SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-17-100935-173

DATE : 1 December 2017

IN THE PRESENCE OF : THE HONOURABLE BABAK BARIN, J.S.C.

NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)
-and-
MARIE-MICHELLE LACOSTE
-and-
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicants

v.

THE ATTORNEY GENERAL OF QUEBEC

Respondent

JUDGMENT ON APPLICATION FOR A STAY

INTRODUCTION

[1] This case was pleaded before the Court in chambers in both English and French. The applicants presented their submissions in English and the Attorney General of Quebec in French. The Application for judicial review (Declaration of invalidity) and the

JB4784

Application for an interim stay pursuant to articles 529(1) and 49 C.C.P. were filed in English. The Court is rendering its judgment in the language of the Applications.[1]

[2] On 18 October 2017, Bill 62 or *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies* (**Act**)[2] as it is more formally known, was passed and assented to by the Quebec National Assembly. With the exception of certain specific provisions, the Act came into force the same day.

[3] According to the explanatory notes, the purpose of the Act "*is to establish measures to foster adherence to State religious neutrality. For that purpose, it provides, in particular, that personnel members of public bodies must demonstrate religious neutrality in the exercise of their functions, being careful to neither favour nor hinder a person because of the person's religious affiliation or non-affiliation or because of their own religious convictions or beliefs or those of a person in authority [...].*"

[4] The applicants request the stay of section 10 of the Act, pending a final determination on the merits of the judicial review application they have filed. They submit that section 10 violates the guarantees of freedom of religion and the right to equality enshrined in both the Quebec *Charter of human rights and freedoms*[3] (***Quebec Charter***) and the *Canadian Charter of Rights and Freedoms*[4] (***Charter of Rights***).

[5] For reasons that follow, the request for the stay is in part granted until such time as section 11 of the Act is brought into force and is fully operational in accordance with the guidelines set out in section 12.

LEGISLATIVE CONTEXT

[6] Sections 1, 10, 11 and 12 of the Act read as follows:

> **1.** This Act affirms the religious neutrality of the State in order to ensure that all are treated with proper regard for their recognized rights and freedoms, including freedom of religion for personnel members of public bodies. To that end, the Act imposes a duty of religious neutrality, in particular on personnel members of public bodies in the exercise of the functions of office.
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> A further purpose of the Act is to recognize the importance of having one's face uncovered when public services are provided and received so as to ensure

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[1] La présente demande de sursis a été présentée en chambre de pratique civile. Les demandeurs ont plaidé en anglais et le Procureur général du Québec, en français. La demande de pourvoi en contrôle judiciaire (Déclaration d'invalidité) et la demande de sursis selon les articles 529(1) et 49 C.p.c. ont été rédigées en anglais. Le Tribunal rend son jugement dans la langue de ces demandes.

[2] S.Q. 2017, c. 19.

[3] CQLR, c. C-12.

[4] Part I of the *Constitution Act, 1982*, [Schedule B to the *Canada Act 1982*, c. 11 (U.K.)].

quality communication between persons and allow their identity to be verified, and for security purposes.

The Act also sets out criteria to be taken into consideration when dealing with requests for accommodations on religious grounds resulting from the application of the Charter of human rights and freedoms (chapter C-12).

10. Personnel members of a body must exercise their functions with their face uncovered.

Similarly, persons who request a service from a personnel member of a body referred to in this chapter must have their face uncovered when the service is provided.

11. When dealing with a request for an accommodation on religious grounds resulting from the application of section 10 of the Charter of human rights and freedoms, the body must make sure that:

(1) the request is serious;

(2) the accommodation requested is consistent with the right to equality of women and men and the right of every person to be treated without discrimination;

(3) the accommodation requested is consistent with the principle of State religious neutrality; and

(4) the accommodation is reasonable in that it does not impose undue hardship with regard to, among other considerations, the rights of others, public health and safety, the proper operation of the body, and the costs involved.

An accommodation may be granted only if the person making the request has cooperated in seeking a solution that meets the criterion of reasonableness;

12. The Minister must establish guidelines for dealing with requests for accommodations on religious grounds in order to support bodies in their application of section 11.

The guidelines must be published on the website of the Ministère de la Justice.

[7] As previously indicated, section 10 came into force on 18 October of 2017 after more than two years of legislative preparatory work.

[8] As per sections 2 and 3 of the Act, the requirements of section 10 apply for example to:

- Government departments;

- Certain municipalities, metropolitan communities, intermunicipal boards and municipal housing bureaus;
- Public transit authorities;
- Certain public health and social service institutions, and physicians, dentists and midwives who work in these institutions;
- School boards and general and vocational colleges; and
- National Assembly personnel members.

This list is not exhaustive.

[9] Section 11 of the Act envisages the possibility for individuals to seek accommodation on religious grounds in accordance with section 10 of the *Quebec Charter*.[5]

[10] Section 11, however, is not in force. It is set to become operational no later than 1 July 2018 on a date yet to be determined by the government. Moreover, no guidelines for dealing with requests for accommodation on religious grounds have been established by the Minister of Justice as required under section 12 of the Act, even though that section has been in force since 18 October 2017.

POSITION OF THE APPLICANTS

[11] The National Council of Canadian Muslims and the Corporation of the Canadian Civil Liberties Association are non-profit organisations dedicated to protecting and furthering human rights and civil liberty causes in Canada.

[12] Marie-Michelle Lacoste, born and raised in Montreal, is a muslim since 2003. She began to wear the hijab in 2005 and the niqab in 2011. She believes, according to her declaration, that wearing the niqab brings her closer to God, protects her modesty, and safeguards her dignity. She explains that she wears the niqab at all times outside and inside in the presence of men other than her husband. Ms. Lacoste also asserts that since the coming into force of the Act, she feels concerned about using public services and she has experienced an increase in personal harassment and insults outside of her home.

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[5] Section 10 of the *Quebec Charter* reads as follows :

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

[13] The applicants submit that section 10 of the Act violates the guarantees of freedom of religion and the right to equality rooted in both the *Quebec Charter* and the *Charter of Rights*. The infringement of these rights and freedoms they argue, cannot be justified in a free and democratic society. The applicants also submit that currently, there is no framework to address any requests for accommodation under the Act.

[14] According to the applicants, since section 10 of the Act has immediate application, a muslim woman who covers her face for religious reasons cannot seek public employment. It is also unclear they add, what will happen to a woman who presently wears a face covering for religious reasons and is employed by a public organization.

[15] The applicants plead that a woman who covers her face for religious reasons and who seeks public service will experience violation of her religious freedom and equality rights. This, they insist, is unconstitutional.

[16] The applicants also argue, that the right to cover one's face as a form of religious practice has already been recognized by the Supreme Court.[6] They submit that in addition to there being a serious issue to be tried, the application of section 10 of the Act causes serious and irreparable harm to muslim women who cover their faces for religious reasons. Unless these women act contrary to their sincerely held religious beliefs and uncover their faces, the applicants advance, they are currently ineligible for public sector jobs and they cannot benefit from the basic services offered by municipalities and the province itself. For example, Ms. Lacoste indicates that if she is obliged to remove her niqab in public for reasons not relating to identification or security, and this for long periods of time, she would be forced to act contrary to her religious beliefs and would feel humiliated.

[17] The applicants plead, that the balance of convenience also favours them as the government has not pointed to any problem relating to security, identification or communication that would necessitate the promulgation of section 10. The only way to ensure that section 10 of the Act does not inflict significant, widespread, and irreparable harm for the lengthy period of time during which its legality will be debated before the courts, they add, is to suspend its application.

[18] The applicants also plead that the "*singular nature of this case – the palpable intrusion on individuals' constitutionally guaranteed rights and freedoms, coupled with the nature and severity of the prejudice that flows from and application of the Act – exceptionally creates a public interest in favour of staying the operation of Section 10 of the Act.*"[7]

[19] Finally, the applicants submit that the Act envisions the possibility of requests for accommodation on religious grounds from the obligation imposed by section 10, which

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[6] *R.* v. *N.S.*, 2012 SCC 72.

[7] Applicants' Argument Plan at para. 74.

accommodation provision is not yet in force and for which the Minister has not yet established appropriate guidelines despite being required to do so. According to the applicants, "*although the accommodation provision [...] does not itself save the constitutionality of section 10, [...] this omission remains unexplained and stands in stark contrast to the very title of the Act, which claims to be a framework for allowing accommodation requests.*"[8]

POSITION OF THE ATTORNEY GENERAL OF QUEBEC

[20] The AG takes a rather plain position by pleading that the criteria for the granting of a stay have not been satisfied. The AG submits that public interest in this case requires that the applicants' request for a stay be dismissed.

[21] According to the AG, in a stay application such as this one, public interest as a special factor must be considered in assessing where the balance of convenience lies and the weight it should be accorded.

[22] The AG submits that in examining the balance of convenience, the court seized with a request for the suspension of a validly enacted but challenged law, should not insist on proof that the law in question will produce a public good. At this stage, such a conclusion should be presumed. The AG also submits that in assessing the balance of convenience, the Court should proceed on the assumption that the law is directed to the public good and that it serves a valid public purpose.

[23] According to the AG, the assumption of public interest in enforcing the law must weigh heavily in the balance. In advance of a complete and constitutional review, the AG adds, the court must resist declaring that a law enacted by the Quebec National Assembly for the public good is inoperable. Such an order ought to be granted only in the most clear and exceptional of circumstances.

[24] The AG pleads that sections 1(2) and 10 of the Act, when read together with the sworn declaration of Ms. Lacoste and the Affidavit of Ms. Fatima Ahmad, a supporting affiant in the case, cause no irreparable harm to the applicants.[9]

[25] Ms. Ahmad's Affidavit reads in part as follows:

> 12. To be clear, I have no problem removing my niqab briefly in order to identify myself. In the past, I have removed the niqab to take photos for my student ID card and my OPUS card, if a male doctor needs to see my face during an examination, and on occasion to identify myself. I will also remove my niqab when asked to do so by a doctor for medical reasons.

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[8] *Ibid.*, paras. 90 and 91.
[9] Plan of Argument of AG at para. 12.

[26] The AG submits that since the applicants have failed to demonstrate that they have suffered irreparable harm in this instance, their application for a stay is premature and it must be dismissed.

[27] Finally, and with respect to accommodation, the AG argues that the absence of legislative provisions in that regard is of no consequence. These issues, the AG argues, are currently addressed in the *Quebec Charter*, the *Charter of Rights* and existing caselaw which would apply to any potential accommodation request.

ANALYSIS

[28] To be clear, at this juncture, the Court is seized of the question of stay only. Nothing in this judgment, therefore, ought to be in any way construed as touching upon the merits. The trial of this case, if necessary, will take place more fully in the future. Moreoever, nothing set out in this judgment should preclude the filing of a new stay, if necessary or appropriate, following the coming into force of section 11 of the Act and the establishment of the guidelines under section 12.

[29] In the meantime, the three-part test for the granting of a stay in a constitutional challenge is clearly defined by the Supreme Court.[10]

Criteria for a stay

[30] First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. The threshold is low. If the court determines that the application is not frivolous or vexatious, it must proceed to consider the second and third criteria even if it is of the opinion that the applicant is unlikely to succeed at trial.[11]

[31] Next, the court must examine whether the applicant would suffer irreparable harm if the request for a stay is refused. Irreparable refers to the nature of the harm suffered and not its magnitude. The assessment of irreparable harm in stay applications involving a constitutional challenge is not easy.[12]

[32] Finally, the court must evaluate the balance of convenience – which of the parties would suffer greater harm from the granting or refusal of the stay pending a decision on the merits – by taking into consideration the public interest special factor in constitutional cases.

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[10] *Manitoba (A.G.)* v. *Metroplitan Stores Ltd.* [1987] 1 S.C.R. 110 (***Metroplitan Stores***) and *RJR – Macdonald Inc.* v. *Canada (A.G.)* [1994] 1 S.C.R. 311 (***RJR-Macdonald***) and *Harper* v. *Canada (A.G.)* [2000] 2 S.C.R. 764 (***Harper***).
[11] *RJR – Macdonald* at 337.
[12] *Ibid.*, at 341.

[33] According to the Supreme Court:

> The Public Interest
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> [...]
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> It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience [...]. However, the government does not have a monopoly on the public interest [...]:
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> [...]
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> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.
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> It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.[13]
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> [...]
>
> [Emphasis added]

[34] In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in constitutional cases, many interlocutory proceedings, according to the Supreme Court, will likely be determined at the balance of convenience stage.[14]

Serious question to be tried

[35] There are no specific requirements that need to be satisfied with respect to this criteria. Clearly, there is a serious question to be tried in this instance. The issue is no less than the constitutionality of provisions of a state religious neutrality law passed by

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[13] *Ibid.*, at 343-344.
[14] *Ibid.*, at 342-343.

the Quebec National Assembly regarding which no court has yet ruled. The application is neither vexatious nor frivolous.

[36] The applicants submit that section 10 of the Act violates the guarantees of freedom of religion and the right to equality entrenched in both the *Quebec Charter* and the *Charter of Rights*. The infringement of these rights according to the applicants cannot be justified in a free and democratic society.

[37] Furthermore, the presence of explicit accommodation provisions in the Act that have yet to come into force are *prima facie* demonstrative of the seriousness of the question placed before the Court.

Irreparable harm

[38] Based on Ms. Lacoste's sworn declaration, it is not *prima facie* unreasonable to conclude at this stage that the provisions of the Act occasion irreparable harm to her if she was to remove her niqab contrary to her religious beliefs. Ms. Lacoste is supported in her claim by the sworn declaration of Ihsaan Gardee of the National Council of Canadian Muslims which in part reads as follows:

> 23. The impact of the Act on the Quebec Muslim community is immediate and significant. Moreover, the effect of the Act is unlikely to be confined to Muslim women who wear a face veil for religious reasons, but will rather have consequences for the broader Muslim community both within the province and across Canada.

[39] The Affidavit of Noa Mendelsohn Aviv of the Canadian Civil Liberties Association also supports the above statement.

[40] The harm in question here cannot be quantified in monetary terms and it cannot be cured. Ms. Lacoste submits that unless she uncovers her face contrary to her religious beliefs, she would be ineligible for public sector jobs and she would be unable to benefit from certain basic government services.

[41] Moreover, the fact that Ms. Lacoste admits that she has no difficulty in removing her niqab in certain specific circumstances does not render the harm she is complaining of reparable or illusory. As Dickson J. wrote for a majority Supreme Court in *R.* v. *Big M Drug Mart Ltd.*[15] :

> Freedom of Religion
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> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental

[15] [1985] 1 S.C.R. 295 at 336-37.

> freedoms [...]. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
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> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he [or she] would not otherwise have chosen, he [or she] is not acting of his [or her] volition and he [or she] cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. [...]
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> [Emphasis added]

[42] The fact that the Quebec legislature has prepared section 11 of the Act – presumably because it is of the view that certain adverse effects may flow from section 10 of that same Act for particular minority groups – even though it has not yet brought it into force, is also *prima facie* demonstrative of the violation of equality concerns the legislature likely has in enacting the statute.

[43] Hence, the irreparable harm criteria is *prima facie* satisfied. This leaves the third ground, the consideration of the balance of convenience in the granting of the stay. Such a ground subsumes the question of what irreparable harm, if any, the respondent – or the public faces.

Balance of convenience

[44] As articulated by the Supreme Court, applications for stay of legislation under a constitutional challenge raise special considerations when it comes to determining the balance of convenience:

> On the one hand stands the benefit flowing from the law. On the other stands the rights that the law is alleged to infringe. [A stay] may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying [the stay] may deprive the plaintiffs of constitutional rights simply because the courts cannot move quickly enough [...].[16]

[45] It is trite law as the plethora of cases so far have decided that in all but exceptional cases, "*the effect of democratically enacted legislation should not be suspended*

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[16] *Harper* at 769.

before a finding of unconstitutionality or invalidity".[17] But this case falls under a very narrow, unusual and special exception for the following reasons.

[46] First, there is the title of Bill 62 – *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies.* The legislature could not have been clearer about its intentions. As the preambule of the Act sets out, for the Quebec National Assembly, "*religious neutrality is necessary to ensure that all are treated without discrimination based on religion*" and "*the rights and freedoms of the person are inseparable from the rights and freedoms of others and from the common well-being.*"

[47] The legislature recognizes therefore, both in the preambule of the Act and in sections 10 and 11, that there is potentially adverse effect discrimination flowing from the promulgation of the Act, and that as such, there must be a reasonable attempt on the part of the law to accommodate affected persons. This is essential if the aim of the religious neutrality law at issue is to be fulfilled. To use the words of the Supreme Court, anything less defeats the very purpose of the law and makes it a hollow enactment of minimal value in society. Reasonable accommodation is an integral aspect of equality.[18]

[48] Moreoever, there is no urgency in Bill 62 applying without its full effect, which includes the accommodation provisions. The law has been in preparation since at least June of 2015. Religious neutrality, while perhaps a lofty goal, is not time sensitive. Why then bring into force an incomplete state religious neutrality law before 1 July 2018?[19] In any event, if the impugned law is ultimately deemed to be valid with the full effect of the accommodation provisions in it, no harm but for the passage of time would be caused by the granting of a stay.

[49] The control of the issue of time in this instance is also in the hands of the government. It alone decides when section 11 of the Act comes into force and when the corresponding guidelines will be established. As a custodian of the public good, the government can decide to bring into force section 11 of the Act tomorrow and make it fully operational in accordance with the guidelines set out in section 12. As soon as it does, this stay is lifted.

[50] It is not unreasonable to expect that a state religious neutrality law enacted by the government should apply in a well-thought-out and comprehensive manner, especially when the law in question has been in preparation for some time.

[51] At least with respect to the application of section 10, in the absence of section 11 and the corresponding guidelines, there is enough ambiguity that causes confusion for

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[17] *Ibid.*, at page 777 (Dissenting opinion of Major J.) and *Attorney General of Canada* v. *Gould* [1984] 2 S.C.R. 124.
[18] See by analogy *C.S.R. de Chambly* v. *Bergevin* [1994] 2 S.C.R. 525 at 544.
[19] As per section 22 of the Act, this is the latest date by which section 11 must come into force.

the applicants and the public as a whole. In such a scenario, it cannot be open to the government to argue that accommodation provisions that go to the heart of a law that it is enacting, can be determined on a case by case basis by schools, commissions, organizations etc. based on the *Quebec Charter*, the *Charter of Rights* and past jurisprudence. This is particularly so, when one considers that the application and interpretation of accommodation issues in question will likely be made by individuals who may have no formal training in the subject.

[52] According to the explanatory notes, the Act "*establishes the conditions under which accommodations on religious grounds may be granted as well as the specific elements that must be considered when dealing with certain accommodation requests. Under the Act, the Minister must establish guidelines for dealing with requests for accommodations on religious grounds in order to support bodies in their interpretation of such requests.*" And yet, neither section 11 nor the guidelines in question are available to fulfill the very purpose of the Act.

[53] If the legislature considers that accommodation provisions are necessary for the application of a law, then it must ensure that these provisions and any accompanying guidelines identified in that law come into force and are available to the public at the same time. In a statute such as the Act, there is perhaps as much public interest in section 11 as there may be in section 10. These two sections must operate hand in hand if the intention of the legislature is to offer accommodation to those who may be seeking it in the face of the government's actions.

[54] The AG provided no reason for why the coming into force of section 11 is delayed. The AG was likely unable to explain when the coming into force of that section is envisaged. In answer to the Court's question why section 10 was introduced and assented to without the benefit of section 11 and the accompanying guidelines, the AG simply indicated that the absence of section 11 was of no consequence, as there is the *Quebec Charter*, the *Charter of Rights* and existing accommodation caselaw that could answer any questions or issues that arise.

[55] Certainly, such an approach is not compatible with the intention expressed in the Act. The government cannot bring into force a provision that itself considers to be in need of accommodation and then keep in suspense the accompanying accommodation provision coupled with an omission to establish its operative guidelines to address the public's requests for accommodation.

[56] If as the AG contends, the absence of section 11 is of no consequence because there is the *Quebec Charter*, the *Charter of Rights* and existing accommodation caselaw that answer any issues or questions that arise with respect to section 10, then why adopt section 11 in the first place?

[57] *Prima facie*, therefore, the third part of the test for a stay is also satisfied. Once more, none of the determinations made by the Court at this stage will have an impact on the judge who ultimately hears the merits of this case. Similarly, none of the determinations made by this Court should effect a request for a subsequent stay, should one be appropriate or needed, following the coming into force of section 11 of the Act and the establishment of the corresponding guidelines under section 12.

[58] In the interim, noble as the ideology of state religious neutrality may be, the government must ensure that the law it is adopting for the public good is coherent and complete.

[59] To paraphrase the words of the Supreme Court, public interest includes both the concerns of society at large and the particular interests of identifiable groups. Moroever, public interest does not always gravitate in favour of enforcement of existing legislation. If this was to be the case, the values of our free and democratic society would be compromised.

FOR THESE REASONS, THE COURT:

GRANTS, in part, the Application for an interim stay;

STAYS the operation of section 10 of the *Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies* until such time as section 11 of that same *Act* is brought into force and is fully operational in accordance with the guidelines set out in section 12;

LEGAL COSTS TO FOLLOW.

BABAK BARIN, J.S.C.

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