

RELIGIOUS PLURALISM IN QUÉBEC: A SOCIAL AND ETHICAL CHALLENGE

A document submitted for public consideration

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INTRODUCTION

In September 1994, the press reported the case of a young girl who had been expelled from a public school because she wore the Islamic veil, apparently in contravention of the school's dress code. A comparison was drawn with another situation where, it was claimed, a private Muslim school was forcing its non-Muslim female teachers to wear the veil. In the ensuing debate, each side used the Québec *Charter of Human Rights and Freedoms* as justification and accused the other of discrimination. The Commission was urged to make a public statement.¹

While some clarification is obviously needed, especially as regards the scope of the Charter in situations of this kind, it seems to us that it would not be useful to restrict our input simply to the question of whether or not prohibiting or imposing the wearing of the veil constitutes discrimination.

The questions and concerns raised by this issue suggest that the problem goes much deeper, and has much in common with some aspects of debates in other societies.

In the Québec context, the problem is not unconnected with the popular unease in recent years regarding the transformation of Québec into a pluralist society, fragmented in terms of values, beliefs and ways of life. The new plurality demands adjustment, often to a significant degree.

The social unease goes far beyond the situations that may exist in some schools. It manifests itself, for example, in workplaces that have been asked to adjust their schedules to the religious needs of employees, or to exempt some employees from tasks incompatible with their personal beliefs, or to allow certain rites in the workplace. It is also reflected in the fear that a positive response to one request will trigger an endless stream of requests based on all kinds of religious beliefs.² This has caused an increasingly manifest reaction of intolerance on the part of some people towards any request related to the exercise of rights protected under the Charters.

In recent years, the courts have examined a number of cases in which the Charters were cited in support of requests for changes to adjust to specific individual needs. In some of these cases, they ruled that organizations had a "duty to accommodate" in order to guarantee the individual right to equality, although they added the qualification that the accommodation should be reasonable, that is, it should not place an undue hardship on the organization. In doing this, the courts provided an important means of settling conflicts. However, these decisions were undoubtedly not well-understood, and sometimes led to controversy.

¹ The Commission received no complaints about these specific allegations. However, since then, it has received requests for investigations in two different cases. Each of these cases has its own unique aspects, and some of these aspects may differ from the general principles set out in this document. This document should not therefore be used as a basis for any conclusion as to the eventual outcome of a thorough investigation of the particular facts of each of these cases.

² Some such beliefs can be considered to be significant departures from religious dogma or precepts, as we have observed. Examples would be the case of an employee who refused to use a price decoder so as not to be exposed to evil figures, or employees who refused to work in a musical environment conflicting with their beliefs, or a civil servant who refused to process files concerning medical practices that were contrary to her beliefs.

Although useful and considerable, the case-law cannot provide all the answers to the increasingly difficult situations arising out of the daily challenge of coexistence between beliefs and rules

based on different specificities, including different religious affiliations. In this context, we feel that it should not be left only to the courts to decide what place we as a society wish to give religion in public secular life.

The mandate of the Commission allows it not only to investigate cases but also to promote the principles of the Charter. We have therefore decided to initiate a process of reflection on what we believe are the main issues of religious pluralism in Québec. We do so on the premise that there is a need to base our social relationships not on greater legal input to conflict resolution, but on a new "will to live together" defined by common values.

We therefore propose an interpretation of the right to equality, the freedom of conscience and the freedom of religion in the light of the *Charter of Human Rights and Freedoms*. In the second part of the document, we present a legal analysis concerned specifically with dress restrictions.

The interpretation we make primarily reflects the situation of the schools and workplaces already faced with religious diversity, where we believe that every individual, whether parent, student, director, teacher, employer or employee, must assume his or her share of responsibility in seeking arrangements that will reconcile the objectives of the organization and the rights of everyone involved in it. It is in this spirit that we suggest a number of avenues to be explored in order to allow environments such as these to respond to the demands of religious pluralism.

Finally, we appeal for a continuation of the process of public reflection on questions related to the organization of the exercise of individual rights.

PART I

**FROM RELIGIOUS FREEDOM TO THE
OBLIGATIONS OF LIFE IN SOCIETY**

1. Religious diversity and conflicts of values

Human beings in search of meaning have always sought answers to their existential questions in religions, that is, in the explanatory systems, superior values and ideals that they propose. Religions and churches, whatever their nature, establish rituals, identity codes and rules of conduct to help them achieve their ideals.

Every religion provides answers which lead to adherence "in preference to" or, more often, "to the exclusion of" all others. It is therefore hardly surprising that religion provides such fertile ground for controversy.

In a society where many different religions exist, the "absolute" elements in those religions may make everyday cohabitation difficult. The difficulty will increase as the number of religions, churches and sects grows. The situation is exacerbated by differences in the degree to which individuals comply with the dogma, creeds and rules of each religion, church or sect.

This latter factor is of particular importance in the present case, since Canadian courts have interpreted the notions of freedom of conscience and freedom of religion, protected by the Charters, as embracing "deeply-held personal convictions", even those not based on accepted religious dogma or a shared interpretation.

However, these difficulties explain only part of the unease currently existing in Québec as regards the public space taken up by the assertion of personal beliefs and, especially, as regards the claims that such assertion may lead to. Québec's historical background must also be considered.

1.1 Québec's path towards religious pluralism

Until the end of the 1950s, Québec was, in general religious terms, composed of a Catholic majority of French descent, firmly structured by an omnipresent Church, and Protestant and Jewish minorities. Apart from a few rare groups such as the Jehovah's Witnesses, which sought to recruit their following from the other denominations, compartmentalization was the rule. It was precisely this compartmentalization, in which the various religious denominations followed parallel paths, that for many years contributed to making French schools off-limits to non-Catholics.

More recently, through the affirmation of the freedom of individual conscience, the Catholic majority has been fragmented by a number of major upheavals. Although in general terms people have maintained their affiliation to religion - many see themselves reflected in a culture shaped primarily by the Catholic religion - their involvement is now limited, for the most part, to traditional rituals. Regular religious practice has become the exception rather than the rule, as has membership in a church institution. Above all, religion has changed from a mass phenomenon to a private choice.³

At the same time, the arrival of immigrants affiliated to different religions also played a role in broadening Québec's religious map. Some of the religious practices the immigrants brought with them may have given the impression that whole communities were refusing full insertion into Québec's society, and it might be thought that the religious tension that might exist was attributable to immigrants alone. However, this would be to disregard the fact that, among long-standing

³ GAUTHIER, Madeleine, «Croyances religieuses», in *La société québécoise en tendances 1960-1990*, directed by Simon Langlois, Institut québécois de recherche sur la culture, 1990, pp. 423 ss.

Québecers as well as in the ethnic and cultural communities, religious practices and affiliation to religious institutions vary considerably between groups, and even between individuals.

In addition, the regular requests for intervention received by the Commission tend to suggest that conflicts on the subject of freedom of conscience or freedom of religion are just as likely to involve longstanding Catholic Québecers with roots in Québec as recent immigrant Québecers belonging to another denomination, or members of one of the 600 or so religious sects in Québec whose membership includes people of all origins.

It is therefore important that we do not "ethnicize" conflicts of a religious nature, but we must also be aware that racism may sometimes lie at the root of religious intolerance.

1.2 A secular society challenged by the question of religion

Paradoxically, Québec's new religious diversity exists within a society which, over the years, has made clear and rapid progress in the secularization of its social institutions.

However, for a number of reasons, including constitutional restrictions (in Montreal and Québec City) as well as the religious zeal of some educational institutions and the ambivalence of parents, our educational system remains largely denominational.

The result of this is that we as a society are having to debate the wearing of the Islamic veil in public schools against a background of Catholic or Protestant school boards required by law to accept students from other denominations, with all the adjustments that this implies. According to law, the school boards must, for example, respect the right of students to choose between religious and moral instruction.

The Commission des droits de la personne has clearly pronounced itself in favour of making Québec's education system nondenominational.⁴ However, although we are convinced that this would prevent some conflicts from arising and help in settling others, we are far from convinced that it would free nondenominational schools completely from the challenge of managing religious diversity.

To support this view, we need simply point out that the workplace, traditionally secular in nature, is the area which has so far been challenged most often by individuals citing Charter provisions to claim changes in their working conditions so as to allow them to respect the precepts of their religion or personal beliefs. By way of analogy, recent events in France have shown that even non-religious schools are not impervious to social trends.

In recent years, the Charters have enabled a number of individuals to lift religious practice from its place in private life, to which our society thought it had been relegated. This explains the popular concern surrounding the issue, especially among organizations, which are wondering just how far they must go in accommodating individual religious needs if they are to comply with the Charter and, in some cases, to avoid being charged with intolerance or even being taken to court for discrimination.

⁴ Commission des droits de la personne, *Mémoire présenté à la Commission parlementaire de l'Éducation sur les projets de loi sur les élections scolaires et sur l'instruction publique*, 1988.

As we will see later in this document, the Québec *Charter of Human Rights and Freedoms* and the case-law provide a partial response to this question.

2. The Charter and religion

2.1 The ban on discrimination

The *Charter of Human Rights and Freedoms* is a fundamental piece of legislation that is binding without exception on the citizens of Québec and their organizations, including the State.

The Charter contains provisions to protect individual religious beliefs and practices. First, the chapter on fundamental rights states that every person possesses freedom of conscience, freedom of religion, freedom of expression and freedom of association. The Charter also recognizes every individual's right to equality by stipulating that no person may be discriminated against or harassed on the basis of religion. Where these rights and freedoms are violated, the Charter provides for redress and compensation for the prejudice suffered by the victims.

In the international instruments which Québec and Canada have ratified, and on which the Charter is based, in particular the *International Covenant on Civil and Political Rights*, the criterion of "religion" as a basis for discrimination has been interpreted to include not only affiliation to a particular religion or adherence to a particular belief, but also the rites and practices of the religion, including the question of dress.

In concrete terms, the ban on discrimination means that individuals may not be deprived on religious grounds of the exercise of a right such as, for example, access to the public school of their choice or access to employment. As a result, the following are prohibited:

- ❑ direct discrimination, such as a policy stating explicitly that a practice related to a given religion entails loss of access to a school, or a recruitment policy expressly excluding members of a given religion, unless the exclusion is justified under section 20 of the Charter (c.f. point 2.3);
- ❑ adverse effect discrimination, i.e. a rule that appears to be neutral and universally applicable, but that has a damaging effect on a group member because of that person's religion. This would be the case, for example, of a strict dress code or a work schedule that would conflict with the demands of a particular religion.

Does this mean that, to avoid discrimination, policies or schedules such as these must automatically be abolished? The response to this question is not clear-cut, and lies in the notion of "reasonable accommodation".

2.2 The duty to accommodate

Historically, the notion of the "duty to accommodate" developed in Canada as part of the definition of the conditions of freedom of religion. It is not exclusive to the area of religion, however, and also arises regularly in cases of discrimination based on handicap, among others. This notion is widely misunderstood and often gives rise to intense controversy. Before it is further abused, we feel it would be useful to remove some of the drama that surrounds it.

"The duty to accommodate" means the obligation to take steps to help individuals who have

particular needs as a result of a characteristic related to one of the grounds for discrimination prohibited by the Charter. Such steps are aimed at avoiding a situation where seemingly neutral rules might jeopardize the equal exercise of a right by the individuals concerned.

However, it is not a limitless obligation to submit unconditionally to every particular need, and still less to every intransigence. According to current case-law, an accommodation must be "reasonable", in the sense that it must not place an undue hardship on the organization concerned.⁵

For example, where an employee requests the right not to work on specific days so as to comply with the precepts of a religion, the employer would not be bound to accept an arrangement that would place an undue hardship on the enterprise. According to the Supreme Court, an employer can decide whether or not a hardship is undue by taking into consideration the size of the enterprise, the interchangeability of workers and equipment, the financial cost, safety aspects and the effect of the measure on the legitimate rights of the other employees.

However, the employer is bound to try, in good faith, to come to an arrangement within the limits of reason.

In this context, employees must bear their share of responsibility. They should be aware that the possibility of accommodation is not infinite. If they knowingly make choices that exceed what is possible, they must be prepared to assume the consequences.

The same applies to the educational sector, with one important difference: the criteria used to establish whether or not the accommodation requested constitutes an undue hardship must take account of the specific nature of the educational institution concerned.

In this respect, schools are confronted with two main types of constraint: constraints of a legislative nature, and constraints of an organizational nature.

In legislative terms, Québec's schools are subjected to the *Education Act* and the *Basic School Regulations*, in addition to the *Charter of Human Rights and Freedoms* and the *Charter of the French Language*. The *Education Act* stipulates the obligation to attend school, defines the mandatory content of programs of instruction, establishes the number of days of instruction and fixes holidays. Many of these rules are restrictive in various ways; for example, the obligatory content of the programs of instruction may not be altered. However, others leave rather more room to manoeuvre and thus help promote dynamism.

In organizational terms, schools must ensure the coherence of their objectives and define their working methods, criteria and methods of evaluation, as well as their activities at various levels. For this purpose, they must create harmonious interaction between their various activities, functions and components, and fulfil their mandate with the resources at their disposal.

With these guidelines for fulfilment of the educational mandate, the excessive nature of a request for accommodation can be judged on the basis of how a possible solution will reflect the demands of functional and timetable planning, the demands of classroom functioning and the fulfilment of the school's educational objectives, the burden or unfairness that may result for other individuals

⁵ Where this is the case, the union also has a responsibility to help seek out solutions, especially in the case of a collective agreement that may have discriminatory effects. (students or staff members), the rules of safety and the constraints placed on the school's resources. The size of the institution, the number and diversity of requests, and the time at which the requests are made, could also affect the ability to accommodate.

However, in schools and in the workplace, while the obligation to accommodate is not limitless, it nevertheless includes the duty to explore possible solutions, in good faith, with the people concerned.

In this respect, we remain convinced that the flexibility granted to schools has created an environment that is particularly well-suited to accommodation. The achievements of many schools bear witness to this.

2.3 Section 20 of the Charter: an exception with limited scope

Clearly, there are some exceptions to the ban on discrimination as described above. Section 20 of the Charter states that a distinction, exclusion or preference may be deemed non-discriminatory in certain circumstances, including the case of a non-profit institution devoted exclusively to the well-being of an ethnic or religious group.

However, contrary to the interpretations put forward since last September, which may have given the impression that the Charter grants more rights to certain categories of citizens at the expense of others, the exceptions provided for in section 20 in no way authorize the violation of fundamental rights.

Section 20 can be divided into two components. The first component states that a distinction, exclusion or preference based on the aptitudes or qualifications required for an employment is deemed non-discriminatory.

This provision applies mainly to employer-employee relationships and must be interpreted restrictively, since it breaches the right to equality. To take advantage of it, the employer must prove that there is a rational link between the job and the qualification or aptitude that may discriminate against a particular group. The employer must also show that the rules imposed are reasonable and, if they constitute an undue hardship for some categories of people, must prove that no other solution is possible.

While the Charter prohibits employers from including questions in an employment application form or employment interview that require information relating to any of the grounds for discrimination

⁶ Brossard (Ville) v. Québec (Commission des droits de la personne), [1988] 2 S.C.R. 279, 331.

⁷ Caldwell v. Stuart (1984) 2 S.C.R. 603. In this case, the Supreme Court was asked to rule on the case of a teacher who had been dismissed after marrying a divorced man. The court decided that the teacher, a Catholic working in a school whose educational project was also Catholic, had an obligation to follow the precepts of the Church.

No one can say with any certainty that the Supreme Court's decision would be exactly the same if it had to decide a dispute concerning a religion which, like Islam, is not based on dogma and whose precepts

can be interpreted in different ways.

(s. 18.1), a public school wishing to recruit a pastoral officer, for example, would be able, under section 20, to ask candidates for information on their religious affiliation. In this case, there would be a direct link between the job and the qualification required, and the demand would clearly be reasonable.

The second component of section 20 provides that a distinction, exclusion or preference is deemed non-discriminatory if it is justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group.

According to the Supreme Court,⁶ this provision would allow a non-profit institution, in all legality, to hire only teachers who are members of the institution's "official" religion. Although this constitutes a preference based on religion, it is deemed non-discriminatory by the will of the legislator if it is justified objectively by the specific nature of the institution. Thus, a private Muslim school could, on this basis, hire only Muslim teachers and demand that they uphold the institution's religious practices.⁷

However, if this same school were obliged to hire non-Muslims, for example because no Muslims qualified to teach the subject matter were available, could it then demand that these people observe Islamic practices?

The legislator's intention in introducing the second component of section 20 was to enable groups characterized by their ethnic roots or religious beliefs, for example, to associate freely and promote their values and beliefs. In our view, however, it was not the legislator's intention to authorize such groups to deprive other citizens of the free exercise of their fundamental rights.

Section 20 is contained in the chapter of the Charter dealing with equal rights. Although it provides immunity for religious non-profit schools with regard to preferences that would otherwise be deemed discriminatory, that immunity cannot, in our view, be extended to the freedom of conscience or freedom of religion of a person belonging to another religious denomination. Thus, a school that hires people from another denomination cannot force them to observe the institution's religious practices without interfering illegally with their fundamental rights. This includes the wearing of distinctive clothing.

In addition, since freedom of conscience and freedom of religion are public policy and cannot be renounced, a condition of employment requiring compliance with the institution's religious rules, even if included in a contract of employment signed by both parties, should be considered contrary to public order and incompatible with the Charter.

2.4 *Reconciling religious practices and Charter values*

The Charters, like the religions, propose a value system, but in their case it is backed by a broad social consensus, and tries to define the basic rules of public life. These rules may apply to everyone, independently of the religions, but they create a context in which each separate religion can be practised. Clearly, this does not in itself prevent conflicts from arising.

For example, the current debate on the Islamic veil in schools includes fierce discussion of the notion that the symbolism associated with the veil may be contrary to the value of sexual equality.

It must be acknowledged that the veil is sometimes an instrumental part of a set of practices aimed at maintaining the subjugation of women and that, in some more extremist societies, women are actually forced to wear the veil. For example, we cannot but condemn in the strongest possible terms the terrorism to which some Algerian women are subjected, according to the information that filters through, for refusing the veil for themselves or for others.

Until now, Québec has avoided the violence of this type of political-religious movement. What we are in fact witnessing here is a highly complex debate based on different concerns, including some political aspects that go beyond the bounds of Québec's society. However, the debate is also concerned with the question of whether the veil is contrary to the principle of male-female equality.

A major part of the public debate of recent months has been concerned with the interpretation of the Koran itself, especially as regards the obligation to wear the veil. We do not feel it is up to us to take position on this particular question, which we believe should be considered first and foremost within the Muslim community itself.

However, many people have expressed concern about the right to equality of young Muslim women who, consciously or not, might not wear the veil entirely of their own free will. Some clarification is needed here.

Beyond differences in Koran interpretation and out of respect for the people who choose to wear the veil, we must assume that this choice is a way of expressing their religious affiliation and convictions. In our view, it would be insulting to the girls and women who wear the veil to suppose that their choice is not an enlightened one, or that they do so to protest against the right to equality. It would also be offensive to classify the veil as something to be banished, like the swastika for example, or to rob it of its originality by comparing it to a simple hat.

In general terms, therefore, the veil should be seen as licit, to be prohibited or regulated only if it can be proved that public order or the equality of the sexes is threatened.

This would be the case, for example, if students were forced to wear the veil against their will. While a school must, in the name of freedom of conscience, respect the freedom of students who wish to wear the veil, it must also, for the same reason, support those who do not wish to do so. However, there is no guarantee that this will change what goes on in the privacy of the home.

A school would also be justified in intervening where a campaign to wear the veil is organized with the aim of creating or aggravating tension between student groups, or of inciting discrimination based on sex. In such circumstances, a temporary coercive measure, scaled to suit the gravity of the facts, would be justified.

It should always be remembered, however, that interference with public order and the equality of the sexes must be proved and not presumed. The basic principle must always be that the desire of individuals to wear the veil should be respected. But this principle does not exclude vigilance as regards the political or ideological uses that may be made of the garment; indeed, it demands it.

Finally, it is useful to note that the school's educational mandate confers major social responsibilities,⁸ including the responsibility to provide the young people in its care with equal opportunities

for self-fulfilment and success. Because the school is charged with promoting social insertion, it must also ensure, by teaching mutual respect, that no student is ostracized by his or her peers or rejected by the group for religious reasons or because of a symbol used to express a religious belief. Whatever the situation, exclusion or prohibition are never valid choices, either in terms of equal rights, or from a strictly educational point of view.

3. A social and ethical challenge

3.1 Reciprocity as a vital social bond

The *Charter of Human Rights and Freedoms* is considered to be the social contract or ethical framework defined by Québec's society to harmonize relationships between individuals and with institutions.

Since its adoption, the Charter has helped bring about significant social progress, partly due to the interpretation of some of its provisions by the courts. However, at the same time, we have witnessed a gradual decline in social consensus around the solutions selected to respond to new problems resulting from our evolution and to question our values and reassert our collective desire to live together as a society.

The task of organizing some of our social relationships has been left mainly to the courts. However, the legal decisions in specific cases naturally focus on the protection of individual rights and freedoms, and this may have given the impression that the rights and freedoms of individuals may never be freely compromised in the name of social cohesion.

Faced with the large number of conflicts that such a perception may cause, the Commission feels that it would not be fulfilling its duty as trustee of the Charter if it did not reassert the spirit behind it.

The spirit of the Charter is the spirit of a social contract stating that individual rights and freedoms must be guaranteed by the collective will and, in return, must be exercised with proper regard for democratic values, public order and the general well-being.

While the "collective will" has, as we have seen, taken a number of steps to protect individuals from being denied their rights, individuals still have much to learn in terms of returning the compli-

⁸ The U.N. *Convention on the Rights of the Child*, ratified by Canada with the agreement of the provinces, describes the objectives of the right to education in the following terms (s. 29.1):

States Parties agree that the education of the child shall be directed to:

- (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential;*
- (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;*
- (c) the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;*
- (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups*

and persons of indigenous origin;

(e) the development of respect for the natural environment.

ment when they exercise those rights. The ability of Québec's society to learn reciprocity in this respect is more important than ever as it evolves towards pluralism in many different forms.

In our view, no valid, fair and realistic solution to conflicts of rights can possibly emerge from the current trend, where individuals and institutions alike are quick to claim the rights and freedoms to which they are entitled, but will not accept the responsibility for organizing a shared space and renewing the social bond so that others, too, can exercise their rights and freedoms.

Given that all individuals are equal under the Charter, their rights must be exercised in a context of mutual acceptance, reciprocity and, above all, personal responsibility. The more pluralist the society, the more important these factors will become.

In the case of religion, rights and freedoms can soon be transformed into sacred absolutes placing constraints on society as a whole. If the limits of private choice and the need for reciprocity cannot be acknowledged, practised and managed by individuals and institutions able to consent to arrangements of daily life without plunging into endless legal procedure, the chances are high that we will all lose.

We therefore believe that religious pluralism should be treated like any other form of pluralism and subjected to certain limits established by the demands of life in society, beginning with the need for responsible partners, sharing a desire to promote social cohesion, who will negotiate the conditions on which rights may be exercised in communities faced with the challenge of reconciling differing senses of identity.

3.2 *The first step: negotiation between responsible partners*

To respond to the applications it receives, the Commission has had to establish an approach that reflects the ban on discrimination based on religion, the duty of organizations to accommodate, and the limits affecting their ability to adapt.

This approach is based essentially on negotiation, conciliation and mediation as absolute prerequisites, although it must not be forgotten that many individuals find themselves in a weaker position in this respect. The approach is used both when organizations, businesses or other institutions ask for our help, and when individuals who believe they have been victims of discrimination ask us to investigate.

Our experience has shown that when the parties to a conflict are encouraged and helped, they will generally manage to find solutions - often innovative - allowing them not only to overcome highly complex situations, but subsequently to settle many other problems without resorting to the courts.

It is unfortunate that the parties to a case recently brought before the Supreme Court were forced to spend quite extraordinary amounts of energy, time and money to identify what turned out to be a very simple and obvious solution that allowed the individuals concerned to observe the precepts of their religion.

In the case in question - *Commission scolaire régionale de Chambly v. Bergevin*⁹ - the Court, in its ruling, simply pointed out that the contract of employment in force at the time included a bank of personal leave that employees could use for absences not otherwise covered by the collective

agreement. In the Court's view, the employer could easily agree to the use of personal leave by employees of other denominations to cover absence on religious holidays (specifically, Jewish holidays). Indeed, to avoid discrimination, it was obliged to agree.

This type of arrangement in the workplace could, in our opinion, constitute an excellent means of responding not only to future requests for accommodation for religious purposes, but also to changing workforce needs.

The open-minded attitude required by this type of arrangement is the kind of attitude that the educational community must demonstrate, by taking steps to ensure that students are not penalized for absence related to religious practice. They are already doing this for absence due to sickness. An approach of this kind would require the involvement of everyone in the institution. It may even require schools with high levels of religious diversity to reorganize parts of their timetable to suit the majority, provided of course that the mandatory programs and minimum number of days of instruction continue to be respected.

The issue here is flexibility, a capacity needed by all organizations having to deal with pluralism. However, it is also a question of the ability of individuals to act responsibly in terms of their personal choices and the relative space that those choices should occupy in the school or work environment.

We are aware of the difficulties that are certain to arise in this context, as a result in particular of the difficulty of assessing fairly not only what constitutes an acceptable framework for preserving the "democratic values, public order and the general well-being" mentioned in section 9.1 of the Charter, but also of separating what can be accommodated from what cannot.

In this respect, while we may have provided some clarifications for groups faced with such choices, and while we remain at the disposal of organizations and individuals needing help, we do not claim to have final answers to all the questions that are asked, many of which are a matter for social debate.

4. A debate open to the choices of society

Faced with the increasing precedence of religious issues over secular issues in many environments, we hope very much that the process of public reflection will continue. In our view, it is highly desirable for the institutions and communities concerned, especially school communities, the workplace and religious groups, as well as concerned individuals, to continue, with us, to debate the place we as a society wish to give to religion in the common public space.

Freedom of religion is undoubtedly the area that demands the greatest effort of accommodation in pluralist societies. Not only is consensus difficult to achieve, but the balance is always precarious. However, we are convinced that the forthcoming debate, while preserving the value of freedom of religion, must also teach us something about the methods required to organize this freedom in different social contexts.

In the debate, special attention should be paid to the fact that tolerance and mutual respect are the most fundamental values in our society. If we are to succeed in the daring and essential venture of social architecture that now confronts us, we must not lose sight of the ideal of justice and harmony on which it is based.

⁹ (1994) 2 S.C.R. 525.

In addition, because of the complexity and the links between the various levels of the religious question, the process of reflection should focus on the wider issues to avoid becoming bogged down in isolated cases.

Finally, given the speed of the changes in Québec's religious map, great vigilance and open-mindedness are needed in seeking out satisfactory solutions, especially when new and previously unknown problems come to light.

For the moment, some questions seem to be more important than others because of their impact on our social relationships. They are reflected implicitly or explicitly in the concerns expressed by the environments involved and by the general public. These questions can be resumed as follows.

- ❑ To what extent can we continue along the path outlined by the case-law, where dogma or recognized religious precepts are considered on an equal footing, in terms of the obligation to accommodate, with "deeply-held personal convictions" not based on dogma or precepts?¹⁰
- ❑ Are individuals deprived of their freedom of religion when they are not permitted to exercise it in all spheres of public life?
- ❑ To what extent can a society that has evolved towards secularization ask its organizations to adapt their operations to a set of religious trends?

Applying principles is not easy, since it is sometimes necessary to name the sources of unease first, in order to get past them and identify the conditions of the "desire to live together". The exercise is nevertheless a necessary one, because it is a question not only of our social project, but of compliance with the rules of democracy.

¹⁰ The cases that led the courts to broaden such an interpretation of the notions of freedom of conscience and freedom of religion were concerned with beliefs that are quite familiar. For example, in the case of *Smart v. Eaton*, the tribunal upheld a request by a Catholic woman who did not want to work on Sundays because it was against her religious beliefs. (1994) 17 C.H.R.R. D-446 (Human Rights Tribunal).

We may well wonder if the courts would take the same approach in a case involving a more marginal

trend.

PART II

THE EFFECTS OF DRESS RULES IN SCHOOLS ON THE EXERCISE OF THE RIGHT TO EQUALITY AND THE FREEDOMS OF CONSCIENCE AND RELIGION: LEGAL ASPECTS

I-The islamic veil in public schools

II-Constraints on dress of a religious nature applicable to the staff of certain private schools

Legal opinions by Pierre Bosset, Legal Adviser, Research Department. Adopted by the Commission at its 388th sitting, held on December 21, 1994 (Resolutions COM-388-6.1.3 and COM-388-6.1.4).

The press has recently reported the case of a young girl living in the area covered by the Montreal Catholic School Commission who was forced to attend a school that was not the school of her choice. This was apparently because she wore the Islamic veil,¹ possibly in contravention of the dress rules of the school she wished to attend.²

This opinion contains an analysis of the more general aspects of the issue but does not address this specific case, into which the Commission has not been asked to investigate. The aim of the opinion is to identify the legal principles that would apply under the *Charter of Human Rights and Freedoms*³ and Québec's education legislation. Of particular interest are the relevant provisions of the *Education Act*⁴ and the provisions of the Charter that establish the following rights and freedoms:

- ❑ freedom of conscience and freedom of religion (s. 3);
- ❑ the right to equal recognition and exercise of all rights and freedoms (s. 10);
- ❑ the right to free public education, to the extent and according to the standards provided for by law (s. 40).

The issue is examined in the legislative and regulatory context of *public* schools, and should therefore not be confused with the very different issue of teachers in private Muslim schools being required to wear the Islamic veil. This latter issue will be the subject of separate remarks later on.

We are aware that although the wearing of garments such as the Islamic veil does not cause the same level of controversy here as it does in countries such as France, for example, (where the non-religious nature of the education system is written into the Constitution),⁵ it nevertheless raises the broader question of the relationships between the standards applicable in public institutions and the demands of certain religions. The question deserves to be examined as part of a social debate because of the issues it addresses. However, it exceeds the scope of this opinion, which takes a strictly legal point of view regarding the problems raised by the wearing of a particular garment - the veil - in a particular context, i.e. public schools.

1. THE CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

Strictly speaking, Québec's education system cannot be said to be non-religious, at least not in the way the expression is understood in France. On the contrary, the *Constitution Act, 1867*,

¹ Also known as a shawl or "hidjab", this is a piece of material used to cover a woman's hair. It should not be confused with the chador, a long garment that covers the body from head to foot.

² *La Presse*, September 9, 1994, p. A-1.

³ R.S.Q., c. C-12 (hereinafter "the Charter").

⁴ R.S.Q., c. I-13.3 (hereinafter "E.A." in the notes).

⁵ See the opinion of the Conseil d'État (November 27, 1989) on the non-religious nature of schools and symbols of membership of a religious community, *Revue universelle des droits de l'homme*, Vol. 3, No. 4 (May 17, 1991), 152-154, and the questions raised by: J. RIVERO, "Laïcité scolaire et signes d'appartenance religieuse", *Revue française de droit administratif*, Vol. 9, No. 1 (January-February 1990), 1, 4-5.

guaranteed the existence of some denominational school boards.⁶ It also authorized the creation outside Montreal and Québec City of separate school boards for Catholic or Protestant clientele.⁷ With the exception of the latter case, Québec's schools are, however, *common*⁸ - this is a fundamental principle. In other words, they are open to the population as a whole, and every student, whatever his or her religious denomination, is entitled to attend. They remain common even if they are granted a denominational status.⁹ Even in the Québec City and Montreal school boards, whose denominational nature is protected by the Constitution, the schools are nevertheless "open to all",¹⁰ regardless of religion.

It is up to each school to establish the rules of conduct applicable to its students. The school principal proposes rules of conduct and safety rules to the school's orientation committee.¹¹ The orientation committee must first consult the school committee,¹² and is then free to adopt the rules proposed, with or without amendment.¹³ In short, the system is basically decentralized, and the rules of conduct and safety rules may differ between schools.

Once adopted, the rules of conduct and safety rules are submitted for approval by the council of commissioners, and a copy is sent to all students and their parents. Disciplinary sanctions may be included.¹⁴ However, only the school board itself may order a student to enrol in another school, provided there is just and sufficient cause, and only after giving the student and his or her

⁶ *Constitution Act, 1867*, s. 93, para. (1). These are: The Montreal Catholic School Commission, the Protestant School Commission of Greater Montreal, the Commission des écoles catholiques de Québec and the Greater Québec School Commission. See s. 122, E.A.

⁷ *Ibid.*, s. 93 (2). There are currently five separate school boards, listed in s. 125, E.A.

⁸ *Hirsch v. Protestant Board of School Commissioners of Montreal*, (1928) S.C.R. 220.

⁹ *Act Respecting the Conseil supérieur de l'éducation*, R.S.Q., c. C-60, s. 22, and related regulations.

¹⁰ P. GARANT, *Droit scolaire*, Cowansville, Éditions Yvon Blais, 1992, 58.

¹¹ S. 78, para. (2), E.A. The orientation committee is composed of parents, teachers, professionals, support personnel, students (in the case of a school offering second cycle secondary-level education) and, in some cases, a community representative (s. 55, E.A.).

¹² S. 89, para. (3), E.A. The school committee is composed exclusively of parents (s. 83, E.A.).

¹³ S. 78, para. (2), E.A.

¹⁴ S. 78(2), E.A.

parents an opportunity to be heard.¹⁵

Provided the dress rules applicable in individual schools comply with the Charter provisions, we must assume that, from the standpoint of administrative law, they constitute a valid exercise of the regulatory power described above.

2. THE PRINCIPLES OF THE CHARTER

2.1 General remarks

The legal framework established by the *Education Act* can be considered to be a concrete application of the right established in general terms by section 40 of the Charter:

"40. Every person has a right, to the extent and according to the standards provided for by law, to free public education."

This right stipulates its own limitations, in that it refers specifically to the standards and criteria established in the education legislation. Neither the legislator nor the school authorities have *carte blanche* to regulate the terms and conditions of exercise of this right. In particular, the terms and conditions proposed must not be discriminatory in nature. Section 10 of the Charter¹⁶ should in fact be considered to form an integral part of every other section that establishes a right or freedom.¹⁷ In other words, it is a kind of universal condition applicable to all other rights and freedoms. Consequently, the legislative and regulatory implementation of the right to free public education must also uphold the individual right to equality, which takes precedence over any rule to the contrary,¹⁸ and must not unlawfully interfere with any of the other rights and freedoms granted under the Charter.

2.2 The Islamic veil and the Charter

As regards the right to equality, there are two ways of looking at the banning of the Islamic veil.

2.2.1 Direct discrimination

¹⁵ S. 242, E.A.

¹⁶ "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, 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."

¹⁷ Commission des droits de la personne v. Commission scolaire de Saint-Jean-sur-Richelieu (1991) R.J.Q. 3003, 3038 (Human Rights Tribunal). Upheld by the Court of Appeal, C.A.M. 500-09-001750-918, J.E. 94-925.

¹⁸ S. 52.

If the rules forbid the wearing of the veil only, this would be a form of direct discrimination, within the meaning given to this term by the Supreme Court of Canada.¹⁹ It is not up to the Commission to resolve the issue - which is more a question of Koran exegesis than substantive law - of whether the veil is really compulsory under Islamic dogma. The Commission's guidelines and the jurisprudence of the Human Rights Tribunal both stipulate that conformity with the dogma - assuming there is one - is not essential to the admissibility of a complaint of discrimination.²⁰ Whether or not the veil is formally required under the Koran or under a specific interpretation of it is not the point; what matters is the fact that clear prohibition of this garment stigmatizes Muslims and places conditions on the exercise of their right to public education that are not applicable to other groups. This kind of discrimination is incompatible with the Charter.

Does the denominational nature - whether Catholic or Protestant - of a school or school board justify this kind of rule? Even if, for the purposes of the discussion, we accept that a public school could avail itself of the provisions of section 20,²¹ the only types of distinction allowed would be those justified objectively by the religious nature of a non-profit organization.²² It is doubtful whether a common school, by definition open to everyone regardless of religion, could prohibit students from wearing symbols of their affiliation to "other" religions. In a system that grants students not only the right to choose between moral and religious instruction, but also the right to receive instruction in a religion *other than Catholic or Protestant* where such instruction is offered by the school,²³ such a prohibition could not possibly be justified objectively.

2.2.2 Adverse effect discrimination

The veil may also be prohibited under generally applicable rules that seem to be neutral. This would arise, for example, where the rules forbade the wearing of garments that might "marginalize" a student. Some school authorities - rightly or wrongly - interpret such rules as applying to the Islamic veil.

¹⁹ Ontario Human Rights Commission and O'Malley v. Simpsons-Sears (hereinafter "Simpsons-Sears") [1985] 2 S.C.R. 536, 551: direct discrimination exists when an employer "adopts a practice or rule which on its face discriminates on a prohibited ground".

²⁰ COMMISSION DES DROITS DE LA PERSONNE, Recevabilité des plaintes de discrimination fondée sur la religion, December 18, 1985 (paragraph 2.2.4). In case-law: Smart v. Eaton (1994), 17 C.H.R.R. D-446; Commission des droits de la personne v. Autobus Legault, T.D.P. Abitibi, 615-53-000001-945 (November 18, 1994), Judge Rivet, 17-19 (under appeal).

²¹ For a contrary opinion based on the public nature of the school, see the *obiter dictum* in Commission des droits de la personne du Québec v. Collège Notre-Dame, C.S. Montréal, 500-05-0005-894, 31 (under appeal).

²² Brossard (Ville) v. Québec (Commission des droits de la personne), [1988] 2 S.C.R. 279, 338.

²³ S. 5, E.A. The right to choose moral instruction applies in denominational school boards only by proclamation of the Government (S.Q. 1988, c. 84, s. 728). In practice, however, even denominational school boards offer a choice between moral and religious instruction.

The Supreme Court of Canada decided that even a neutral, generally applicable rule could interfere with the right to equality. The highest court of the land stipulated that an employment-related rule "may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply".²⁴ There is no doubt that this principle also applies to schools.²⁵ A school that used a rule forbidding clothing with a "marginalizing" effect to justify sanctions against a girl who wore the Islamic veil would, in principle, be violating the girl's right to equality. The right to equality is violated even when the substance of the principal right claimed - in this case, the right to free public education - is not destroyed or compromised:

*"Where equality is merely a specification of another right, it is not necessary, to give rise to a remedy, for violation of the right to equality to constitute a denial of the other right. It is sufficient that a distinction incompatible with the rule of equality is established in determining the terms and conditions of that other right."*²⁶

One of the conditions of the exercise of the right to free public instruction is that students, in principle, are free to choose the school they wish to attend.²⁷

Although the student can continue to receive free public education in another school willing to accept her, the fact of preventing her, on discriminatory grounds, from exercising her right to choose constitutes a violation of her right to equality. The prejudice lies in the fact that a more restrictive condition is placed on her exercise of the right to free public education than on other students, since the rule forces her to attend a school that she has not chosen.

A decision to prohibit the wearing of the Islamic veil may also enter into conflict with other Charter provisions, including section 3, which establishes certain fundamental freedoms:

"3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, [and] freedom of opinion, freedom of expression [...]".

According to the case-law, freedom "can primarily be characterized by the absence of coercion or constraint".²⁸ For example,

"If a person is compelled by the State or the will of another to a course of action or

²⁴ Simpsons-Sears, *supra* (note 19), 551.

²⁵ C.D.P.Q. v. C.S. St-Jean-sur-Richelieu, *supra* (note 17), 3041-3044.

²⁶ P. CARIGNAN, "L'égalité dans le droit: une méthode d'approche appliquée à l'article 10 de la Charte des droits et libertés de la personne" (1987), 21 R.J.T. 491, 507 (our translation). Quoted in C.D.P.Q. v. C.S. St-Jean-sur-Richelieu, *supra* (note 17), 3037.

²⁷ S. 4, E.A.

²⁸ R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, 336.

*inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices."*²⁹

Freedom of religion is defined basically as:

*"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".*³⁰

The provisions of a number of international legal instruments support this approach. For example, article 18, par. (1) of the *International Covenant on Civil and Political Rights*,³¹ which was ratified by Canada and Québec, provides that every person is entitled to freedom of thought, freedom of conscience and freedom of religion. It goes on to say that this right implies the freedom to have or to adopt a religion or a conviction of one's choice, and the freedom to manifest one's religion or conviction either individually or in a group, in public or in private, through cult or the performance of rites, practice and teaching.

The United Nations Human Rights Committee has said explicitly that this right includes the right to wear distinctive garments or headgear.³²

Interpreted in this way, freedom of religion thus includes the right to wear a particular garment for religious reasons. Consequently, this right is violated, in principle, if a Muslim student is forbidden from wearing a veil, contrary to her beliefs.

It should be noted that the general validity of the rules of dress used as a basis for forbidding the veil is not questioned here. The rules - whether they forbid garments that have a marginalizing effect or that incite students to violence, for example - may be considered to be aimed at enabling the school to fulfil its mandate, and their validity in this respect is not an issue.

On the other hand, where the rules interfere with the right to equality, they should be adapted so as to eliminate any discriminatory consequences. In this respect, the school has an obligation to "accommodate".

²⁹ *Ibid.*, 336-337.

³⁰ *Ibid.*, 336.

³¹ UNITED NATIONS GENERAL ASSEMBLY, Res. 2200A (XXI) of December 16, 1966. (1976) 999 U.N.T.S. 187, [1976] C.T.S. 47. Came into force for Canada on August 19, 1976.

³² *General Comment No. 22 concerning a. 18 of the Covenant*, CCPR/C/21/Rev.1/Add. 4 (July 20, 1993), para. 4.

2.2.3 Reasonable accommodation

The Court of Appeal had this to say on the subject of reasonable accommodation:

*"Where a neutral rule appears to be discriminatory because it causes a damaging effect, it is maintained so as to apply to everyone except those people on whom it has a discriminatory effect, provided the author of the discrimination can make the necessary accommodations without suffering undue hardship and without interfering significantly with the rights of the other members of the group."*³³

The Court ruled that such accommodation was an essential condition for the equal exercise of the right to public education.³⁴

By itself, transferring a student who wears a veil would not constitute sufficient accommodation under the Charter. The principle of the free choice of schools is established by law, and forced enrolment in another school for reasons of religion, far from constituting "accommodation", is in fact discriminatory and cannot, in principle, be considered to be a desirable solution from the standpoint of equality. Transfer should only be envisaged as a last resort, where no accommodation is possible without placing an undue hardship on the school chosen by the student.

The criteria used to decide whether or not a hardship resulting from accommodation is "undue" must necessarily take into account the specific nature of the educational institution concerned. In Québec, observance of the official programs of instruction,³⁵ the status of the French language as the language of instruction,³⁶ and equality of the sexes³⁷ must all be considered to be essential and therefore non-negotiable elements of the public education system. Other factors to be considered are discipline, safety and educational effectiveness. These criteria are elements of public order, democratic values and the general well-being, all of which may place certain limits on the exercise of fundamental freedoms under section 9.1 of the Charter.³⁸ Some

³³ *C.D.P.O. v. C.S. St-Jean-sur-Richelieu*, *supra* (note 17), 51 (our translation). It is not necessary for the purposes of this analysis to consider the controversy surrounding the question of whether or not the obligation to accommodate can also be cited in the context of direct discrimination.

³⁴ *Ibid.*, 52.

³⁵ See the *Basic School Regulations for Preschool and Elementary Education* (1990), 122 G.O. II, 569 and *Basic School Regulations for Secondary Education* (1990), 122 G.O. II, 575.

³⁶ *Charter of the French Language*, R.S.Q., c. C-11, s. 72.

³⁷ *Charter*, ss. 10 and 47; *Civil Code of Québec*, a. 392.

³⁸ "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law."

aspects of this issue deserve special attention because of their practical implications.

Marginalization of the student

The risk of a veiled student becoming "marginalized" within the student group is a legitimate cause for concern. It is not desirable, from the point of view of both the student and the school as social environment and place of learning, that students should be ostracized for any reason whatsoever. Here again, the responsibilities of the school must be considered. According to the *Education Act*, teachers have a duty to take the appropriate means to foster respect for human rights among their students.³⁹ This duty constitutes a specific element in the general mandate of the school, which is to educate its students.⁴⁰ Consequently, the school must clearly inform teachers and students that manifestations of discrimination or harassment are unacceptable in every way.⁴¹ As the Human Rights Tribunal pointed out:

*"While the school board cannot absolutely prevent any manifestation of attitudes, words or gestures with a discriminatory connotation, it can control the response it makes to such acts. It therefore has the duty, on the basis of the knowledge it has of its own environment, to respond adequately, that is, on the basis of the gravity of the gestures and the personality of the victim, by clearly indicating that such behaviour is not acceptable."*⁴²

If a student wearing the Islamic veil becomes marginalized, the school cannot remain passive; on the contrary, it must teach its students to respect the rights and freedoms of that student. To use the words of the Supreme Court, no undue hardship should result from attitudes that are incompatible with human rights.⁴³

Public order and equality of the sexes

Elements of what we might call the "symbolic" aspect of the veil are rather more delicate. For many people, the veil signifies and even serves as a vehicle for the oppression of women in the Muslim world.

The principle of sexual equality is one of the fundamental rights and freedoms that schools and

³⁹ S. 22, E.A.

⁴⁰ S. 36, E.A.

⁴¹ *Commission des droits de la personne du Québec v. Commission scolaire Deux-Montagnes*, [1993] R.J.Q. 1297, 1317 (Human Rights Tribunal).

⁴² *Ibid.*, 1317-1318 (our translation).

⁴³ *Central Okanagan School District v. Renaud*, [1992], 2 S.C.R. 970, 988.

teachers are obliged to promote, just as they are charged with preserving the internal order needed to accomplish their mandate. The question of whether or not the wearing of the veil is *incompatible* with these obligations to an extent that would justify *prohibiting* it as a means of expressing religious beliefs in a specific environment must necessarily be examined in context, and the veil itself must be distinguished from the symbolical and ideological use made of it.⁴⁴

In itself, the Islamic veil demonstrates a religious conviction whose intrinsic legitimacy is in no way contested. If we were to designate the veil as a symbol to be banished, like the swastika, for example, we would be insulting the women who wear it. Generally speaking, the veil should be considered licit, to be prohibited or regulated only where it has been shown that public order or sexual equality would be threatened by its presence.

This would be the case, for example, if it became known that certain students were being forced to wear the veil against their will. While the school is obliged to respect the freedom of students who wish to wear the veil, it must also support those who do not wish to do so. The school would also be justified in intervening where a campaign to wear the veil was organized with a view to creating or aggravating tensions between groups of students, or inciting discrimination based on sex. In such circumstances, a temporary coercive measure, scaled to suit the gravity of the facts,⁴⁵ would be justified. It must, however, be shown that such situations threaten public order and the principle of sexual equality. The basic principle followed must be to respect the wish of individuals to wear the veil. This principle does not exclude vigilance in the face of the political or ideological uses that could be made of the garment. Indeed, it demands it.

Considerations of safety

It is also relevant to consider the school's obligations as regards safety, under the general principles of civil liability and the legislation respecting occupational health and safety.⁴⁶ The question of safety brings into play two fundamental rights guaranteed by the Charter, i.e. the right to life and the right to personal inviolability (s.1). Since students are required to take part in all the activities provided for by a program of instruction, the Islamic veil may be regulated with a view to guaranteeing their personal safety and the security of property. If necessary, certain restrictions may therefore be placed on the way in which the veil is worn, for example in physical education courses and during laboratory activities where the student may be required to handle dangerous products or materials. However, the risk to safety must be real and not just presumed.

3. Conclusions

A. On the validity of prohibiting the Islamic veil as such

Such a measure would not be compatible with the *Québec Charter of Human Rights and*

⁴⁴ See the opinion of the French Conseil d'État, op. cit. (note 5), 153. For a specific application: Conseil d'État, decree of November 2, 1992, *Revue française de droit administratif*, Vol. 9, No. 1 (January-February 1993), 118-119.

⁴⁵ *Pandori v. Peel Board of Education* (1990) 12 C.H.R.R. D-364 (Ont. Bd. of Inquiry) (wearing of the Sikh dagger in school).

⁴⁶ Arts. 1457 and following, *Civil Code of Québec*; *Act Respecting Occupational Health and Safety*, R.S.Q., c. S-2.1.

Freedoms.

B. On prohibiting the Islamic veil under a generally applicable dress code

The validity of dress codes is not called into question by this opinion. However, schools must seek reasonable accommodations with Muslim students who are discriminated against by the application of such codes. The wearing of the Islamic veil should, in principle, be considered to be licit, except in a context where the students are pressured into wearing it, or where wearing the veil is designed to provoke or incite discrimination on the basis of sex. The veil may also be restricted where necessary for reasons of safety.

1. PRIVATE SCHOOLS AND THE CHARTER

Section 42 of the Charter reads as follows:

"42. Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law."

This is therefore a human right, although subject to the standards prescribed by or approved by virtue of the law.

2. THE LEGISLATIVE FRAMEWORK OF PRIVATE EDUCATION

2.1 The Basic School Regulations

The basic school regulations in force in private schools (both elementary and secondary) are in principle the same as those applicable in public schools, as far as the following elements are concerned:

- the subjects to be taught;
- admission, enrolment and school attendance;
- the school calendar;
- the evaluation of students' learning and the certification of studies;
- the diplomas, certificates and other official attestations awarded by the Minister of Education.⁴⁷

The manner in which the basic school regulations are to be applied is also the same as in public schools.⁴⁸

⁴⁷ Act Respecting Private Education, R.S.Q., c. E-9.1, s. 25(1).

⁴⁸ *Ibid.*, s. 25(2).

However, to further a specific school project, the Minister may allow a school to depart from the basic school regulations in a given subject.⁴⁹ Religious instruction in a religion other than Catholic or Protestant is possible provided it complies with the objectives and mandatory content of the program of studies in moral instruction established by the Minister. The program would then be prepared by the institution itself.⁵⁰ This arrangement is of benefit in particular to private Jewish and Muslim schools.

2.2 Financing

An institution that is the holder of a permit⁵¹ may ask the Minister to be accredited for the purposes of subsidies. In granting accreditation, the Minister considers the following elements, among others:

- the quality of the institution's educational organization and its selection criteria governing the selection of teaching and management personnel;
- the scope of the need expressed to which the institution proposes to respond;
- the extent of public support and community involvement;
- the effects of accreditation on resources in the community;
- the specific contribution to be made by the institution in terms of enrichment, complementarity or diversity;
- the level of participation of parents in the life of the institution;
- the compatibility between the institution's objectives and the policies of the Minister or the Government.⁵²

In 1991, the subsidies granted to certified elementary and secondary institutions accounted for approximately 52% of their total funding (*Le Devoir*, November 12, 1994, p. E-2).

To obtain a subsidy, a private institution must comply with the provisions of sections 72 and 73 of the *Charter of the French Language* (R.S.Q., c. C-11).⁵³ Under section 72, French is, in

⁴⁹ *Ibid.*, s. 30.

⁵⁰ *Ibid.*, s. 32(4).

⁵¹ Every private educational institution must hold a permit authorizing it to exercise its activities. *Ibid.*, s. 10.

⁵² *Ibid.*, s. 78.

⁵³ *Ibid.*, s. 126.

principle, the language of instruction. However, under section 73, some students are granted access to English-speaking schools.

2.3 Status as a profit or non-profit organization

A private educational institution may be a profit or a non-profit organization.

3. CONFORMITY WITH THE CHARTER: THE RESTRICTIONS CONCERNING DRESS IN PRIVATE SCHOOLS OF A RELIGIOUS NATURE

The question of the restrictions concerning dress in private schools of a religious nature is most likely to arise in the case of employees who do not belong to the school's "official" denomination. This problem should be analyzed in light of the relevant Charter provisions, taking into account the employment context in which it arises.

3.1 The employment context

The employer-employee relationship is contractual in nature. Here, it differs from the legal relationship existing between *students* and *public schools* (as analyzed in our opinion on the Islamic veil in public schools).⁵⁴ This latter case is concerned with the exercise of the right to free public education, as guaranteed by the Charter.⁵⁵ By law, children must attend school.⁵⁶

The employer-employee relationship, based on the principle of free will, is of a different nature, and although the provisions of the Charter concerning the right to equality apply to it,⁵⁷ the problem raised by the dress requirements of a religion cannot, in such a context, be examined in the same terms as the issue of dress and the right to public education. In our view, any parallel between the two situations must take into account the special context of employment.

3.2 The Charter principles

The dress requirements in force in private schools of a religious nature may be of several kinds.

For example, the contract of employment may establish in general terms the *desirable characteristics* of employees' dress, without specifically prohibiting a given article of clothing. An example of this would be a rule requiring employees to dress in a modest and conservative manner. Second, the contract of employment may also prohibit the wearing of symbols of *other* religions. And third, it may impose the wearing of a specific garment associated with the *religion of the*

⁵⁴ See pp. 25-37.

⁵⁵ S. 40.

⁵⁶ Until the age of 16. *Education Act*, R.S.Q., C. I-13.3, s. 14.

⁵⁷ SS. 10 and 16.

institution on all staff or a category of staff.

The first type of rule does not seem to us to raise any problems in terms of freedom of religion, freedom of conscience or the right to equality. It is difficult to see how such a rule would conflict with the exercise of a religion, or interfere either directly or indirectly with the right to equality on the basis of religion. It is a dress code worded in terms of *objectives* rather than means, with which everyone, regardless of religion, should be able to comply.⁵⁸

The second and third types of rule, however, seem to raise more difficulties. Forbidding an employee to wear a garment required by his or her religion may be seen as a *prima facie* interference with the right to equality,⁵⁹ and an interference with the freedom of religion.⁶⁰ Requiring staff to wear a specific garment associated with the official religion of the institution also raises a number of problems. Where the garment required is forbidden by the employee's religion, for example, then the rule enters into conflict with the freedom of religion. Even where, objectively speaking, this is not the case (eg. the wearing of the Islamic veil by a Christian employee), the compulsory wearing of a garment may be perceived, subjectively, as a desire to impose the religion of the institution on the employee. This raises problems in the area of freedom of conscience and freedom of religion, and also - if non-compliance with the rule leads to the imposition of a penalty - in the area of the right to equality.

The question is this: are such constraints on dress authorized under the Charter? To answer this question, we must look first at the Charter provisions which create exceptions to the right to equality.

3.3 Section 20 of the Charter

The first paragraph of section 20 (the only relevant one for our purposes) reads as follows:

"20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory."

This paragraph has two separate components. The first, applicable to the employment sector,

⁵⁸ A rule of this kind could, of course, be contested from the point of view of freedom of expression. See the Commission's opinion *Les exigences des employeurs et des établissements de service sur la tenue vestimentaire et l'apparence personnelle*, June 29, 1993, cat. 113-3. In this case, the applicable principle would be the principle that the employer has the right to make rules on dress, provided they do not contain any irrational and disproportionate aspects (Idem, p. 14).

⁵⁹ See *Bhinder v. Canadian National Railways* [1985] 2 S.C.R. 561 (the wearing of a turban by a Sikh).

⁶⁰ The performance of rites and the practice of a religion may involve ceremonial acts and also customs such as the wearing of distinctive clothing or headgear: UNITED NATIONS HUMAN RIGHTS COMMITTEE, *General Comment No. 22* re. a. 18 of the *International Covenant on Civil and Political Rights*, CCPR/C/21/Rev. 1/Add.4 (adopted on July 20, 1993), para. 4.

is concerned with the qualifications or aptitudes required for an employment; the second, applicable mainly to non-profit organizations, authorizes distinctions justified by the religious or educational nature of the institution. It should be noted that the two components of section 20 could apply at the same time, as a private school could be covered by both the second component (as a non-profit organization) and by the first component (as an employer).⁶¹

The first component requires a restrictive interpretation; it suppresses rights that would otherwise be interpreted liberally.⁶² In *Ontario Human Rights Commission v. The Borough of Etobicoke*,⁶³ which rules on the interpretation of a similar Ontarian provision, the Supreme Court had this to say:

*"To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient, economical performance of the job without endangering the employee, his fellow employees and the general public."*⁶⁴

The second component of the paragraph has a different objective:

*"(This) branch of s. 20 was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances."*⁶⁵

This component of section 20 conveys a "policy decision" on the part of the legislator to recognize "the primacy of certain groups based on the particular views those groups espouse or the particular pursuits in which those groups are engaged".⁶⁶ For example,

⁶¹ *Brossard (Ville) v. Québec (Commission des droits de la personne)* [1988] 2 S.C.R. 279 (simultaneous application of both parts of s. 20, in the case of a municipality).

⁶² *Brossard*, 307.

⁶³ [1982] 1 S.C.R. 202.

⁶⁴ *Ibid.*, 208.

⁶⁵ *Brossard*, *supra* (note 15), 324.

⁶⁶ *Ibid.*, 208.

"A Catholic school might invoke the second branch of s.20 to justify a preference given to Catholics in its hiring policy for teachers [...] The section 20 protection is extended to the school in order to allow Catholics to freely associate to promote Catholic values and beliefs."⁶⁷

As a non-profit organization, a private religious school may therefore hire only teachers who adhere to its "official" religion. Thus, a Muslim school could, in all legality, hire only Muslim teachers. Although this is a preference based on religion, it is, by the will of the legislator, deemed non-discriminatory, to the extent that it is "justified in an objective sense by the particular nature of the institution in question".⁶⁸ According to the case-law, the school could also, on the same condition, demand that its Muslim teachers observe the rules of the Muslim religion.⁶⁹

The school may, however, be obliged to hire non-Muslim personnel, for example because no Muslims qualified to teach the subject matter were available. Could it then use section 20 - especially the second component - to require its non-Muslim personnel to comply with Islam-related restrictions as to dress?

This question must be examined in the general context of the Charter.

3.4 The general context of the Charter

Section 20 is contained in the chapter of the Charter concerned with the right to equality. It provides protection for religious non-profit schools as regards exclusions, distinctions or preferences that would otherwise be deemed discriminatory.

In our opinion, section 20 is not intended to, and does not have the effect of, authorizing the violation of the freedom of conscience or freedom of religion of a person not belonging to the Muslim faith. Freedom of conscience and freedom of religion are not covered by the exception provided for in section 20. These freedoms are public policy and cannot be renounced, even within the framework of a contractual employer-employee relationship.⁷⁰ A condition of employment requiring teachers who do not adhere to the "official" faith of the institution to wear an item of clothing associated with that faith would therefore not be compatible with the Charter.

4. CONCLUSION

⁶⁷ Ibid., 331 (our translation).

⁶⁸ Ibid., 338.

⁶⁹ Caldwell v. Stuart [1984] 2 S.C.R. 603 (obligation for a Catholic teacher hired to work in a Catholic school to observe the precepts of the Church).

⁷⁰ On the public policy character of the Charter, see generally: Union des employés de commerce v. Bégin Inc., C.A.Q. 200-09-000709-821 (December 19, 1983). On the public policy character of freedom of conscience and freedom of religion: Klein v. Klein, [1967] C.S. 300, Renaud v. Lamothe, (1906) 15 B.R. 400 (case decided in 1900), aff'd at (1902) 32 S.C.R. 357; and P.-B. MIGNAULT, *Droit civil canadien*, vol. 6 (1899), 14.

A non-profit religious school cannot use section 20 of the Charter as a basis for requiring teachers of another religion to wear an item of clothing associated with the institution's official religion. As a condition of employment, this would be contrary to freedom of conscience and freedom of religion, which are public policy.