

Right to Equality

Between Women and Men and Freedom of Religion





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Aim of the Opinion

This opinion sets out the common values upon which Québec identity is based. Relying on legal arguments, it shows that one such value – equality between women and men – must influence the interpretation or construction of freedom of religion and any accommodation which may be afforded in its name. The *Conseil du statut de la femme* (Council on the Status of Women) argues that the right to equality between women and men must be observed under all circumstances.

Background and Origin of the Opinion

The Council on the Status of Women has long been interested in cultural and religious diversity as well as in societal transformation that stems from it, strengthened in its conviction that choices made by the community in these matters can have a major impact on the development of women's rights. In 1995, the Council published a concept paper on the issue of wearing veils to school*. It also made a statement in 1997 on the cultural diversity dimension of women's rights in a study and opinion which highlighted the values of Québec society, including equality between the sexes and enabled a definition of a feminist approach to the management of this diversity. At the time, the Council had already stressed the urgency of holding a public debate on this issue and urged the government to place feminist values at the heart of the enhancement of diversity. The Council on the Status of Women, in 2006, also held a symposium entitled "Diversité de foi – Égalité de droits" (Diversity in Faith – Equality in Rights) which set the stage for this opinion on the challenges facing religious pluralism in light of the equality between women and men.

Understanding the Full Dimension of Reasonable Accommodation

The true scope of requests for accommodation on religious grounds in Québec is narrower than it is perceived to be by the general population. Reasonable accommodation, in effect, is complex and far different from the rather unsubtle manner in which it has been depicted by several members of Québec society acting under the undue influence of their fears. The Council is of the opinion that an appropriate response by the Québec government to the issue of reasonable accommodation requires an intricate understanding of the phenomenon.

* All references have been omitted.



At the beginning of April 2007, a survey conducted for Radio-Canada and L'actualité revealed that 55% of the population was of the view that the government should not accede to any demand with religious overtones originating from cultural minorities. As suggested by the data, it appears that the population in Québec currently believes that members of cultural communities are too exacting in terms of accommodation based on religious grounds. Hence, it is possible that, out of ignorance, some elements of society exaggerate the scope of “reasonable accommodation” and the place it truly occupies in society.

The Council, by way of reminder, asserts that the number of complaints relating to discriminatory circumstances calling for accommodation on religious grounds is limited. Pierre Bosset, a lawyer representing the *Commission des droits de la personne et des droits de la jeunesse* (CDPDJ) (Commission for Human Rights and the Rights of Youth), asserts that, during the 2000-2005 period, of the 85 files having a “religion” classification at the CDPDJ, barely a third involved a request for accommodation; two thirds related to deliberate discrimination, or “direct discrimination”.

Reasonable Accommodation

In popular usage, the notion of reasonable accommodation does not always agree with the legal definition. It is a legal concept developed by the courts in furtherance of the right to equality recognized in the Canadian and Québec Charters of rights and freedoms.

Reasonable accommodation involves the implementation of a general standard or practice which grants differential treatment to a person who, otherwise, would be prejudiced in the absence of this standard. Accommodation is afforded only if the standard is discriminatory on its face and if it does not impose undue constraints upon the person required to implement it.

Quite obviously, arrangements can also be made on a voluntary basis in order to lessen the impact of a standard on an individual without the necessity of establishing beforehand an infringement of his or her rights. Such cases, however, do not involve the implementation of the “duty of reasonable accommodation” as defined in the case law. Indeed, several events reported by the media were erroneously referred to as reasonable accommodation, such as the Montreal YMCA frosted windows episode or the Hérouxville code of conduct.



PART ONE

Three Common Values Underpinning Québec Identity

In order to explain the reactions to expressions of religious diversity, the Council deems it crucial to recall the scope of some of the values which currently pervade Québec society. Emphasis has been placed on the three values propounded by the Premier of Québec, Mr. Jean Charest, when he announced last February the creation of the Consultation Commission on Accommodation Practices Related to Cultural Differences (Bouchard-Taylor Commission), namely the values of separation between State and religion, primacy of the French fact, and equality between women and men. The Premier added that respect for these values was a significant premise in the decision to live in Québec, and that such values could, under no circumstances, be jeopardized.

1 - Separation Between State and Religion

Throughout the history of Québec institutions, secularism has never been a legal tradition. This concept is foreign to Canadian and Québec law. However, in 2008, Québec will have completed the process of separating religious and political powers, a process which is called secularization, by implementing a fully non-denominational education system. Secularism, therefore, exists *de facto* in Québec. Occasionally, the government reaffirms this secularism, as it did, for instance, in December 2006 upon adopting the governmental policy on equality between women and men, entitled *Turning Equality in Law into Equality in Fact*.

The Road Towards Secularization

The history of Québec shows the extent of the control which the Church exerted over the entire social life of women and men in French Canada during that period. The Catholic Church was the representative of the French Canadian people and the latter's identity, first and foremost and necessarily, was built upon its ties to the Catholic Church. Although Québec has never had a state religion and freedom of religion was recognized in the Royal Proclamation of 1763, the Church nevertheless controlled entire segments of civil institutions and French Canadian society up to the time before the birth of a responsible government and up to the 1960s. During this long period, the presence of the



Church had a profound impact on the management of the education and health systems and even exerted notorious influence on government policy, specifically during the time of Maurice Duplessis. The secularization of the State evolved rather cautiously until the Quiet Revolution.

Today, in Québec, as in many other Western societies, religion is no longer present in state institutions. This victory for State neutrality and separation of powers also promoted freedom of religion for all believers of various denominations.

This historical recap illustrates the role played by the Catholic Church in public institutions, in the regulation of social relations, in the political sphere and in the management of public affairs in Québec. It is also a testament to the long road which Québec took towards secularism. The omnipotence of the Church in Québec society, according to some authors, is the reason why our community has been slow in achieving its status in modern society, characterized by its secularism, respect for individual freedoms and the promotion of equality between women and men. This secularism, which has been newly asserted as a common value of the Québec people, clearly makes sense in light of our history. State neutrality and the separation of civil and religious powers are the best guarantee of respect for freedom of religion, which also includes the freedom not to be compelled to espouse a belief.

2 - Primacy of the French Fact

Since Québec is the only jurisdiction in North America which has a majority French-speaking community, it goes without saying that the French language has long been the distinctive feature of Québec identity. Today, the primacy of the French fact is well established in Québec and the fact that it represents a common value and a marker of our identity is no longer seriously debated.

This primacy took concrete expression chiefly in the *Charter of the French Language* which, for thirty years now, has protected the French language, making it the language of instruction, of communication by the government and of commercial advertising and has set out to create tools in order to rid the language of anglicisms and improper usage. The Charter was challenged on numerous occasions before the Courts, in the name of



individual rights. The striking down of some of its provisions afforded an opportunity to the executive and legislative branches to reaffirm the importance of the paramountcy of French fact over individual rights and freedoms.

Interculturalism, a Consequence of the French Fact

The significance that our values as a community represent for our identity, in particular its character as a French-speaking society, guided the preference shown by Québec for interculturalism as a model for integration of immigrants. This policy is specific to Québec and is to be distinguished from the Canadian policy on multiculturalism. It stems from the common will to protect Québec culture as well as values of religious neutrality in our institutions and equality between women and men.

On the whole, interculturalism purports to integrate persons immigrating to Québec around the central focus of the French language, while displaying the openness of Quebecers to the contributions of foreign cultures to the definition of their collective identity. The originality of the Québec model owes its existence, in part, to the role played by the Québec government which acts positively in the interests of preserving the common heritage and public interest of Quebecers.

3 - Equality Between Women and Men

Québec today has certainly progressed very far in making equality between women and men a reality. However, the acknowledgement of women and their participation in public life as distinct individuals with authority to act under law are relatively recent in Québec.

Women's Right to Vote

The history of the struggle to obtain women's right to vote in provincial elections illustrates the long road which women have had to take to secure their equality. Indeed, this quest for the right to vote is no doubt the most probative example of the struggle for equality between women and men. Women in Québec only obtained the right to vote in 1940, although this right had been granted to them for the federal elections of 1918.



A Québec Committed to Ensuring Equality Between the Sexes

Nowadays, in Québec and elsewhere throughout the world, the inalienable nature of equality between the sexes resides in the fact that it is the fruit of historical struggles for women's rights in which women, and many men from all walks of life, took part. As a testament to the significance attached to this value, note that, for more than twenty years, Québec has been bound by several international conventions, including the Convention on the Elimination of all Forms of Discrimination Against Women. Equality between women and men is also a right guaranteed by the *Charter of Human Rights and Freedoms*, which has a supralegislative value, as well as by the *Canadian Charter of Rights and Freedoms* which is enshrined in the Canadian Constitution.

In addition, since the last provincial election held in March 2007, Québec, for the first time, is governed by a Cabinet equally made up of women and men.

A Québec Identity to be Reaffirmed and Shared

The transition from a society moulded by religion and traditions towards a more modern and democratic society signaled the end of the control of public institutions by members of the clergy and of their control over the common values of the time. From then on, the foundations based on values of equality between women and men and secularism, as well as the French fact, devoid of its religious feature, have staked a greater role in the community.

There is every reason to believe that the strong reactions recently displayed in the face of requests for reasonable accommodation were fuelled by considerations based on identity. As a backdrop to this uneasiness, is the idea that, in society, too much accommodation fails to promote the adaptation of newcomers and is prejudicial to interculturalism, the model of integration propounded by Québec which aims at building a common culture. Without this shared construction of an identity, it then becomes impossible for various cultural expressions to coexist harmoniously within the same society.



PART TWO

The Right to Equality Between The Sexes Does Not Allow For Accommodation

The fundamental values of a society take concrete expression in Charters of rights; the documents guide and inform legislative action, that of decision-makers and, in the case of the Québec Charter, that of citizens amongst themselves. Therefore, the legal arguments which form the basis of our opinion are set against the backdrop of the identifying values of Québec: **the right to equality between women and men ought to be observed under all circumstances and no infringement thereof should take place in the name of freedom of religion.**

Equality Between the Sexes

The notion of equality is polysemous, it fluctuates over time and according to the scientific angle from which it is examined. It is important to examine the portrayal thereof by the Supreme Court through its interpretation or construction of the safeguards provided for in the Québec and Canadian Charters.

The Supreme Court has established that human dignity lies at the heart of the guarantee of equality. Dignity means that a person feels respect and self-esteem. An infringement of equality will occur where there is a distinction, based on a listed ground (such as a personal feature, for instance the person's sex) or an analogous ground which is truly discriminatory, meaning that it impinges on fundamental human dignity. Several contextual factors assist the Courts in determining whether or not there has been an infringement of dignity.

The Council's Definition

The Council proposes the following definition of the right to equality between women and men, taking into account substantive law and drawing inspiration from reflections made on the international scale:

Equality between the sexes is the "equal right of every person to do that which he or she is empowered to". It is achieved if every person has "the possibility of achieving all his or



her rights to the extent of his or her own potential and contributing to the cultural, economic, political and social development of his or her country, while personally benefiting from such development". In this respect, it is essential to recognize that society makes a "distinction between the group of women and that of men", and that this distinction is systemic and aggravated by other factors such as ethnic origin and sexual orientation. Equality between the sexes requires the implementation of a concerted policy on equality at all State levels, as well as an integrated approach; the efficiency of equality between the sexes is a matter of concern for all Quebecers, whether they are women or men.

Freedom of Religion is Limited, Intrinsically, by the Right to Equality Between the Sexes

This equal right of every person to do that which he or she has the ability to do, this protection against conduct impinging on human dignity, according to the Council, implies the following corollary: freedom of religion cannot be understood to allow for the infringement of the equality between sexes. Freedom of religion is restricted by the right to equality between women and men.

Freedom of Religion

Freedom of religion, as defined by the Supreme Court, contains three features:

- 1 - The ability that a person has to entertain religious beliefs, to express them and to practice them. Consequently, a standard or a decision, should not interfere, in a manner that is non-trivial or not insubstantial, with his or her ability to express or practice his or her religious beliefs.
- 2 - The ability that a person has not to espouse any religion or to be forced to act according to religious precepts that he or she does not share, in other words, conscientious objection.
- 3 - The State's duty of neutrality. The State may not impose observance of a belief or a religious practice. It must implement a social and legal framework in which beliefs are respected.



The Supreme Court has opined that the infringement of any of these aspects must be more than non-trivial or insubstantial for a court to determine that there has been an infringement of freedom of religion. Most of all, however, it has asserted that one must take into account the effect of the exercise of freedom of religion on the rights of third parties. Freedom of religion may be subordinated to compliance with overriding social concerns.

Considering the Impact on Equality Between Sexes

This latter aspect is crucial and unavoidable: the effect on the right to equality between the sexes must be taken into consideration when defining the nature of freedom of religion. Although this analysis may also be conducted subsequently, at the stage where one seeks to justify action taken which is *prima facie* unconstitutional, as the majority case law of the Supreme Court seems to indicate, the Council believes that one ought to examine the impact on the right of third parties when defining the ambit of freedom of religion.

Hence, the Council is of the opinion that a standard impeding a religious practice should not be found to infringe freedom of religion if its purpose or effect is to protect the right to equality between the sexes.

Section 28 of the Canadian Charter

The fundamental nature of the right to equality between the sexes is reinforced by the presence, in the Canadian Charter, of Section 28, which provides that “[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”.

This provision resulted from the pressure exerted by the feminist lobby on the Trudeau government. Having seen their rights trampled, in particular, by the formalistic interpretations and constructions of the *Canadian Bill of Rights* by the Courts, women’s groups were seeking a substantive, precise and express guarantee of equality between the sexes. They were also preoccupied by the possible watering down of equality between the sexes in light of multiculturalism.

Owing to its wording, Section 28 enjoys a rather peculiar, nearly unique status in the Canadian Charter since it provides that the guarantee of equality between the sexes ap-



plies “notwithstanding anything in this Charter”. Therefore, no derogation or restriction to equality between the sexes may exist, which is not the case with respect to most of the other safeguards, including freedom of religion.

The Council believes that Section 28 must be taken into consideration in the interpretation or construction of each of the rights and freedoms guaranteed: the general purpose sought to be achieved by Section 28 is “the protection and promotion of equality of the sexes as a fundamental and core constitutional value”. Consequently, the Council is of the opinion that freedom of religion must be understood, defined, interpreted and construed as not enabling an infringement of the right to equality between women and men. This reasoning applies equally to Section 27 of the Canadian Charter: multiculturalism must be interpreted in light of the guarantee of equality between the sexes and should not be argued in order to counteract Section 28. This is the meaning which ought to be ascribed to the words “notwithstanding anything in this Charter”.

The Duty to Afford Reasonable Accommodation Cannot Allow any Infringement of Equality Between the Sexes

Conduct, or any act arising therefrom, which is deemed to be discriminatory or infringing with respect to freedom of religion *prima facie* entails a duty of reasonable accommodation for the initiator or perpetrator of such conduct or act. Reasonable accommodation forms an integral part of the right to equality and of the right to freedom of religion and, in this respect, it is compulsory.

However, the Supreme Court has held that such duty must not impose undue constraints upon the initiator or perpetrator of such conduct or act. The criteria currently used in order to determine if the accommodation contemplated would be excessive are plentiful and strongly dependent on the factual background submitted to the Court. Most of the time, they relate to physical and financial constraints and, while they may take into consideration the rights of third parties, they do not expressly refer to other rights contained in the Charters.



The Infringement of Equality Between the Sexes is an Undue Constraint

The Council believes that the infringement of the right to equality between the sexes must be acknowledged to be an undue constraint and, consequently, act as an obstacle to the duty of reasonable accommodation.

This recognition is self-evident to the same extent as compliance with law and order. The State, which is the guardian of public policy, has a duty to ensure that any accommodation cannot be afforded if it is discriminatory. Similarly, the State cannot allow a person to voluntarily waive his or her right not to be discriminated against. The argument of voluntary consent must be rejected with respect to any act – especially one performed in the name of a religious belief – which would infringe human dignity.

Furthermore, the Council strongly believes that it is incumbent upon the State to promote public institutions in which it is not possible to relinquish one's dignity. To this end, specific action must be taken, and the value of equality between the sexes must be reaffirmed.

Illustrations of Accommodations which Would Impinge upon the Right to Equality between the Sexes

It is impossible for the Council to define all situations where any accommodation afforded in the name of freedom of religion could unduly affect equality between the sexes. Indeed, such is highly dependent on the factual background in which a general standard and the accommodation contemplated would arise. Consequently, the Council will limit itself to presenting two examples of accommodation which, on their face, should not be afforded since they would jeopardize the right to equality between the sexes.

Illustration One

A teacher in an elementary school in the public system converts to the Muslim faith and wishes to wear the nikab, the veil which covers her face in its entirety except for the eyes.



In this case, the learning establishment should clearly indicate to its employee that she should not display any symbols of religious belonging as part of her employment. The nikab, quite obviously, sends a message of the submission of a woman, which should not be conveyed to young children as part of a secular education which is required to promote values of equality between women and men.

Illustration Two

As part of the services provided by the State, a recipient may not refuse, on religious grounds, to be served by a woman to the extent that his refusal would jeopardize the right to equality of this public official.

Agreeing to provide the service through a male employee rather than a female employee is liable to infringe the right to equality of the female employees. State institutions must take into account the impact of any accommodation on the right to equality under all circumstances. There is a collective duty to convey a clear message that women are no less capable and worthy than men of performing a professional task which has nothing to do with their sex. This duty does not cease when confronted with religious beliefs.

International Standards and Certain States Define the Limits of Freedom of Religion

The question of the interaction between freedom of religion and other rights, such as the right to equality between women and men, has arisen elsewhere than in Québec. Although, here, our courts have not yet had to reconcile the two safeguards, international courts and foreign courts have had to determine the validity of legislation liable to restrict freedom of religion. There is no doubt that international, transnational and foreign instruments as well as the case law derived therefrom will be examined with great interest by Canadian judges when called upon to determine this issue. Furthermore, this body of legislation and case law should strongly inspire the Québec legislator in its search for a solution whereby we would all “better live together”. Several countries in Europe, for instance, have implemented rules governing freedom of religion which have successfully passed the test before the Courts.



Commitments Made by Québec and Canada

The guarantee of equality between women and men is found in several international instruments to which Canada and Québec have adhered, such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *Convention on the Elimination of All Forms of Discrimination against Women*. These international standards, on the national level, have been embodied in the Canadian and Québec Charters. Since the safeguards enshrined therein are drafted in a broad and general manner, the courts, therefore, rely, in particular, on international instruments and case law derived therefrom, in order to define such guarantees, pursuant to the principle of the interpretation or construction which is favorable to international law.

Even instruments which are not legally binding on Québec and Canada may have persuasive effect on the development of case law and public policy. This is particularly true where the issues, which have not yet been resolved under State law, have been examined by other jurisdictions. Hence, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (the European Convention), which inspired the drafters of the Canadian and Québec Charters, is often cited by Canadian courts.

International Standards Assert the Paramountcy of the Right to Equality Between the Sexes

International and European instruments affirm quite expressly the paramountcy of the right to equality over freedom of religion. For instance, the Council of Europe, in 2005, passed *Resolution 1464: Women and Religion in Europe*. This resolution establishes quite forcefully that discrimination towards women cannot be justified on religious grounds and, in addition, with the apparent consent of women. It firmly supports the position of the Council: equality between women and men may not be subject to accommodation on religious grounds.

Comparative Law

The balancing act between freedom of religion and the right to equality between the sexes has led to various forms of accommodation within the European states. An exhaustive review of these forms of accommodation would have clearly exceeded the frame-



work of this opinion. With a view to developing new Québec standards for the management of cultural diversity which take into account the right to equality between the sexes, this study ought to be undertaken.

In the meantime, the European Court of Human Rights (the European Court) in the decision *In the matter of Leyla Sahin v. Turkey*, handed down on November 10, 2005, observed that the prohibition against students wearing the veil in a school environment had been a hotly-debated issue for some twenty years in most European countries, and the latter have adopted various solutions. In France and in Turkey, for instance, the prohibition against wearing any visible religious symbols in public institutions is the direct consequence of the principle of secularism written into the constitution of these states.

In this case, the European Court found that the prohibition against a student in the faculty of medicine in Turkey wearing the veil did not infringe freedom of religion as guaranteed by the European Convention in part due to the principle of secularism and to the right of equality between the sexes. This decision is in keeping with the current trend which the European Court seems to be following.

In another matter, *Lucia Dahlab v. Switzerland*, handed down in 2001, the European Court also found that a teacher could be prohibited from wearing the Islamic veil as part of her employment in an elementary school in the public system, due to the principle of secularism provided for by law. The Court held that the school administration was justified in forbidding her the right to wear the veil, in particular due to the effect of this symbol on young children.

In the matter of *R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher and Governors of Denbigh High School*, handed down in 2006, and which involved the prohibition against a 15-year old student wearing the jilbab to school, namely a long robe covering everything but the hands and the face, the British House of Lords held that the school by-law did not infringe the freedom of religion of the student, as guaranteed by the European Convention. In his reasons for decision, one of the judges observed that the decision whether to wear religious garb must be a personal choice and not a reaction to pressures from a community. He also felt that, in a school environment, certain restrictions must be possible in order to promote social cohesion.



This review of the international standards shows quite clearly that freedom of religion is subservient to considerations of equality between the sexes, on the one hand, and that several states subject freedom of religion to compliance with principles of secularism and non-belief, on the other hand, which action has been deemed to be in keeping with the European Convention.

**Respect for the Right to Equality Between the Sexes
Justifies State Action Which May Restrict Freedom of Religion**

Ultimately, if the Courts were to observe a conflict between freedom of religion and the right to equality between the sexes, they would grant precedence to the guarantee of equality, on the basis of the grounds put forth by the Council. This determination would mainly result from the presence of Section 28 in the Canadian Charter, and also from the fact that equality between women and men lies at the heart of the collective identifying values which characterize Québec society.



General Findings Pursuant to the Opinion

This opinion demonstrates that an interpretation or construction of freedom of religion without any consideration of its effects on equality between women and men and their human dignity weakens this right secured with great effort and which requires that all social actors be vigilant in order to ensure that it achieves its full potential. The Council reaffirms its wish to make equality between the sexes a fundamental, core value which would guide the interpretation or construction of the other guaranteed freedoms and rights. Under no circumstances can the Québec of today accept that this right could be infringed.

It is crucial that the State act to the full extent of its mission as guardian of public policy and fundamental freedoms. It must promote the existence of public institutions in which relinquishing one's dignity must not be possible, and where the freedom of non-belief may be exercised. While it must also enable the expression of religions beliefs, it must absolutely, in the name of collective values and respect for human dignity, impose reasonable limits thereon, as recommended by the Council.

The creation of the Bouchard-Taylor Commission appears to be excellent news with respect to better defining the difficulties and solutions to ensure that Quebecers, regardless of their culture and origin, are able to “better live together”. The Council ardently hopes that a consensus will stem from its work which will lead to concrete action by the government in the form of a recognition of the fundamental value of equality between women and men.



Recommendations

- 1 – That, in order to make up for the lack of information in this respect, civic education be provided as early as elementary school with respect to the existence of the Charter and of guaranteed rights, both with respect to children’s rights and freedom of religion as well as equality between women and men.
- 2 – That the common values be included in the documents drafted for persons wishing to settle in Québec and those handed out to them upon their arrival in Québec.
- 3 – That the representatives of the State or its civil servants not be allowed to wear visible religious symbols as part of their work.
- 4 – That the *Charter of Human Rights and Freedoms* be amended to include a provision analogous to Section 28 of the *Canadian Charter*, and clearly affirming that equality between women and men may not be jeopardized, in particular, in the name of freedom of religion.
- 5 – That the government adopt a policy for the management of religious diversity in state institutions and that this policy clearly and unambiguously incorporate the fundamental dimension of equality between the sexes.
- 6 – That the *Education Act* state that the value of equality between the sexes is to be conveyed in education policies and that it is not to be set aside for religious or cultural considerations.



This document is a summary of the opinion entitled *Droit à l'égalité entre les femmes et les hommes et la liberté religieuse* (Opinion on the Right to Equality between Women and Men and Freedom of Religion), Conseil du statut de la femme, 2007.

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