APPELLATE COURT HEARS CHALLENGES TO BILL 21

Montreal November 17, 2022 – Over the past two weeks the Quebec Court of Appeal heard a series of arguments in defence and in contestation of Quebec's secularism legislation: *An Act respecting the laicity of the state* (Bill 21). The bill, which passed into law in June 2019, was challenged before the Superior Court of Quebec in April 2021.

At Superior Court, Justice Marc-André Blanchard found that Bill 21 violates the right to freedom of religion under subsection 2(a) of the *Canadian Charter of Rights and Freedoms* (*Charter*). However, Justice Blanchard ruled that the law, despite its infringement of fundamental freedoms, remains legally valid due to the law's invocation of the notwithstanding clause (section 33 of the *Charter*). Additionally, Justice Blanchard ruled that Bill 21 should not apply to English-language schools in Quebec as it would violate the English minority's constitutional right under section 23 of the *Charter* to the "management and control" over English-language education. Justice Blanchard also iterated in his ruling that section 23 rights cannot be overridden by the notwithstanding clause.

Blanchard's decision was appealed on numerous grounds by opponents of Bill 21, some of the major themes of which are explored below.

Religious Neutrality of the State

Over four days, legal representatives of the office of Quebec's Attorney General and interest groups presented arguments in defence of Bill 21. The Attorney General's office argued that the notwithstanding clause cannot be invoked by a law for an illegitimate purpose (such as if the objective is to remove constitutional rights). They argued that this is not the case with Bill 21, where the purpose is not to take away rights, but to preserve the laicity (religious neutrality) of the State and its institutions.

In support of the government's position, M^{tre} Luc Alarie, legal counsel for Mouvement Laïque Québécois (MLQ) argued that Bill 21 in fact protects the religious freedom of parents. He specified that under section 41 of the *Quebec Charter of Human Rights and Freedoms* (*Quebec Charter*), parents have a right to teach their own children about religion according to their own beliefs, and therefore the State must ensure its schools do not impose any religious ideologies upon its students. M^{tre} Alarie also argued that teachers hold "considerable influence" over their students, especially those of a younger age in primary and secondary schools. This influence by teachers who wear religious symbols could, according to him, relay "moral values" of their personal religion onto students and thus deny parents their right to pass on their religious beliefs to their children. M^{tre} Alarie said that the Quebec government must maintain its obligation of religious neutrality, irrespective of the consequences on minority communities' fundamental freedoms. He concluded that state employees are allowed to thrive in Quebec and be themselves, but that within their professional duties they must keep their personal beliefs to themselves.

M^{tre} Molly Krishtalka, representing the Coalition Inclusion Québec, countered the arguments made by the Attorney General's office and MLQ. She argued that the individual actions of state employees do not

represent the values of the State, and that an individual state employee being allowed to don a religious symbol does not constitute State endorsement of said religion. This was a concept, she argued, that the Quebec government has taken for granted and with which Justice Blanchard agreed in his Superior Court decision. M[tre] Krishtalka also said that M[tre] Alarie's argument erroneously equates a state employee wearing a cross around their neck, as an example, to the State as a whole adhering to Catholicism. The result of the law, she claimed, is forcing people to choose between their livelihood and their identity.

Finally, M[tre] Theodore Goloff, legal representative of the Lord Reading Law Society, presented his arguments across two days, on one of which he wore a kippah. He asked the court to consider if his arguments were any less legitimate on the day that he wore a religious symbol than on the day that he did not.

Disparate Impact on Muslim Women

While the Attorney General's office and other pro-laicity organizations assert that Bill 21 applies equally to all public employees regardless of their religion, other organizations disagreed. M[tre] Perri Ravon, legal counsel for the English Montreal School Board (EMSB), argued that the bill's purpose and effect are misaligned, the latter creating a disproportionate disadvantage for Muslim women who wear a hijab. She said that in the EMSB alone, eight people have been denied or lost their employment since the enactment of Law – all of whom hijabi women. She added that in the French-language Centre de services scolaire de Montréal, one hundred per cent of the cases involving employment denial or dismissal under Bill 21 regarded the hijab. She could not report as to the precise number of cases. To the extent of her research, M[tre] Ravon also claimed she could find no other examples of persons other than Muslim women suffering those same employment consequences. She argued that Bill 21 was largely drafted to target the hijab, an interpretation she said was accepted by Justice Blanchard at trial.

M[tre] Julius Grey, representing both the Canadian Human Rights Commission and the Quebec Community Groups Network, concurred with M[tre] Ravon's arguments. He claimed in court that the hijab is the "jewel in the crown for the government" in its adoption of Bill 21.

Violation of Gender Equality

Different lawyers presented further arguments that Bill 21 violates section 28 of the *Charter*, a provision that cannot be overridden by the notwithstanding clause and which guarantees all *Charter* rights and freedoms equally to male and female persons. For instance, M[tre] Ravon argued that section 8 of Bill 21 — which prohibits state employees from wearing a face covering while performing their jobs and people from receiving a public service while wearing a face covering — is a provision that effectively applies only to Muslim women who wear a niqab. When asked if Bill 21 discriminates based on gender when men of other religions, such as Judaism or Sikhism, can be subject to the same consequences as Muslim women, M[tre] Ravon cited case law that declares how every member of a gender needs not be affected by effectively discriminatory legislation in order for gender discrimination to exist. She further said that declaring the reverse would ultimately deny the intersectional experience of discrimination that Muslim women face, based on both gender and religion.

To counter this argument, the Attorney General's office said that the protection of gender equality under section 28 is a "general guarantee" that is meant to be read into other rights and freedoms, but is not a substantive right in of itself, nor is it immune from the notwithstanding clause. They also noted that Bill 21 affects women more than men in the teaching profession, not because the statue is designed to target women, but because there are more female teachers and workers in the public sector. They also noted that demographic numbers can affect the perception of the law's impact. In other words, they argued that Muslim women may be more affected by Bill 21 not because they are women or Muslim, but because there are more Muslim Canadians than Sikh or Jewish Canadians, for instance. Additionally, M[tre] Christiane Pelchat, representing Droits des femmes du Québec, argued that Bill 21 protects against gender discrimination. She said that "the state cannot associate itself with a religion that suggests a woman cannot appear in public without being covered". She also reminded the Court that intersectionality is a concept not yet recognized within Canadian law.

M[tre] Olga Redko, representing the appellant Nourel Hak and the National Council of Canadian Muslims, argued that section 8 of Bill 21 violates section 3 of the *Charter*, which also cannot be overridden by the notwithstanding clause and guarantees every Canadian citizen the right to vote or run in a provincial election. She argued that Bill 21 imposes a voting and electoral candidacy restriction on Muslim niqabi women not experienced by Muslim men or the general male population.

Conflict of Provincial and Federal Jurisdiction

Several parties opposed to Bill 21 argued that based on the division of powers between the federal and provincial governments outlined in sections 91 and 92 of the *Constitution Act, 1867* (*Act*), the Quebec government does not possess the jurisdictional authority to legislate on matters of state secularism. M[tre] Krishtalka, for example, argued that Bill 21 undermines the federal power to ensure peace, order and good government within Canada. She also argued that the federal government has a say in provincial governments wishing to enact laws on religion expression, as the secularization of Quebec's public school system could not have been finalized without an amendment to section 93 of the *Act*.

M[tre] Redko moreover claimed that Bill 21's preamble enshrines laicity as a fundamental value of Quebec society, placing the law's purpose in protecting a societal value. She then argued that the Quebec government considers religious practice to be a threat to this societal value of laicity and that Bill 21 can therefore be interpreted to be legislating on morality and hence on criminal law, which falls under exclusively federal jurisdiction.

In response, the Attorney General's office argued that these interpretations against provincial jurisdiction only focus on Bill 21's prohibition of religious symbols, that is, two of its 30 provisions. They argued that this reduction "evades the overall objective of the law to affirm the secularism of the State". They concluded that the law's goal is therefore to redefine the relationship between the state and religion in the legislative and public service spheres. Countering M[tre] Redko's arguments, they also said that the sanctions for violating the provisions of Bill 21 are not criminal in nature, and that even if they were, that the federal government does not hold exclusive jurisdiction over penal law matters. They mentioned Quebec's *Highway Safety Code* as an example of provincial legislation that imposes sanctions for certain infractions.

Infringement of English-language Minority Education Rights

Pleading on behalf of the EMSB, M^tre^ Ravon argued that English-language school boards should be exempt from the rules of Bill 21, which violates their right under section 23 of the *Charter* to exercise management and control over English-language education. The office of the Attorney General rebutted that minority official-language protections granted by section 23 apply only to the instruction of the English language. By extension, they further argued that "political opinions" or "expressions of values" are not protected under section 23, and that "nothing other than language" should be considered in analyzing the scope of the provision. They concluded with the argument that section 23 is meant to protect the language rights of parents, and not those of teachers employed by the English-language school boards.

In response to this interpretation, M^tre^ Ravon argued that while the school board is a secular, non-denominational institution, religious diversity is an integral component of the cultural heritage of Quebec's English-speaking community and of its English-language schools, where religious minorities are welcome and accepted. Citing several past court judgments, she said that minority official-language rights under section 23 have been found to include promotion and preservation of linguistic culture and identity, achieved in part through control over the recruitment and hiring and teaching staff and other school personnel. She concluded that Bill 21 infringes upon the scope of section 23 rights because it restricts the English-speaking community's ability to promote religious diversity and protect its cultural identity.

Interpretive Limitations on the Notwithstanding Clause

The Attorney General's office stated that there are no limits or restrictions on the use of the notwithstanding clause. They also argued that the provision's role is to protect parliamentary sovereignty of the provincial government and the will of the Quebec electorate. In response, several bodies argued that given the unprecedented use of the clause by provincial legislatures in recent years, interpretations of the clause and how it can be invoked must be reassessed by the courts.

M^tre^ Grey, for instance, argued that the clause has only very recently been used in a pre-emptive manner to override rights and shield legislation from judicial review before bills become law. The historic understanding of the clause was that it was to be invoked in exceptional circumstances, almost as a last resort (such as the enactment of Quebec's Bill 178 following the Supreme Court ruling in *Ford v Quebec*, which held that banning commercial signage in any language other than French violated the right to freedom of expression under subsection 2(b) of the *Charter*).

In agreement with M^tre^ Grey's points, M^tre^ Krishtalka argued that constitutional rights, meant to protect minority communities, cannot be overridden simply because the electorate wishes so or as a means to achieve the electorate's will. She also explains that Bill 21's override of rights in the *Quebec Charter* does not remove protections granted in the Canadian *Charter* that are not neutralized by the notwithstanding clause.

Finally, M^tre^ Sibel Ataogul, legal counsel for the French Canada division of Amnesty International, argued that the absence of limitations on the use of the notwithstanding clause within the provision's text does not mean there are no conditions as to its use under international law. She referenced article 18(3) of the *International Covenant on Civil and Political Rights*, of which Canada is a signatory member, that

provides religious freedoms can only be subjected to limitations “prescribed by law” and “necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others”. M^{tre} Ataogul explained that the second condition is not satisfied in the Bill 21’s invocation of the notwithstanding clause.

A decision by the Court of Appeal of Quebec on the constitutionality of Bill 21 is expected sometime next year. All parties to the appeal, however, have expressed that the battle over Quebec’s secularism law will ultimately be settled by the Supreme Court of Canada.