RCA, vol 31 at 10093**.

⁶⁵ Common admissions, EMSB-28-19/AC-4 at 3 of 15, 8 of 15, 13 of 15, **RCA, vol 20 at 6572, 6577, 6582**.

⁶⁶ Examination of Me L. Bellerose, CSSDM, August 25, 2020 at 12, 82, **RCA, vol 24 at 7718, 7788** (“100 % de nos cas ont impliqué le hijab, la seule chose que je peux dire. J’ai eu aucune autre question sur aucun autre signe religieux.”).

attention (at the opposite end of the spectrum, the presence of the cross is normalized);⁶⁷ and the visibility of the hijab is directly tied to the discrimination and hate crimes faced by Muslim women in Québec;⁶⁸ and

(d) evidence regarding the different role of religious symbols for non-Christians, specifically Muslim women: unlike Christianity, the dominant religion in Québec, which is described by Université de Montréal expert Solange Lefebvre as an “*orthodoxie*” (“*on [insiste] davantage sur le contenu des croyances*”), for Muslims, wearing religious symbols is a core aspect of religious practice (“*orthopraxie*”);⁶⁹ wearing the hijab has a doctrinal source in addition to having an important religious significance to Muslim women in Québec who wear it.⁷⁰

[61] There is also extensive evidence in the record of how Bill 21 exacerbates pre-existing disadvantage:

(a) uncontested evidence regarding pre-existing disadvantage faced by Muslim women in Canada and Québec: throughout Canada, Muslim women earn among the lowest average incomes

⁶⁷ Expert report of P. Eid [**Eid Report**], EMSB-28-17 at para 42, **RCA, vol 31 at 10220-10221**. See also, **TJ** at para 804, **AR, vol 1 at 171**; Examination-in-Chief of expert D. Koussens, November 23, 2020 at 68, 77, **RCA, vol 29, 9511, 9513**; Examination-in-Chief of expert J. Beauchemin, November 17, 2020 at 45-46, **RCA, vol 28 at 9254.15**; Cross-Examination of J. Beauchemin, November 17, 2020 at 117, 123-124, 126-128, **RCA, vol 28 at 9254.33, 9254.35-9234.36**; Cross-Examination of J. Beauchemin, November 18, 2020 at 23-24, **RCA, vol 29 at 9264**; Examination-in-Chief of expert G. Legault, 16 November 2020 at 52-54 (“*les signes peuvent avoir une force symbolique différente*”), **RCA, vol 28 at 9103**.

⁶⁸ Eid Report, EMSB-28-17 at paras 63-64, **RCA, vol 31 at 10233-10234**; Examination-in-Chief of expert P. Eid, November 3, 2020 at 53, 57-58, **RCA, vol 25 at 8003, 8007-8008**; AGQ Exhibit PGQ-13 at 19, **RCA, vol 9 at 2786**; Second Supplementary Expert Report of P. Eid, EMSB-28-17.3 [**Eid Second Supp Report**], **RCA, vol 34 at 11490-11491**.

⁶⁹ Examination-in-Chief of expert S. Lefebvre, November 6, 2020 at 25-29, **RCA, vol 26 at 8461-8462**, November 9, 2020 at 19, **RCA, vol 26 at 8478**; Lefebvre Report, EMSB-28-16 at paras 22-23, **RCA, vol 31 at 10091-10092**.

⁷⁰ See e.g. Déclaration sous serment de H. Dadouche, June 18, 2019 at paras 5-6, **RCA, vol 2 at 494.57**; Déclaration sous serment de B. Chelbi, March 12, 2020 at paras 9-10, **RCA, vol 15 at 4602**; Eid Report, EMSB-28-17 at para 108, **RCA, vol 31 at 10258-10259**; Lefebvre Report, EMSB-28-16 at para 26, note 26, **RCA, vol 31 at 10093**; Examination-in-Chief of expert S. Lefebvre, November 6, 2020 at 30-36, **RCA, vol 26 at 8462-8464**; Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], 27 January 2015, Case Nos 1 [BvR R 471/10](#) & 1 [BvR 1181/10](#) (Germany) at paras 89-90 [Case Nos 1 BvR R 471/10 & 1 BvR 1181/10], discussed in Expert Report of P. Bosset and D. Koussens, EMSB-REP-3 at para 83 [**Bosset/Koussens Report**], **RCA, vol 34 at 11406**; Examination-in-Chief of expert P. Bosset, November 24, 2020 at 89-93, **RCA, vol 29 at 9539-9540**; Examination-in-chief of expert D. Koussens, November 24, 2020 at 43-49, **RCA, vol 29 at 9505-9506**.

and have among the highest rates of unemployment (despite their education levels), face discrimination in access to employment, and are among those most targeted for harassment and hate crimes (and in Québec are the most targeted);⁷¹ and

(b) qualitative evidence about the range of harms faced by Muslim women in connection with Bill 21: increase in prejudice, harassment and assaults faced by Muslim women, in addition to the severe harm of loss of employment and professional mobility.⁷²

⁷¹ Eid Report, EMSB-28-17 at paras 20, 25-27, 78, 83, **RCA, vol 31 at 10207-10208, 10211-10212, 10243, 10246**; Eid Second Supp Report, EMSB-28-17.3, **RCA, vol 34 at 11490-11491**.

⁷² Where the public associates legislative restrictions with a given social group, prejudice towards that group is expected to increase, as accepted by the trial judge at **TJ** at para 996, **AR, vol 1 at 213** (Expert report of Eric Hehman, EMSB-28-18 at paras 8-15 [**Hehman Report**], **RCA, vol 32 at 10549-10550**; Examination-in-Chief of expert E. Hehman, November 4, 2020 at 14-18, **RCA, vol 25 at 8170-8171**). For examples of quasi-official discourse focusing on Muslim women, see: Extract of the Coalition Avenir Québec website entitled “Neutralité religieuse : la CAQ abrogera la loi 62 et fera adopter une véritable Charte de la laïcité” dated October 18, 2017, EMSB-28-1, **RCA, vol 18 at 5710**; CBC News, “Muslim head scarf a symbol of oppression, insists Quebec minister for status of women” dated 6 February 2019, EMSB-28-2, **RCA, vol 18 at 5712-5714**; Global News, “Quebec status of women minister calls Muslim head scarf a symbol of oppression” with video from web page dated 6 February 2019, EMSB-28-2, **RCA, vol 18 at 5715-5719**. Uncontested evidence establishes that Islam has been the “focal point” of Québec debates around religious diversity since 2006 and up until today (Eid Report, EMSB-28-17 at paras 46-47, **RCA, vol 31 at 10223-10224**; Re-examination of expert J. Maclure, November 5, 2020 at 180-183, **RCA, vol 26 at 8369-8372**). A 2020 survey establishes that the Québec population most associates Bill 21 with Islam and the hijab (Hehman Report, EMSB-28-18 at paras 28-36, **RCA, vol 32 at 10553-10557**). Muslim women who wear religious symbols recount the increase in insulting comments, negative attitudes and assaults at their behest around the time Bill 21 was tabled (Examination-in-Chief of M. Dridj, November 2, 2020 at 17-18, **RCA, vol 25 at 7865-7866**; Déclaration sous serment de I. Hak, June 13, 2019 at para 39, **RCA, vol 2 at 494.13**; Affidavit of F. Ahmad, June 13, 2019 at paras 11-12, **RCA, vol 2 at 494.27**).

[62] All of the evidence regarding the disparate impacts of Bill 21 on Muslim women must be assessed in light of the gendered purpose of the law,⁷³ as well as the National Assembly’s avowed intent to ban religious symbols it considers contrary to gender equality⁷⁴ and the fact that Muslim women have been the focal point of the public debates surrounding Bill 21⁷⁵ – both findings of fact of the trial judge.

[63] Contrary to what the AGQ has suggested, persons benefiting from Bill 21’s “grandfather clause” must be included in the assessment of discriminatory adverse impacts. Persons “grandfathered” under s. 31 of Bill 21 are still subjected to the prohibition under s. 6: s. 31 simply carves out an exception as long as the person is exercising “the same function within the same organization”. As the trial judge found, persons “grandfathered” under s. 31 face harsh professional and psychological impacts as a result of s. 6: they are frozen in their current positions, denied both upwards mobility towards leadership roles, and lateral mobility as between organizations.⁷⁶ The evidence also indicates that “grandfathered” persons face increased stigma, prejudice and emotional distress.⁷⁷

[64] The AGQ has also erroneously tried to argue that adverse impacts should be assessed based merely on a calculation of who wears religious symbols among persons subject to Bill 21

⁷³ Bill 21, Preamble (“AS the Québec nation attaches importance to the equality of women and men”). The legislature “does not speak in vain” (*AG (Que) v Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831 at 838; Sullivan at 440-441, **BOA, Tab B4**). Gender equality would not be referenced in the Preamble of a law on religious symbols if the National Assembly conceived of such symbols and their ban in a gender-neutral fashion. Preambles are recognized by this Court as an apt reflection of legislative purpose (*Rawluk v Rawluk*, [1990] 1 SCR 70 at 90).

⁷⁴ **TJ** at paras 803, **AR, vol 1 at 171**; Québec, Assemblée nationale, Commission permanente des institutions, Journal des débats de la Commission permanente des institutions, 42-1, vol 45, n°33 (7 mai 2019) EMSB-28-3 at 6 of 7, **RCA, vol 18 at 5726**. CBC News article “Muslim head scarf a symbol of oppression, insists Quebec’s minister for status of women” and Global News article “Quebec status of women minister calls Muslim head scarf a symbol of oppression” with video from web page, EMSB-28-2, **RCA, vol 18 at 5712-5720** (video filed separately on CD-ROM, **AR, vol IV, tab M**).

⁷⁵ **TJ** at para 803-804, **AR, vol 1 at 171**.

⁷⁶ **TJ** at paras 998, 1102, **AR, vol 1 at 213, 233**.

⁷⁷ Examination-in-Chief of B. Chelbi, November 3, 2020 at 14-15, **RCA, vol 25 at 7900-7901**; Examination-in-Chief of M. Dridj, November 2, 2020 at 13-14, **RCA, vol 25 at 7861-7862**; Examination-in-Chief of expert T. Dee, November 4, 2020 at 44-47, **RCA, vol 25 at 8151-8152**; Hehman Report, EMSB-28-18 at para 36, **RCA, vol 32 at 10557**.

or who wish to work in categories of employment subject to Bill 21 (a calculation which the AGQ maintained was impossible to carry out in any case). Who wears religious symbols is not at all determinative of disparate impact; the question – from a substantive equality perspective – is whose religious symbols are visible, whose religious symbols attract attention, and who is losing their job and facing increased stigma because of the law.⁷⁸

[65] Of course, not all women must be impacted by a measure for a gender-based protection to be triggered.⁷⁹ Section 28, which must be read with another right or freedom, is designed to remedy partial discrimination that raises another operative distinction in addition to gender. Parliamentarians in 1981 were alive to s. 28's role in protecting women who were also members of other marginalized groups.⁸⁰

[66] In sum, Muslim women are disproportionately impacted in the exercise of their freedom of religion and expression – the ambit⁸¹ of s. 2(a) and (b) – and face disproportionate discrimination on the ground of religion – the ambit of s. 15 – in violation of s. 28.

(2) The prohibition on face coverings contained in s. 8 only applies to Muslim women

[67] Section 8 of Bill 21 (the ban on face coverings) also infringes s. 28, by preventing Muslim women from exercising their freedom of religion and expression – the ambit of s. 2(a) and (b) – and discriminating against Muslim women – the ambit of s. 15. Unlike s. 6 of Bill 21, which could affect groups in addition to Muslim women, s. 8 can only apply to Muslim women. The only religious symbols that cover a person's face in Québec contemporary society are those worn by Muslim women (the niqab or the burqa).⁸² By singling out Muslim women who wear the niqab or the burka for sweeping exclusion from employment in the public service, s. 8 “itself invokes prejudicial and stereotypical views about [these women], feeding harmful stigma” against them.⁸³ Such a targeted measure “sends a strong and sinister message” to all members of Québec society that these Muslim women are less worthy of participating in society through

⁷⁸ See e.g. *AGO v G* at para 43; *Fraser* at para 42.

⁷⁹ *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at 1288-1289; *Fraser* at paras 72-74.

⁸⁰ Canada, House of Commons Debates, 32-1, No 7 (4 March 1981) at 7898 (Hon Pauline Jewett), **BOA, Tab A4**; Canada, House of Commons Debates, 32-1, No 12 (24 November 1981) at 13198 (Hon Margaret Mitchell), **BOA, Tab A10**.

⁸¹ See paragraph 57 above.

⁸² Lefebvre Report, EMSB-28-16 at para 34, **RCA, vol 31 at 10096**.

⁸³ *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 65, 67.

public service, and less worthy of having their fundamental religious freedom protected.⁸⁴ The evidence establishes an increase in prejudice, harassment and assaults faced by Muslim women as a result of Bill 21.⁸⁵ These harms are sufficient to establish an infringement of s. 28.⁸⁶

C. THE INFRINGEMENTS OF S. 28 ARE NOT SAVED UNDER S. 1

[68] A s. 1 justification is not available because the AGQ neither pled, nor argued, s. 1. Indeed, the AGQ's position that it was not invoking s. 1 made justification evidence irrelevant – and related discovery rights were restricted for this reason.⁸⁷ The s. 1 analysis is a “process of demonstration” that falls on the Government;⁸⁸ the absence or insufficiency of Government submissions on s. 1 must lead the Court to conclude that *Charter* infringements are not justified.⁸⁹

[69] The language and history of s. 28 require that any infringement to s. 28 be subject to a particularly stringent justification standard. This requirement has been adopted by this Court in the context of s. 23 and s. 3 (the right to vote) based on their exclusion from the notwithstanding clause⁹⁰ – which is precisely the case for s. 28, as seen in part A(2) above.

[70] In any case, the infringements of s. 28 in the instant case are not justified under s. 1. While Bill 21's Preamble references gender equality, all the evidence in the record indicates that Bill 21 harms women, without promoting their equality in any way: (a) the women being denied employment – or who could be denied employment – because of Bill 21 are educated women seeking jobs as teachers or in the public service; (b) the majority of Muslim women in Québec who wear the hijab choose to do so, often against the wishes of their families, and adhere

⁸⁴ *Vriend v Alberta*, [1998] 1 SCR 493 at paras 100-102.

⁸⁵ Affidavit of F. Ahmad, June 13, 2019 at paras 11-12, **RCA**, vol 2 at 494.27. See *supra* note 72 regarding increase in prejudicial attitudes.

⁸⁶ *AGO v G* at para 65, 67.

⁸⁷ Avis de gestion du Procureur général du Québec et pièces au soutien, August 25, 2020, at paras 8, 13, **RCA**, vol 3 at 608.2-608.3; Jugement de la Cour supérieure accueillant l' Avis de gestion du Procureur général du Québec (Blanchard, J.C.S.), September 1, 2020, **RCA**, vol 3 at 608.37-608.38.

⁸⁸ *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 128-129; *Health Services* at para 139.

⁸⁹ *Reference re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 at paras 278-280; *R v Ruzic*, 2001 SCC 24 at paras 91.

⁹⁰ *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 148 [**CSFCB**].

strongly to values of gender equality;⁹¹ and the affiants in this case are examples of women autonomously exercising their freedom of religion.⁹² In short, there is no rational connection between (a) promoting gender equality and (b) preventing women who wear religious symbols from working. The idea that the ban on religious symbols may somehow “liberate” affected women finds no support in, and is contradicted by, the evidence. As the ECHR has held, “a State Party cannot invoke gender equality in order to ban a practice that is defended by women [...] in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms”.⁹³

[71] The government led no evidence suggesting that Bill 21 could promote gender equality.⁹⁴ The trial judge found that Bill 21 has only negatively impacted women.⁹⁵

D. BILL 21 VIOLATES THE S. 23 RIGHT OF MANAGEMENT AND CONTROL

[72] At the heart of this case is also the right of management and control under s. 23 of the *Charter*, recently reaffirmed in strong terms by the Québec Court of Appeal in *QESBA*.⁹⁶

[73] This Court explained in *Mahé* that s. 23’s guarantee of management and control is rooted in the provision’s purpose, i.e., “to preserve and promote minority language and culture throughout Canada”, and its text and history.⁹⁷ The core function of management and control is to “protect an official language minority from the effects of decisions of the majority in the area of education by granting the minority a certain autonomy in relation to its education system”.⁹⁸

⁹¹ Eid Report, EMSB-28-17 at paras 15, 105-106, 108, 112, **RCA, vol 31 at 10204, 10257-10259, 10261.**

⁹² See e.g. Déclaration sous serment de F.B., September 18, 2019 at paras 6-7, **RCA, vol 3 at 494.159**; Déclaration sous serment de Ghadir Hariri, June 21, 2019 at paras 8-10, **RCA, vol 2 at 494.79**; Déclaration sous serment de de I. Hak, June 13, 2019 at para 13, **RCA, vol 2 at 494.10.**

⁹³ *S.A.S. v France* [ECHR], [No 43835/11](#) (1 July 2014) at para 119, discussed in Bosset/Koussens Report, EMSB-REP-3 at para 121, **RCA, vol 34 at 11418** [emphasis added].

⁹⁴ See e.g. Demande de communication de documents des demandeurs à la défenderesse en date du 13 janvier 2020, P-20 [LAUZON], **RCA, vol 14 at 4496-4500**; Réponse de la défenderesse à la demande de communication de documents des demandeurs en date du 27 février 2020, P-21 [LAUZON], **RCA, vol 15 at 4501-4504.**

⁹⁵ **TJ** at paras 67-69, 807, 1102, **AR, vol 1 at 18, 171, 233.**

⁹⁶ *Procureur général du Québec c Quebec English School Boards Association*, [2025 QCCA 383](#) at paras 109, 117, 132, 143, 174, 192, 194 [*QESBA*].

⁹⁷ *Mahé v Alberta*, [\[1990\] 1 SCR 342](#) at 369-373 [*Mahé*].

⁹⁸ [CSFCB](#) at para 149 [emphasis added].

[74] Since *Mahé*, this Court has recognized that the right of management and control is a fundamental attribute of s. 23 and is notably distinct from the right to a substantively equivalent educational experience.⁹⁹ Numerous cases, including of this Court, have granted constitutional remedies for violations of the right of management and control.¹⁰⁰ The Court of Appeal’s suspicious – if not hostile – attitude towards the right to management and control in this case,¹⁰¹ which permeates the entire decision on s. 23, is both erroneous and incongruous; more recently, in *QESBA*, the Court of Appeal reaffirmed the importance of the management and control right in very strong terms.¹⁰²

[75] This Court has emphasized that management and control “are critical to the enjoyment of s. 23 rights”:¹⁰³

[45] [...] First, they are essential to the preservation and enhancement of minority language education and culture. [...] management and control are necessary “because a variety of management issues in education, e.g., curricula, hiring and expenditures, can affect linguistic and cultural concerns”. Second, the right to management and control furthers the remedial goals of s. 23. Empowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns.

[76] Bill 21 infringes s. 23 management and control rights in three profound ways: (1) it trenches upon core areas of the minority school boards’ exclusive authority, without regard for the particular circumstances and needs of the English-language community; (2) it interferes with the English-language community’s cultural concerns; and (3) it disempowers the English-

⁹⁹ *Mahé* at 378.

¹⁰⁰ See e.g. *Mahé* at 393-94; *Arsenault-Cameron v Prince Edward Island*, [2000 SCC 1](#) at paras 60-62 [*Arsenault-Cameron*]; *QESBA* at paras 142-143, 159, 170, 174, 179-180, 187, 194, 208, confirming *Quebec English School Boards Association v Procureur général du Québec*, [2023 QCCS 2965](#); *Reference re Public Schools Act (Man)*, s. 79(3), (4) and (7), [\[1993\] 1 SCR 839](#) at 865-66 [*Reference re Public Schools Act (Man)*]; *re Education Act of Ontario and Minority Language Education Rights*, [\[1984\] OJ No 3260 \(CA\)](#) at paras 80, 107-10; *Assn. des parents francophones de la Colombie-Britannique v British Columbia*, [1998 CanLII 3969 \(BC SC\)](#) at paras 48-59; *L’Association des parents francophones de la Colombie-Britannique, La Fédération des francophones de la Colombie-Britannique v Woods*, [1996 CanLII 1455 \(BC SC\)](#) at paras 37, 40, 47-48, 53; *Commission des écoles fransaskoises Inc et al v Saskatchewan*, [1988 CanLII 5128 \(SK KB\)](#) at paras 46, 53.

¹⁰¹ [QCCA](#) at para 562, **AR, vol 3 at 220**.

¹⁰² *Supra* note 96.

¹⁰³ *Arsenault-Cameron* at para 45.

language community in its efforts to promote its own vitality by fostering the success of its more vulnerable members and the community's cohesion. Each of these intrusions into s. 23 management and control constitutes a breach of s. 23.

(1) Bill 21 trenches upon a core area of minority school boards' exclusive authority

[77] In *Mahé*, this Court identified five core areas of exclusive management and control:¹⁰⁴

- (a) expenditures of funds provided for such instruction and facilities;
- (b) appointment and direction of those responsible for the administration of such instruction and facilities;
- (c) establishment of programs of instruction;
- (d) recruitment and assignment of teachers and other personnel; and
- (e) making of agreements for education and services for minority language pupils.

[78] As the Court of Appeal has held, s. 23 management and control rights “must at a minimum, ensure ‘exclusive control over’”¹⁰⁵ the five listed areas from *Mahé*. In *Mahé*, Dickson CJ stressed that “a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns. I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues.”¹⁰⁶

[79] Exclusive authority does not mean that there is no role whatsoever for the Province to regulate these areas. Rather, as the Court put it in *Arsenault-Cameron*:¹⁰⁷

[53] The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.

[80] Thus, what exclusive authority does mean is that provincial standards and requirements cannot be uniformly imposed upon the official language minority without regard for its specific circumstances and needs, and certainly not over the express insistence of its elected school board representatives that such measures are not adapted to, and are in fact harmful to, the minority. As

¹⁰⁴ *Mahé* at 377 [emphasis added].

¹⁰⁵ *Procureur général du Québec c Québec English School Board Association*, [2020 QCCA 1171](#) at para 21 [emphasis in original] (decision on the stay). See also [QESBA](#) at paras 173, 198.

¹⁰⁶ *Mahé* at 372.

¹⁰⁷ *Arsenault-Cameron* at para 53 [emphasis added]. See also *Mahé* at 373.

the Court of Appeal recently reaffirmed in *QESBA*, drawing on this Court’s decision in *Arsenault-Cameron*, s. 23 “imposes an obligation on governments to take the educational needs of the linguistic minority into account”¹⁰⁸ and its implementation “will require the fullest understanding of the needs of the [linguistic] minority”.¹⁰⁹ In *QESBA*, the Court of Appeal notably invalidated a legislative measure that resulted in English school boards losing control over the expenditure of funds (the first of the *Mahé* listed areas): “minority representatives lose control over these subsidies, since they must be used for specific purposes that do not necessarily correspond to the minority’s needs, objectives or linguistic and cultural interests”.¹¹⁰

[81] In short, legislative measures that are not responsive to the linguistic minority community’s needs in the listed areas from *Mahé* infringe s. 23 and must be justified under s.1.

[82] Often, even in the listed areas from *Mahé*, the application of provincial standards to s. 23 schools will give rise to no difficulties, as s. 23 school boards can be expected to support measures that are in the best interests of their students (e.g., a requirement that teachers not only undergo criminal background checks, but also follow certain training). However, courts should view with considerable skepticism, and strict scrutiny, the imposition of standards regulating these five areas that are developed by and for the majority, over the vigorous objections of s. 23 school boards. It will be rare that a province can demonstrate that such standards are nevertheless responsive to the particular circumstances and needs of the minority.

[83] Bill 21 significantly interferes with English school boards’ exclusive authority over the “recruitment and assignment of teachers and other personnel” and the “appointment and direction of those responsible for the administration of” its schools (two of the *Mahé* listed areas). It notably prohibits English school boards from recruiting as teachers Muslim women who wear a hijab.¹¹¹ There is no basis whatsoever to conclude that, despite the objections of English school boards – indeed their “unanimous institutional opposition”¹¹² – Bill 21 is somehow responsive to the particular circumstances and needs of the English-language community.

¹⁰⁸ *QESBA* at para 234.

¹⁰⁹ *QESBA* at para 237, citing *Reference re Public Schools Act (Man)* at 862.

¹¹⁰ *QESBA* at para 205.

¹¹¹ See e.g. Watson Affidavit, EMSB-23-42-1/AW-1 at 1 of 4, **RCA, vol 16 at 5166**.

¹¹² **TJ** at para 992 (“*opposition institutionnelle unanime*”), **AR, vol 1 at 211**; Expert report of Jocelyn Maclure, EMSB-23-48 at para 43 [**Maclure Report**], **RCA, vol 30 at 10030**; Brief regarding Bill 21 by the EMSB, EMSB 23-39, **RCA, vol 16 at 5028-55**; Brief regarding Bill 60

(2) Bill 21 interferes with the English-language community’s cultural concerns

(a) Management and control guarantees exclusive control over both linguistic and cultural concerns – and culture is not subsumed within language

[84] The jurisprudence is unequivocal: representatives of the minority language group have “exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns”.¹¹³ This principle is given effect through the following test: government measures can regulate official language minority education but only “in so far as they do not interfere with the linguistic and cultural concerns of the minority”.¹¹⁴

[85] The Court of Appeal’s conclusion in this case that “culture” under s. 23 can only be protected “through the medium of language itself”¹¹⁵ is incompatible with this Court’s jurisprudence. First, this Court has consistently referred to both culture and language in articulating s. 23’s purpose and the scope of management and control rights. Indeed, the majority in *CSFCB* emphasized that “Section 23 is intended to preserve culture and language, two core elements of the notions of identity and well-being of individuals and communities”, citing to W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*.¹¹⁶ In this work,

by the EMSB, EMSB-23-40, **RCA, vol 16 at 5056-78**; Brief regarding the Bouchard-Taylor Commission by the QESBA, EMSB 23-41-1, **RCA, vol 16 at 5082-113**; Brief regarding Bill 60 by the QESBA, EMSB-23-41-2, **RCA, vol 16 at 5114-31**; Brief regarding Bill 62 by the QESBA, EMSB-23-41-3, **RCA, vol 16 at 5132-40**; Brief regarding Bill 21 by the QESBA, EMSB-23-41-4, **RCA, vol 16 at 5141-57**; Joint Statement on Bill 21 by the QESBA and other English organizations, EMSB-23-41-5, **RCA, vol 16 at 5158-62**; Resolution of the Central Québec School Board, EMSB-23-27, **RCA, vol 15 at 4878-79**; Resolution of the Eastern Shores School Board, EMSB-23-28 at 0398, **RCA, vol 15 at 4899**; Press Release of the Eastern Townships School Board, EMSB-23-29, **RCA, vol 15 at 4902-03**; Resolution of the EMSB, EMSB-23-30 at 14-15 of 16, **RCA, vol 15 at 4917-18**; Resolution of the EMSB’s Parents Committee, EMSB-23-31 at 4 of 8, **RCA, vol 16 at 4924**; Resolution of the Lester B. Pearson School Board, February 25, 2019, EMSB-23-32 at 5-7 of 14, **RCA, vol 16 at 4932-34**; Resolution of the Lester B. Pearson School Board, April 29, 2019, EMSB-23-33 at 99-100, **RCA, vol 16 at 4953-54**; Resolution of the New Frontiers School Board, EMSB-23-34 at 2-3 of 10, **RCA, vol 16 at 4967-68**; Resolution of the Riverside School Board, EMSB-23-35, **RCA, vol 16 at 4977-81**; Resolution of the Sir Wilfrid Laurier School Board’s Parents Committee, EMSB 23-36 at 808, **RCA, vol 16 at 4989**; Resolution of the Sir Wilfrid Laurier School Board, EMSB-23-37 at 15-18 of 23, **RCA, vol 16 at 5006-09**; Resolution of the Western Quebec School Board, EMSB-23-38 at 9-11 of 11, **RCA, vol 16 at 5024-26**.

¹¹³ *Mahé* at 375-376.

¹¹⁴ *Mahé* at 380; *Arsenault-Cameron* at para 53, cited in *QESBA* at para 236.

¹¹⁵ *QCCA* at para 557, **AR, vol 3 at 225**.

¹¹⁶ *CSFCB* at para 13.

Professor Kymlicka defines culture as “involv[ing] a shared history as well as a common language, and their embodiment in particular societal practices and institutions” and explains that “[a] common language, then, is necessary for a shared culture, but not sufficient”.¹¹⁷

[86] Recently, this Court stressed that s. 23 values “require preserving and developing the vitality not only of the minority language, but also of the minority culture”.¹¹⁸

[87] Second, s. 23 jurisprudence consistently stresses the preservation and development of official language minority communities and groups – not merely the two official languages. In *Arsenault-Cameron* – a management and control case – this Court affirmed that “[i]t is clearly necessary to take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community”.¹¹⁹

[88] Third, while this Court has indeed stressed the vital importance of language to culture, it has also specifically and separately emphasized the cultural significance of s. 23 schools. In fact, this Court’s decisions often discuss culture by itself, making clear that culture is not merely protected as an aspect of language. In *Mahé*, the Court noted that “minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture”.¹²⁰

[89] Likewise, in *Association des parents de l’école Rose-des-vents*, the Court relied on the Report of the Laurendeau-Dunton Commission (Book II) to highlight the distinct linguistic and cultural protections offered by official language minority schools:¹²¹

[27] [...] The gradual loss of the mother tongue is inevitable without some institution to give formal instruction in the language and to enhance its prestige by according it

¹¹⁷ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1996) at 103, n 29, **BOA, Tab B1**.

¹¹⁸ *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para 80 [emphasis added] [**CSFTNO**].

¹¹⁹ *Arsenault-Cameron* at para 27 [emphasis added].

¹²⁰ *Mahé* at 363 [emphasis added]. See also *Arsenault-Cameron* at paras 29-30.

¹²¹ *Association des parents de l’école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21 at para 27 [**RDV, CSFCB, et al**] [emphasis added], citing *Report of the Royal Commission on Bilingualism and Biculturalism, Book II, Education* (Ottawa: Queen’s Printer, 1968) at 8–9 [**B&B Report**], **BOA, Tab A2**.

some social recognition. At the same time, minority-language schools can adapt the curriculum to stress the cultural heritage of the minority group.

[90] Indeed, that Report further supports the protection of minority culture under s. 23 as distinct from language. The Commission explains in the General Introduction, when interpreting its terms of reference, that it adopts a definition of culture for all six books of the Report:¹²²

35. Before exploring the relationship between language and culture, and even before analyzing the concept of biculturalism, we wish to dwell for an instant on the word “culture” and explain the sense in which we shall use it. [...]

38. The reality covered by the neologisms “biculturalism” and our definition of “bicultural” appears to us to be broader, including more than intellectual and artistic activity. Moreover, the majority of briefs dealing with this question chose this broader conception of culture. In this sense, which we ourselves shall use, culture is a way of being, thinking, and feeling. It is a driving force animating a significant group of individuals united by a common tongue, and sharing the same customs, habits, and experiences. Clearly the two cultures designated in our terms of reference are those associated with the English and the French languages in Canada. But as there are the two dominant languages, there are two principal cultures, and their influence extends, in greatly varying degrees, to the whole country. [...]

56. We conclude that the vitality of the language is a necessary condition for the complete preservation of a culture, but it is not at all the sole condition. A thorough treatment of the problem of bilingualism is necessary in our Report, but it would be quite insufficient, and in the last analysis illusory, to limit ourselves to this problem and to neglect other conditions equally vital to the maintenance and progress of the English and French cultures in Canada. We emphasize once again that this is why the Commission felt it had to give a broad interpretation – the only realistic kind – to its terms of reference.

[91] Book II on Education emphasizes that “[t]his Book is not an isolated study, but is a segment of the total Commission Report”.¹²³ It reiterates that “[l]anguage and culture are not synonymous”.¹²⁴ Throughout Book II, the Commission repeatedly stresses the role of minority-language schools in protecting the minority’s “cultural heritage”, as distinct from its language:¹²⁵

382. [...] Minority-language students belong to a separate cultural group and they must be introduced to their own society and its place within the larger provincial and national structure. This approach is based on sound pedagogical principles and it is

¹²² Canada, *Report of the Royal Commission on Bilingualism and Biculturalism*, vol 1, General Introduction (Ottawa: Queen’s Printer, 1967) at paras 35, 38, 56 of General Introduction [emphasis added] [**B&B Report, General Introduction**], **BOA, Tab A1**.

¹²³ B&B Report, Book II at para 804, **BOA, Tab A2**.

¹²⁴ B&B Report, Book II at para 9, **BOA, Tab A2**.

¹²⁵ B&B Report, Book II at paras 11, 29, 356, 382 [emphasis added], **BOA, Tab A2**. See also *RDV, CSFCB, et al*, at para 27.

also consistent with the objective of making the minority-language students aware of their own cultural heritage.

[92] The Court of Appeal cut down the cultural dimension of s. 23 management and control because no s. 23 case has, to date, been framed in such starkly cultural terms as this one.¹²⁶ Yet, the absence of such jurisprudence is not evidence of a rejection or attenuation of the official language minority's right to cultural autonomy within its schools. Rather, it is evidence of just how unprecedented it is, since the adoption of the *Charter*, for the official language majority to so brazenly impose its cultural values on the official language minority's schools.

[93] The Court of Appeal's decision, if upheld, leaves official language minority communities vulnerable to frontal attacks on their culture in their most vital institution for protecting and promoting that culture – their constitutionally-protected schools. For example, while the Court of Appeal's decision would ensure that English-language schools in Québec could teach Shakespeare and French-language schools in the rest of Canada could teach Molière,¹²⁷ it would offer no protection from legislation prohibiting schools from teaching about the *Grand dérangement* – the deportation of Acadians in the 18th century.

[94] Such a conclusion would strike a devastating blow to the purpose of s. 23. In interpreting the core content of s. 23 management and control in this case, this Court must also have regard to the impact that cutting out the cultural guarantee would have on French-language minority communities outside Québec.¹²⁸ For example, s. 23 jurisprudence from British Columbia has recognized the severe vulnerability of that province's French-language community to assimilation¹²⁹ – and the mutually reinforcing effects in resisting the force of assimilation of strong identification with Francophone culture and schooling that promotes such identification. Expert evidence accepted by the British Columbia Supreme Court established “that identification with Francophone culture is strongly correlated with school choice”: a strong Francophone identity makes parents more likely to enroll their children in s. 23 schools, whereas a weak Francophone identity is the most influential reason parents choose not to send their children to s.

¹²⁶ [QCCA](#) at paras 562–602, 606, **AR, vol 3 at 220-234, 236**.

¹²⁷ [QCCA](#) at para 612, **AR, vol 3 at 237**.

¹²⁸ *Solski (Tutor of) v Quebec (Attorney General)*, [2005 SCC 14](#) at para 5.

¹²⁹ [CSFCB](#) at paras 155-156.

23 schools.¹³⁰ At the same time, s. 23 schools “serve as a primary site for socializing children into the French language and culture”.¹³¹ The Court considered expert evidence stressing the importance of minority language schools in “building Francophone identity” and “preparing a new generation of community leaders” by, among other things, “emphasiz[ing] a positive relationship with and active enculturation in the French language and culture”.¹³² The Court also considered the French-language school board’s cultural pedagogy programming, which notably “asks teachers to model and foster in students a cultural identity, against the challenge of BC’s minority setting, where many families do not share the same background and history.”¹³³ Taking this evidence into account, the Court concluded that, for s. 23 “schools to have the best possible impact on [ethnolinguistic vitality] and assimilation, they need programmes to socialize children into the French language and culture.”¹³⁴ Yet, the Court of Appeal’s approach would open such vital cultural programming to direct regulation, and indeed, proscription by the majority. Significantly, in *CSFCB*, this Court overturned the trial judge’s conclusion that the high rate of assimilation in BC minimized the gravity of the deleterious effect within the s. 1 analysis, and instead insisted upon the need for robust s. 23 protections against the heightened threat of assimilation.¹³⁵

(b) The culture protected by s. 23 is distinct from any s. 93 guarantee

[95] Where it applies, s. 93(1) entrenches rights and privileges of denominational schools permitted by law at the time of Union, which have a denominational aspect or “which are necessary to give effects to denominational guarantees”.¹³⁶

[96] Although in 1867 “language and religion often went hand in hand,” this narrow denominational guarantee proved to be woefully inadequate to protect official language

¹³⁰ *Conseil-scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, [2016 BCSC 1764](#) at paras 597, 600, 963 (see also paras 595-605) [*CSFCB BCSC 2016*].

¹³¹ [CSFCB BCSC 2016](#) at para 368.

¹³² [CSFCB BCSC 2016](#) at para 1801.

¹³³ [CSFCB BCSC 2016](#) at para 1804.

¹³⁴ [CSFCB BCSC 2016](#) at para 1811.

¹³⁵ [CSFCB](#) at paras 144, 155-158.

¹³⁶ *Reference re Bill 30* at 1191, 1195 (per Wilson J. for the majority); *Greater Montreal Protestant School Board v Quebec (Attorney General)*, [\[1989\] 1 SCR 377](#) at 415.

minorities, particularly minority Francophone Catholic communities outside Québec. This situation was very much in the minds of the framers in adopting s. 23.¹³⁷

[97] Incongruously, in this case, the AGQ has attempted to invoke the failure of s. 93(1) to protect linguistic minority communities to insist that s. 23 must be similarly narrowly interpreted to provide no meaningful protection for the official language minority's culture. Yet, as the Court of Appeal recently recognized, when the Constitution was amended in 1997 to render s. 93 denominational guarantees inapplicable in Québec, it was understood that this would in no way diminish the English-speaking community's management and control rights – which would be better protected by s. 23.¹³⁸

[98] Culture, in the words of the Commission, and as found by the trial judge, is “a way of being, thinking, and feeling. It is a driving force animating a significant group of individuals united by a common tongue, and sharing the same customs, habits, and experiences”.¹³⁹ Culture cannot be equated with espousing a particular religious belief, as was protected under s. 93, and certainly no such issue arises in this case. There is no merit to any suggestion that EMSB et al, in seeking protection for the cultural value of open secularism, are seeking to revive a denominational guarantee. Nor would the viability of such an attempt, which raises manifest tensions with other *Charter* rights and freedoms, turn upon the outcome of this case.

(c) Bill 21 is incompatible with the minority language community's culture

i. The culture in Québec's English schools

[99] As the trial judge found, valuing religious diversity characterizes English schools in Québec: “*la preuve non contredite permet de conclure que les commissions scolaires anglophones et leurs enseignants.es ou directeurs.trices accordent une importance particulière à la reconnaissance et célébration de la diversité ethnique et religieuse*”.¹⁴⁰

[100] Valuing and celebrating religious traditions and diversity are consistently practiced as a way of life (“*la façon naturelle et souhaitable d'aménager la vie collective*”)¹⁴¹ in Québec's English schools, as amply set out in the uncontested voluminous evidence (principals'

¹³⁷ CSFCB at paras 7, 9-11.

¹³⁸ OESBA at paras 19-22.

¹³⁹ B&B Report, General Introduction at para 38, **BOA, Tab A1**.

¹⁴⁰ TJ at para 983, **AR, vol 1 at 208**.

¹⁴¹ Maclure Report, EMSB-23-48 at para 45, **RCA, vol 30 at 10031**.

affidavits;¹⁴² English education sector briefs on religious symbols bans;¹⁴³ school boards' diversity policies;¹⁴⁴ and school boards' public position statements on Bill 21¹⁴⁵). English schools are proactive in and pride themselves on introducing students to religious diversity in all of its forms.¹⁴⁶

¹⁴² **TJ** at para 983, **AR, vol 1 at 208**; Affidavit of Principal C. Beaulieu, EMSB-23-1 [**Beaulieu Affidavit**], **RCA, vol 15 at 4696-98**; Affidavit of Principal G. Cacchione, EMSB-23-2 [**Cacchione Affidavit**], **RCA, vol 15 at 4699-701**; Affidavit of Principal R. Caplan, EMSB-23-3 [**Caplan Affidavit**], **RCA, vol 15 at 4702-08**; Affidavit of Principal J. Daskalakis, EMSB-23-4 [**Daskalakis Affidavit**], **RCA, vol 15 at 4709-11**; Affidavit of Principal J. Genovezos, EMSB-23-5, **RCA, vol 15 at 4712-14**; Affidavit of Principal N. Katalifos, EMSB-23-6 [**Katalifos Affidavit**], **RCA, vol 15 at 4715-18**; Affidavit of Principal E. Lagodich, EMSB-23-7, **RCA, vol 15 at 4719-21**; Affidavit of Principal C. Lauzier, EMSB-23-8, **RCA, vol 15 at 4722-24**; Affidavit of Principal D. Lee, EMSB-23-9, **RCA, vol 15 at 4725-27**; Affidavit of Principal J. Lehuquet, EMSB-23-10, **RCA, vol 15 at 4728-30**; Affidavit of Principal D. Manos, EMSB-23-11, **RCA, vol 15 at 4731-33**; Affidavit of Principal I. Margetis, EMSB-23-12, **RCA, vol 15 at 4734-36**; Affidavit of Principal S. Marotta, EMSB-23-13, **RCA, vol 15 at 4737-39**; Affidavit of Principal D. Michakis, EMSB-23-14, **RCA, vol 15 at 4740-42**; Affidavit of Principal J. Pevec, EMSB-23-15, **RCA, vol 15 at 4743-47**; Affidavit of Principal T. Rhymes, EMSB-23-16, **RCA, vol 15 at 4748-50**; Affidavit of Principal S. Sujata, EMSB-23-17, **RCA, vol 15 at 4751-53**; Affidavit of Principal N. Sammarco, EMSB-23-18, **RCA, vol 15 at 4754-56**; Affidavit of Principal A. Vaudry, EMSB-23-19, **RCA, vol 15 at 4757-59**; Affidavit of Principal J. Wright, EMSB-23-20, **RCA, vol 15 at 4760-62**.

¹⁴³ **TJ** at para 992, **AR, vol 1 at 211**. See *supra* note 112.

¹⁴⁴ **TJ** at paras 985-988, **AR, vol 1 at 208-210**. Cultural Policy of the Central Quebec School Board, EMSB-23-21, **RCA, vol 15 at 4763-68, 4773**; Policy on Multicultural/Multiracial Education, Eastern Townships School Board, EMSB-23-22 at 1-2, 15 of 35, **RCA, vol 15 at 4790-91, 4804**; Policy on Multicultural/Multiracial Education, EMSB, EMSB-23-23 at 1-7, 18-19 of 33, **RCA, vol 15 at 4826-32, 4843-44**; Intercultural Policy, Lester B. Pearson School Board, EMSB-23-24, **RCA, vol 15 at 4860-66**; Cultural Policy, New Frontiers School Board, EMSB-23-25, **RCA, vol 15 at 4867-69**; Policy on Respect for Diversity, Sir Wilfrid Laurier School Board, EMSB-23-26, **RCA, vol 15 at 4870-74**.

¹⁴⁵ **TJ** at para 992, **AR, vol 1 at 211**. See *supra* note 112.

¹⁴⁶ **TJ** at para 983, **AR, vol 1 at 208**. See e.g. Beaulieu Affidavit, EMSB-23-1 at paras 7-10, **RCA, vol 15 at 4696-97**; Caplan Affidavit, EMSB-23-3 at paras 3, 11, **RCA, vol 15 at 4702-03**; Daskalakis Affidavit, EMSB-23-4 at paras 3-4, **RCA, vol 15 at 4709**; Katalifos Affidavit, EMSB-23-6 at paras 8-10, **RCA, vol 15 at 4716**; Re-examination of expert J. Maclure, November 5, 2020 at 174-176, **RCA, vol 26 at 8363-65**.

[101] Moreover, the positions, opinions and practices described in the evidence are not matters of transient political ideology; they have deep philosophical roots and constitute a fundamental and stable feature of Québec’s English-language culture.¹⁴⁷

ii. Bill 21 is incompatible with the culture in Québec’s English schools

[102] Bill 21’s interference with the cultural concerns of Québec’s English-language community is manifest: Bill 21 prohibits core aspects of open secularism within English-language schools by prohibiting teachers and staff from wearing religious symbols. Bill 21 forces English school boards to insist that persons erase their religious identities and to exclude persons who refuse to do so.¹⁴⁸ English school boards are thus forced to abandon a key and longstanding cultural value. Professor Maclure, philosopher of laicity and secularism, stresses the clash in values between Bill 21 and the open secularism practiced in English schools (“*pas compatible*”);¹⁴⁹ as the trial judge found, all nine English school boards perceive Bill 21 as contrary to and an interference with their culture of open secularism.¹⁵⁰

[103] Importantly, Bill 21 itself is framed in strong cultural terms, as found by the trial judge;¹⁵¹ the AGQ has maintained that Bill 21 expresses a profound cultural and historical value and

¹⁴⁷ *Contra* [QCCA](#) at para 607, **AR, vol 3 at 236**. See Maclure Report, EMSB-23-48 at paras 20-25, 32-36, **RCA, vol 30 at 10021-22, 10024-26**; Examination-in-Chief of expert J. Maclure, November 5, 2020 at 21-35, **RCA, vol 26 at 8210-24**; Examination-in-Chief of expert Y. Lamonde, November 11, 2020 at 56-57, **RCA, vol 27 at 8683**; Rapport d’expertise de Y. Lamonde, PGQ-8 at 6, 28-33 of 38 [**Rapport Lamonde**], **RCA, vol 32 at 10585, 10607-12**; Supplementary expert report of J. Maclure, in response to Y. Lamonde’s expert report, EMSB-23-49 at paras 1-3, **RCA, vol 33 at 10889-90**; Rapport d’expertise de Y. Dufresne et G. Gagné, PGQ-11 at paras 46, 114-115, 158 [**Rapport Dufresne/Gagné**], **RCA, vol 33 at 10922, 10956-57, 10979-80**; Third Supplementary expert report of J. Maclure, in response to Gagné and Dufresne’s expert report, EMSB-23-51 at paras 2-3, **RCA, vol 34 at 11344**.

¹⁴⁸ Watson Affidavit, EMSB-23-42 at 1 of 4, **RCA, vol 16 at 5166**.

¹⁴⁹ Re-examination of expert J. Maclure, November 5, 2020 at 174-176, **RCA, vol 26 at 8363-65**.

¹⁵⁰ [TJ](#) at para 992, **AR, vol 1 at 211**; Maclure Report, EMSB-23-48 at paras 20-25, 39, 43, **RCA, vol 30 at 10021-22, 10027, 10028-10030**.

¹⁵¹ [TJ](#) at paras 978-979, **AR, vol 1 at 207-208**; Bill 21, Preamble (“AS the Québec nation has its own characteristics, one of which is its civil law tradition, distinct social values and a specific history that have led it to develop a particular attachment to State laicity”); Québec, National Assembly, Commission permanente des institutions, Journal des débats, 42-1, Vol 45 No 50 (4 June 2019) at 18 (S. Jolin-Barrette), **BOA, Tab A13**, cited by AGQ expert M. Chevrier in Rapport d’expertise de M. Chevrier, PGQ-7 [**Rapport Chevrier**] at para 117, **RCA, vol 33 at 10844**.

presented considerable evidence establishing the cultural significance of Bill 21 to Québec's French-speaking majority.¹⁵²

iii. The focus of this Court's inquiry must be on the minority's culture, not the majority's

[104] Contrary to what the AGQ has suggested, s. 23's cultural protection does not depend on showing a social fracture between English and French cultures. Section 23's protection turns upon the cultural and linguistic concerns of the minority linguistic community – regardless of whether those concerns are (or have been) shared by the majority. Were it otherwise, s. 23 protections could be progressively eroded based on the vagaries of the majority linguistic community's cultural evolution. Such a result would be an egregious instance of allowing the linguistic majority's priorities to “trump cultural and linguistic concerns” of the minority.¹⁵³

[105] In this case, the evidence establishes that the English-language community of Québec's conception of secularism has not only followed a distinct trajectory,¹⁵⁴ it is distinct today.¹⁵⁵ What matters, however, for the purpose of establishing a s. 23 infringement is simply that Bill 21, which is framed in profoundly cultural terms, reflects a conception of secularism incompatible with that embraced by Québec's English-language community.

¹⁵² Défense du Procureur général du Québec, July 31, 2020 at paras 57, 63, 65, 69, **RCA, vol 3 at 625-27**; Rapport Chevrier, PGQ-7 at paras 101, 124, **RCA, vol 33 at 10834, 10848-49**; Rapport Lamonde, PGQ-8 at 28-33, 37-38 of 38, **RCA, vol 32 at 10607-12, 10616-17**; Rapport Dufresne/Gagné, PGQ-11 at paras 41-42, 46, 65, 82, 88, 89, 101, 111, 114-15, 131, 152-54, 156, 158, 175-76), **RCA, vol 33 at 10921-22, 10933-34, 10941, 10944-45, 10951, 10955-57, 10965, 10978-80, 10985-86**; Yannick Dufresne et al, “Religiosity or racism? The bases of opposition to religious accommodation in Quebec” (2019) 25:2 Nations and Nationalism 673 at 684-89, reproduced in Rapport d'expertise de J. Beauchemin, IN-MLQ-51 at [**Rapport Beauchemin**], **RCA, vol 30 at 9924-29**; Rapport d'expertise de Benoît Pelletier, PGQ-10 at 53, 63-67, 91-92, 100 of 113, **RCA, vol 32 at 10713, 10723-27, 10751-52, 10760**; Déclaration sous serment de G. Rocher, October 8, 2020 at para 48, **RCA, vol 3 at 494.255**.

¹⁵³ *Arsenault-Cameron* at para 38.

¹⁵⁴ See *supra* note 147.

¹⁵⁵ Re-examination of expert J. Maclure, November 5, 2020 at 180, **RCA, vol 26 at 8369**; Cacchione Affidavit, EMSB-23-2 at paras 3, 4, 8, 9, **RCA, vol 15 at 4699-700**; Yannick Dufresne et al, “Religiosity or racism? The bases of opposition to religious accommodation in Quebec” (2019) 25:2 Nations and Nationalism 673 at 684-89, reproduced in Rapport Beauchemin, IN-MLQ-51, **RCA, vol 30 at 9913, 9924-29**; Cross-examination of Y. Dufresne on November 16, 2020 at 29-34, **RCA, vol 28 at 9141-46**; Rapport d'expertise de R. Bourhis at paras 25, 32, 50, **RCA, vol 31 at 10325, 10328, 10335-36**.

iv. Broad cultural repercussions of Bill 21

[106] The AGQ has sought to argue that Bill 21 does not infringe s. 23 because English school boards are still allowed to recognize and accommodate some forms of religious diversity.

[107] First, this position contradicts the jurisprudence. Section 23 protects against “interferences” with minority culture (rather than cultural eradication) because interferences weaken cultural identity. In French, this criterion is expressed as follows: “[p]our autant qu’ils ne sont pas incompatibles avec les préoccupations linguistiques et culturelles de la minorité” (in *Mahé*)¹⁵⁶ and “dans la mesure où ceux-ci n’affectent pas de façon négative les préoccupations linguistiques et culturelles légitimes de la minorité” (in *Arsenault-Cameron*).¹⁵⁷ Either way, the test is satisfied here. Bill 21’s prohibitions fundamentally clash with a culture of celebrating religious diversity (incompatibility) and prevent a core expression of this culture, namely welcoming teachers wearing diverse religious symbols (negative effects). That English school boards can still carry out certain practices consistent with their culture of open secularism (e.g., accommodating teachers or students around religious holidays) has no bearing on whether Bill 21 is incompatible with, negatively affects, and interferes with the culture, which it is and does.

[108] Second, the evidence accepted by the trial judge establishes that the impact of Bill 21 on English-language schools extends far beyond regulating teachers and staff; the cultural intrusion is far more pervasive. The prohibition on wearing religious symbols teaches students, including visible minority students, that minority identities do not deserve to be celebrated and included within the English-language community. It thus conveys to students cultural values antithetical to those of English school boards. Stanford professor and expert in education policy, Thomas Dee, whose evidence was accepted by the trial judge,¹⁵⁸ explains:¹⁵⁹

[A] direct effect of implementing the highly publicized ban would be to send an unequivocally clear message to all students that public schools are prominent places where marginalized cultural and religious identities are unwelcome. This development is likely both to increase students’ experiences of prejudice and increase the alienation minority students, particularly those associated with visible religious symbols, sometimes experience in school settings.

¹⁵⁶ *Mahé* at 380.

¹⁵⁷ *Arsenault-Cameron* at para 53. The broader formulation from *Arsenault-Cameron* should be favoured given this Court’s warning in *CSFCB* at para 18 regarding pre-*Beaulac* case law.

¹⁵⁸ *TJ* at paras 995, 998-1002, 1081, **AR, vol 1 at 211-214, 229-230.**

¹⁵⁹ Expert report of T. Dee, EMSB-23-47 at para 60 [**T. Dee Report**], **RCA, vol 30 at 9990.**

[109] Professor Hehman, expert clinical psychologist, whose evidence was accepted by the trial judge,¹⁶⁰ explains that implementing the highly publicized ban sends a clear message to students that public schools are places where minority religious identities are unwelcome.¹⁶¹

(3) Bill 21 harms English school boards' ability to promote community development

[110] A third way in which Bill 21 interferes with management and control is by preventing minority language school boards from enhancing “community development”.¹⁶² The core purpose and project of minority language school boards is to promote the flourishing and vitality of the community in the education context.¹⁶³ As the Court of Appeal recently concluded in *QESBA*, ensuring student success is “at the core of the management and control rights guaranteed to the linguistic minority”.¹⁶⁴ Government measures that interfere with minority language school boards' determination of how best to promote community development, particularly ones that actively harm community development, such as in the instant case, infringe s. 23.

[111] English school boards' efforts to integrate and ensure the success of their more marginalized students include an emphasis on ethnic and religious minority representation. As the trial judge found, “*la preuve démontre clairement, d'une part, que les commissions scolaires anglophones désirent intégrer les minorités culturelles qui portent des signes religieux afin, d'autre part, faciliter cette même intégration et la réussite scolaire de ses élèves issues de groupes religieux minoritaires qui portent des signes religieux, en assurant une représentativité de ces minorités dans le corps enseignant et les dirigeants d'établissement scolaire*”.¹⁶⁵

[112] Stanford Professor Dee, whose evidence the trial judge accepted (and preferred to that of Mouvement laïque québécois expert George Legault),¹⁶⁶ draws on a large body of qualitative and quantitative research to conclude that the presence of teacher diversity improves minority students' academic outcomes, perception of and engagement in the classroom environment, and social and emotional development.¹⁶⁷

¹⁶⁰ *TJ* at paras 996, 998, **AR, vol 1 at 213**.

¹⁶¹ Hehman Report, EMSB-28-18 at paras 15, 21, 28-34, 36, **RCA, vol 32 at 10550, 10552-57**.

¹⁶² *Arsenault-Cameron* at paras 27, 45.

¹⁶³ *QESBA* at para 174; *CSFTNO* at para 4.

¹⁶⁴ *QESBA* at para 191.

¹⁶⁵ *TJ* at para 997, **AR, vol 1 at 213**.

¹⁶⁶ *TJ* at paras 995, 998-1002, 1081, **AR, vol 1 at 211-214, 229-230**.

¹⁶⁷ T. Dee Report, EMSB-23-47 at paras 8-49, **RCA, vol 30 at 9978-87**.

[113] In contrast, the expert evidence establishes, and the trial judge accepted, that Bill 21 will likely harm the integration and success of students from minority cultures and religions, frustrating English school boards' efforts in that regard.¹⁶⁸ Professor Dee explains that Bill 21 will likely have myriad negative effects on these students in English schools: contributing to increased prejudice among majority students by reducing their “intergroup” contact with teachers wearing visible religious symbols; contributing to school practices that uniquely disadvantage minority students (e.g., exclusionary discipline, lack of access to advanced coursework); decreasing minority students' exposure to teachers who are less likely to harbour harmful implicit biases that result in lower expectations, lower assessments of their potential and achievement, and increased referrals for special education and exclusionary discipline; reducing their access to teachers who are adept in culturally synchronized instructional practices that can support their academic potential; and increasing the stereotype threat they experience.¹⁶⁹

[114] The Court of Appeal's passing statement that no s. 23 rightsholders are “prejudicially affected here”¹⁷⁰ is completely at odds with the evidence accepted by the trial judge, which in any event the Court of Appeal did not consider.

E. THE S. 23 INFRINGEMENTS ARE NOT JUSTIFIED UNDER S. 1

[115] The trial judge rightly held that the infringements of s. 23 are not justified by s. 1.¹⁷¹ This conclusion is even more straightforward and overwhelming than his reasons suggest.

[116] A s. 1 justification is not available because the AGQ neither pled, nor argued, s. 1.¹⁷² This is especially so given that any s. 23 infringement must be justified according to a “particularly stringent standard”.¹⁷³

[117] In any event, no basis has been suggested for rejecting the less impairing alternative of exempting s. 23 schools from the application of Bill 21's prohibitions; the AGQ has not argued,

¹⁶⁸ [TJ](#) at paras 995-1002, **AR, vol 1 at 211-214**; T. Dee Report, EMSB-23-47 at paras 65-71, **RCA, vol 30 at 9991-92**; Examination-in-Chief of expert T. Dee, November 4, 2020 at 49-50, **RCA, vol 25 at 8152-53**; Hehman Report, EMSB-28-18 at paras 15, 21, 28-34, 36, **RCA, vol 32 at 10550, 10552-57**.

¹⁶⁹ [TJ](#) at paras 995, **AR, vol 1 at 211**; T. Dee Report, EMSB-23-47 at paras 65-71, **RCA, vol 30 at 9991-92**.

¹⁷⁰ [QCCA](#) at para 605, **AR, vol 3 at 235**.

¹⁷¹ [TJ](#) at para 1139, **AR, vol 1 at 237**.

¹⁷² See paragraph 68 above.

¹⁷³ [CSFCB](#) at para 147.

let alone demonstrated, that allowing the minority to live its culture in English schools in Québec somehow harms the linguistic majority.

[118] Section 23's exclusion from s. 33 extends to the s. 1 analysis. As this Court instructs, the "values and principles essential to a free and democratic society" are the "ultimate standard" of a s. 1 justification¹⁷⁴ – s. 33 cannot erode this standard in justifying limits on s. 23. Thus, harms to both teachers and students, found by the trial judge,¹⁷⁵ are properly considered at the proportionality stage. Further, harms to English-language culture and community development add to the deleterious effects that the trial judge found outweighed any salutary effects.

PART IV – SUBMISSION ON COSTS

[119] The EMSB et al seek costs before all levels of court.

PART V – ORDERS SOUGHT

[120] The EMSB et al ask this Court to allow the appeal and:

(a) declare that ss. 4 (first paragraph), 6, 7, 8, 10, 12 (first and second paragraphs), 13, 14 and 16 of Bill 21 impermissibly violate s. 28 of the *Charter*, and are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*;

(b) in the alternative: declare that ss. 4 (first paragraph), 6, 7, 8, 12 (first and second paragraphs), 13, 14 and 16 of Bill 21, read together with paragraph 7 of Schedule I, paragraph 10 of Schedule II and paragraph 4 of Schedule III, impermissibly violate s. 23 of the *Charter* and are (i) of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*, or alternatively (ii) of no force or effect with respect to English-language school boards pursuant to s. 52 of the *Constitution Act, 1982*.

Dated this 22nd day of April, 2025.



JURISTES POWER LAW

Mark C. Power

Perri Ravon

Jennifer Klinck

¹⁷⁴ *R v Oakes*, [1986] 1 SCR 103 at 136.

¹⁷⁵ See e.g. TJ at para 1102, **AR**, vol 1 at 233.

PART VI – SEALING ORDER

N/A

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APPENDIX A

Court File No. 41231

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)**

B E T W E E N:

**ENGLISH MONTREAL SCHOOL BOARD,
MUBEENAH MUGHAL and PIETRO MERCURI**

**APPELLANTS
(Respondents on Cross-Appeal)**

– and –

**ATTORNEY GENERAL OF QUÉBEC,
JEAN-FRANÇOIS ROBERGE, in his official capacity,
SIMON JOLIN-BARRETTE, in his official capacity**

**RESPONDENTS
(Appellants on Cross-Appeal)**

– and –

**MOUVEMENT LAÏQUE QUÉBÉCOIS
FRANÇOIS PARADIS, in his official capacity**

RESPONDENTS

AND BETWEEN:

**WORLD SIKH ORGANIZATION OF CANADA
AMRIT KAUR**

**APPELLANTS
(Respondents on Cross-Appeal)**

– and –

ATTORNEY GENERAL OF QUÉBEC

**RESPONDENT
(Appellant on Cross-Appeal)**

AND BETWEEN:

**ICHRAK NOUREL HAK,
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM),
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

**ATTORNEY GENERAL OF QUÉBEC,
JEAN-FRANÇOIS ROBERGE, in his official capacity,
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS
(Appellants on Cross-Appeal)

– and –

**FRANÇOIS PARADIS, in his official capacity
MOUVEMENT LAÏQUE QUÉBÉCOIS
POUR LES DROITS DES FEMMES DU QUÉBEC**

RESPONDENTS

AND BETWEEN:

FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT

APPELLANT
(Respondent on Cross-Appeal)

– and –

**ATTORNEY GENERAL OF QUÉBEC,
JEAN-FRANÇOIS ROBERGE, in his official capacity,
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS
(Appellants on Cross-Appeal)

AND BETWEEN:

**ANDRÉA LAUZON, HAKIMA DADOUCHE, BOUCHERA CHELBI
LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant on Cross-Appeal)

AND BETWEEN:

THE LORD READING LAW SOCIETY

APPELLANT
(Respondent on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant on Cross-Appeal)

– and –

**QUEBEC COMMUNITY GROUPS NETWORK, ICHRAK NOUREL HAK,
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM), CORPORATION OF
THE CANADIAN CIVIL LIBERTIES ASSOCIATION, FÉDÉRATION AUTONOME
DE L'ENSEIGNEMENT, LAUZON, ANDRÉA, HAKIMA DADOUCHE, BOUCHERA
CHELBI, LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC,
CANADIAN HUMAN RIGHTS COMMISSION, LORD READING LAW SOCIETY,
WORLD SIKH ORGANIZATION OF CANADA, AMRIT KAUR, AMNISTIE
INTERNATIONALE, SECTION CANADA FRANCOPHONE, PUBLIC SERVICE
ALLIANCE OF CANADA (PSAC), CHRISTIAN LEGAL FELLOWSHIP, QUEBEC
ENGLISH SCHOOL BOARDS ASSOCIATION, FÉDÉRATION DES FEMMES DU
QUÉBEC, WOMEN'S LEGAL EDUCATION AND ACTION FUND, POUR LES
DROITS DES FEMMES DU QUÉBEC, MOUVEMENT LAÏQUE QUÉBÉCOIS,
LIBRES PENSEURS ATHÉES, ENGLISH MONTREAL SCHOOL BOARD,
MUBEENAH MUGHAL and PIETRO MERCURI**

INTERVENERS


**NOTICE OF CONSTITUTIONAL QUESTIONS
OF THE APPELLANTS, ENGLISH MONTREAL SCHOOL BOARD,
MUBEENAH MUGHAL AND PIETRO MERCURI**
(Pursuant to rule 33(2) of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

TAKE NOTICE that Mark Power, Perri Ravon, Jennifer Klinck and Darius Bossé, counsel for the English Montreal School Board, Mubeenah Mughal and Pietro Mercuri, assert that the appeal raises the following constitutional questions:

- 1) Do ss. 4 (first paragraph), 6, 7, 8, 10, 12 (first and second paragraphs), 13, 14 and 16 of the *Act respecting the Laicity of the State*, CQLR c L-0.3 impermissibly violate s. 28 of the *Canadian Charter of Rights and Freedoms*, such that they are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11?
- 2) Do ss. 4 (first paragraph), 6, 7, 8, 12 (first and second paragraphs), 13, 14 and 16 of the *Act respecting the Laicity of the State*, CQLR c L-0.3, read together with paragraph 7 of Schedule I, paragraph 10 of Schedule II and paragraph 4 of Schedule III, impermissibly violate s. 23 of the *Canadian Charter of Rights and Freedoms* such that they are (a) of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, or alternatively (b) of no force or effect with respect to English-language school boards pursuant to s. 52 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11?

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at Ottawa, Ontario this 24th day of February, 2025.


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