Unofficial English Translation

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No : 500-09-026443-168
(500-17-087520-154)

DATE: October 3, 2018

CORAM: THE HONOURABLE **FRANCE THIBAULT, J.A.**
ROBERT M. MAINVILLE, J.A.
SUZANNE GAGNÉ, J.A.

RANIA EL-ALLOUL
APPELLANT — Plaintiff
v.

ATTORNEY GENERAL OF QUEBEC
COURT OF QUEBEC
RESPONDENTS — Defendants
-and-

CONSEIL DE LA MAGISTRATURE DU QUÉBEC
SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE DU QUÉBEC
MIS EN CAUSE — Mis en cause

JUDGMENT

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[1] The appellant appeals a judgment of October 3, 2016, of the Superior Court, District of Montreal, dismissing her application for various judicial declarations and a *de bene esse* judicial review following a refusal by a judge of the Court of Québec to hear her on February 24, 2015 with respect to a proceeding she had then initiated under section 209.11 of the *Highway Safety Code*, on the ground that she did not remove her head scarf (*hijab)* in the courtroom and was therefore contravening the dress code established under the *Regulation of the Court of Québec.*

[2] For the reasons of Mainville, J.A., with which Thibault and Gagné, JJ.A., concur, **THE COURT** :

[3] **ALLOWS** the appeal;

[4] **SETS ASIDE** the judgment of the Superior Court of October 3, 2016;

[5] **QUASHES** the judgment of the Court of Québec of February 24, 2015;

[6] **DECLARES** that the appellant was entitled to be heard by a judge of the Court of Québec on February 24, 2015, wearing a head scarf (*hijab)* to testify and to make representations with respect to the proceeding she had then initiated under section 209.11 of the *Highway Safety Code*;

[7] **DECLARES** that the provisions of the *Regulation of the Court of Québec* dealing with a dress code do not forbid the appellant from wearing a head scarf (*hijab*) if that practice results from a sincerely held religious belief and does not conflict with or harm an overriding public interest;

[8] **THE WHOLE** without legal costs.

FRANCE THIBAULT, J.A.

ROBERT M. MAINVILLE, J.A.

SUZANNE GAGNÉ, J.A.

Mtre Catherine Elizabeth McKenzie
Mtre Olga Redko
IRVING MITCHELL KALICHMAN
Mtre Julius Grey
Mtre Geneviève Grey
GREY CASGRAIN
For appellant

Mtre Mario Normandin
MINISTÈRE DE LA JUSTICE DGAJLAJ
For Attorney General of Quebec

Mtre Pierre Laurin
TREMBLAY BOIS MIGNAULT LEMAY
For Court of Quebec and Conseil de la magistrature du Québec

Mtre André Buteau
SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE DU QUÉBEC
For Société de l'assurance automobile du Québec

Date of hearing: August 29, 2018

REASONS OF MAINVILLE, J.A.

[9] Rania El-Alloul (the "**appellant**") appeals a judgment of October 3, 2016, of the Superior Court, District of Montreal (Justice Wilbrod Claude Décarie) (the "**Superior Court judge**") dismissing her *Amended Motion for Declaratory Judgment*.

[10] Through those proceedings, the appellant is seeking various judicial declarations and a *de bene esse* judicial review following a refusal by a judge of the Court of Québec (Judge Eliana Marengo) (the "**trial judge**") to hear her on February 24, 2015, on the ground that she did not remove her head scarf (*hijab)* in the courtroom and was therefore contravening the dress code established under the *Regulation of the Court of Québec*.

[11] I would allow the appeal so as to set aside the judgment of the Superior Court, quash the decision of the trial judge rendered on February 24, 2015, to declare that the appellant was entitled to be heard that day wearing a head scarf (*hijab*), and to further declare that the provisions of the *Regulation of the Court of Québec* dealing with a dress code do not prevent the appellant from wearing a head scarf (*hijab*) if the source of that practice is a sincerely held religious belief, does not conflict with or harm an overriding public interest and is exercised in a manner suitable for a courtroom.

BACKGROUND

[12] On February 11, 2015, the appellant's son was stopped while driving a motor vehicle. As his driving licence was suspended, the motor vehicle was seized and impounded for 30 days pursuant to section 209.2 of the *Highway Safety Code.*[1] On February 20, 2015, the appellant applied to a judge of the Court of Québec for the release of the motor vehicle pursuant to section 209.11 of the *Highway Safety Code*, which application must be served on the Société de l'assurance automobile du Québec ("**SAAQ**"):

> **209.11.** The owner of a road vehicle seized may, on the authorization of a judge of the Court of Québec acting in chambers in civil matters, recover his vehicle on the conditions set out in section 209.15,
>
> **209.11.** Le propriétaire du véhicule routier saisi peut être remis en possession du véhicule aux conditions prévues à l'article 209.15, sur autorisation d'un juge de la Cour du Québec exerçant en son bureau en matière civile:

[1] *Highway Safety Code*, CQLR, C-24.2.

(1) if, being the driver of the vehicle, the owner was unaware that he was disqualified; or	1° si, étant le conducteur du véhicule, il ignorait qu'il était sous le coup d'une sanction;
(2) if, not being the driver of the vehicle, the owner	2° si, n'étant pas le conducteur du véhicule:
(*a*) was unaware that the driver he allowed to drive his vehicle was disqualified or did not hold a licence of the class required to drive the vehicle, even though he had made a reasonable attempt to verify the information;	*a*) il ignorait que le conducteur à qui il avait confié la conduite de son véhicule était sous le coup d'une sanction ou n'était pas titulaire du permis de la classe appropriée à la conduite du véhicule alors qu'il avait effectué des vérifications raisonnables pour le savoir;
(*b*) had not consented to the driver being in possession of the vehicle seized; or	*b*) il n'avait pas consenti à ce que le conducteur soit en possession du véhicule saisi;
(*c*) could not reasonably have foreseen, in the case of a seizure under section 209.2.1 or 209.2.1.1, that the driver would commit the offence that gave rise to the seizure;	*c*) il ne pouvait raisonnablement prévoir, dans le cas d'une saisie effectuée en vertu de l'article 209.2.1 ou 209.2.1.1, que le conducteur commettrait l'infraction ayant donné lieu à la saisie;
(*d*) *(subparagraph replaced).*	*d*) *(sous-paragraphe remplacé).*
The application for release must be served on the Société with a copy of the minute of the seizure at least two clear days before its presentation to the judge. The application is heard and decided by preference. Saturday and Sunday are not counted in calculating the time for the service.	La demande pour mainlevée de la saisie doit être signifiée à la Société avec une copie du procès-verbal de saisie, au moins deux jours francs avant la date de sa présentation devant le juge. Elle est instruite et jugée d'urgence. Aux fins du calcul du délai de signification, les samedis et dimanches ne sont pas comptés.

[13] The *Highway Safety Code* thus provides that this type of application is to be heard and decided by preference. A hearing was consequently held before the trial judge. As the appellant was about to testify, the following exchange took place between the judge and her:[2]

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[2] Transcript of the hearing of February 24, 2015, p. 3, lines 14-19.

THE COURT

Q. Madam El-Alloul, can I ask you why you are wearing a scarf?

A. I'm Muslim.

Q. Is it for religious reasons?

A. Yes.

Q. Okay. I'm going to suspend for a few minutes.

[14] The hearing was then suspended for approximately half an hour, after which the trial judge rendered the following decision:[3]

THE COURT

Mrs. El-Alloul, you stated that you were wearing a scarf earlier. You stated that you are wearing a scarf as a religious symbol.

MS EL-ALLOUL

Yes.

THE COURT

In my opinion, the Courtroom is a secular place and a secular space. There are no religious symbols in this room, not on the walls and not on the persons. Article 13 of the Regulation of the Court of Québec states:

> "Any person appearing before the Court must be suitably dressed."

In my opinion, you are not suitably dressed. Decorum is important. Hats and sunglasses, for example, are not allowed. And I don't see why scarves on the head would be either. The same rules need to be applied to everyone. I will therefore not hear you if you are wearing a scarf on your head just as I would not allow a person to appear before me wearing a hat or sunglasses on his or her head, or any other garment not suitable for a Court proceeding. So, what do you wish to do?

MS EL-ALLOUL

Actually, I cannot remove my scarf. This is ... since long years I'm wearing my scarf.

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3 *Ibid.*, p. 4, line 5 to p. 8, line 5.

THE COURT

Okay.

MS EL-ALLOUL

I came here to explain my case actually.

THE COURT

I understand. But I will not hear you. I have to apply the same rules to everybody. So you can ask me for a postponement and consult a lawyer. This is not about the case, this is about the... the Regulation of the Court of Québec and the rules of decorum. So, you know, it's up to you.

MS EL-ALLOUL

How can I defend myself then?

THE COURT

Well, you can ask me for a postponement and I'll give it to you, and you can consult a lawyer.

MS EL-ALLOUL

So, I'm on welfare by the way, I'm separated, I'm living with three (3) boys. I'm facing...

THE COURT

But that's...

MS EL-ALLOUL

... money problems.

THE COURT

I know. But that's not what we're... that's not what I'm talking about.

MS EL-ALLOUL

I cannot pay for any lawyer. I cannot pay even for the penalties for my son. Because of that, we are here today.

THE COURT

Okay. Again, but that's not the issue. We're not addressing the issue. The issue is, I can only repeat what I've said and I don't think it's necessary. So, you have to do something, I mean...

MS EL-ALLOUL

Thank you very much. I have to...

THE COURT

You want to ask me for a postponement? Yes?

MS EL-ALLOUL

Yes.

THE COURT

Okay. So the motion for a postponement is granted. Do you want me to put it for another date or you're going to decide what you want to do?

MS EL-ALLOUL

Actually, my car is... it's taken from me till 13th of March. And I need it before this day because I'm facing money problems.

THE COURT

Okay.

MS EL-ALLOUL

No time to make another date.

THE COURT

So, it's *sine die* then. Thank you.

(...)

[15] Article 13 of the *Regulation of the Court of Québec* referred to by the trial judge read as follows at the time of her decision:[4]

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[4] *Regulation of the Court of Québec*, CQLR, c. C-25, r. 4, s. 13.

13. Any person appearing before the court must be suitably dressed.	**13.** Toute personne qui comparaît devant le tribunal doit être convenablement vêtue.

[16] This regulation has since changed. The new regulation still provides that a person appearing before the Court of Québec must be suitably dressed, but it has expanded the application of that rule to all persons present in the courtroom: [5]

22. Every person present in the courtroom must be suitably dressed.	**22.** Toute personne présente en salle d'audience doit être convenablement vêtue.
[...]	(...)

[17] Since the appellant refused to remove her scarf, the judge was of the view that she was acting in contravention to the dress code set out in the *Regulation of the Court of Québec*. The trial judge postponed the hearing *sine die*, effectively denying the appellant a hearing by preference as provided by law. The 30-day impoundment period eventually expired and the motor vehicle was released to the appellant on March 14, 2015, by operation of the law.

[18] Shortly after these events, the appellant filed a complaint with the *Conseil de la magistrature du Québec*, the provincial judicial complaints board responsible for the discipline of provincially appointed judges. This board found her complaint to be unfounded. However, numerous other complaints concerning the same events were held by the board to warrant an investigation. Though over three and a half years have elapsed since the incident, no public report resulting from this investigation has been produced.

[19] On March 27, 2015, the appellant filed a *Motion for Declaratory Judgment* before the Superior Court, identifying as defendant the Attorney General of Québec ("**AGQ**") and designating the *Conseil de la magistrature du Québec* as an impleaded party. Though recognizing that the underlying impoundment case was technically moot in light of the restitution of the motor vehicle, the appellant argued that her constitutional rights had been infringed and that the appropriate remedy in the circumstances should take the form of various judicial declarations.

[20] The rights on which the appellant relies are those set out in the following provisions of the *Canadian Charter of Rights and Freedoms*[6] ("***Canadian Charter***") and the Québec *Charter of Rights and Freedoms*[7] ("***Quebec Charter***"):

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5 *Regulation of the Court of Québec*, CQLR, c. C-25.01, r. 9, s. 22.

6 *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (UK),* 1982, c 11.

7 *Charter of Human Rights and Freedoms*, CQLR, c. C-12.

Canadian Charter

2. Everyone has the following fundamental freedoms :	**2.** Chacun a les libertés fondamentales suivantes :
(*a*) freedom of conscience and religion;	*a*) liberté de conscience et de religion;
(...)	[...]

Quebec Charter

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, (...).	**3.** Toute personne est titulaire des libertés fondamentales telles la liberté de conscience, la liberté de religion, [...].
10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on (...) religion, (...)	**10.** Toute personne a droit à la reconnaissance et à l'exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur [...] la religion, [...]

[21] The appellant's proceedings were subsequently amended to name the Court of Québec as a defendant and the SAAQ as an impleaded party. The amendments sought to avoid a procedural argument from other parties contending that the proper procedural vehicle was judicial review.[8] As a result, although the appellant did not consider the matter subject to judicial review, she nevertheless sought judicial review on a *de bene esse* basis.

THE JUDGMENT OF THE SUPERIOR COURT

[22] The Superior Court judge recognized that the approach adopted by the trial judge was fundamentally wrong in law.[9] However, he was of the view that the issue raised by the proceedings was not whether the trial judge had erred in law, but rather whether the Superior Court could issue judicial declarations respecting a right which is otherwise clearly recognized under Canadian law.[10]

[23] The Superior Court judge concluded that he could not issue the declarations sought by the appellant based on the breaches of her constitutional rights resulting from the February 24, 2015, decision of the first instance judge. In his view, that decision could

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8 *Amended Motion for Declaratory Judgement*, June 25, 2015, par. 12a, reproduced below [45].
9 Judgment under appeal, par. 16-18.
10 *Ibid.*, par. 19.

only be overturned through an appeal or through judicial review. In the absence of an appeal and since, in the Superior Court judge's opinion, judicial review proceedings had not been initiated by the appellant, no relief could be granted.[11]

[24] The Superior Court judge was of the view that a declaration concerning the decision of trial judge would be of no use since the matter had become moot with the restitution to the appellant of the motor vehicle which had been the subject matter of the underlying litigation in the Court of Québec.[12]

[25] As for the declarations sought by the appellant relating to her general right to wear a *hijab* before the Court of Québec, the Superior Court judge found that the criteria of article 142 of the *Code of Civil Procedure* for granting such a declaration had not been satisfied:

> **142.** Even in the absence of a dispute, a judicial application may be instituted to seek, in order to resolve a genuine problem, a declaratory judgment determining the status of the plaintiff, or a right, power or obligation conferred on the plaintiff by a juridical act.
>
> **142.** La demande en justice peut avoir pour objet d'obtenir, même en l'absence de litige, un jugement déclaratoire déterminant, pour solutionner une difficulté réelle, l'état du demandeur ou un droit, un pouvoir ou une obligation lui résultant d'un acte juridique.

[26] The Superior Court judge concluded that a court decision was not a "juridical act" within the meaning of article 142 *C.P.P.*, thus precluding declaratory relief in this case.[13]

[27] He also found that there was no "genuine problem" to resolve within the meaning of article 142 since there had been no controversy between the appellant and the AGQ or the Court of Québec, these parties having not been called before the trial judge.[14]

[28] In the Superior Court judge's view, the humiliation the appellant suffered as a result of the February 24, 2015 decision was not an issue which could be remedied through judicial declarations.[15]

[29] As for the appellant's submission that she could be precluded from being heard by the Court of Québec in future cases, the Superior Court judge found that her fears in this

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11 *Ibid.*, par. 26-28.
12 *Ibid.*, par. 29.
13 *Ibid.*, par. 33-36.
14 *Ibid.*, par. 37-40.
15 *Ibid.*, par. 43.

respect were hypothetical given the lack of evidence that the decision of the trial judge was followed by all the other judges of the Court of Québec.[16]

[30] The Superior Court judge added that the declarations dealing with the general right to wear a *hijab* when appearing in the future before the Court of Québec, if granted, would constitute an unjustified interference with the institutional authority of the judges of that court to decide whether the use of a head scarf by a litigant is part of a sincerely held religious belief.[17] In the Superior Court judge's view, it was impossible to predict what the future outcome of such a case would be ("[n]ul ne peut prédire l'avenir"), adding that the legal principles which govern the use of religious head scarves could change over time, as could the appellant's religious beliefs ("[l]'état du droit sur cette question peut évoluer, la croyance religieuse de El-Alloul peut changer").[18]

[31] As for the appellant's *de bene esse* judicial review application, the Superior Court judge refused to entertain it on the grounds that (a) the conclusions of the application were not judicial review remedies; (b) the application failed to address the question of the applicable standard of review, and (c) any intervention by the Superior Court would be pointless since the matter could not be remitted back to the Court of Québec for final adjudication on the issue of the restitution of the motor vehicle.[19]

THE ISSUES ON APPEAL

[32] The appellant raises two issues on appeal:

(a) the Superior Court judge erred by holding that a declaratory judgment was not available to establish her rights on February 24, 2015, and for the future;

(b) he also erred by holding that judicial review was not available to her.

[33] The Court of Québec principally challenges the judicial declaration the appellant solicits concerning her future right to wear religious clothing in a courtroom. The Court of Québec submits that any determination of her future rights to wear a *hijab* or any other religious garment in one of its courtrooms is a matter which falls under the authority of the judge who will preside the hearing, should the issue ever arise.

[34] In her appeal brief, the AGQ submits that the record does not show that before the Court of Québec she opposed the appellant's wearing of a hijab. Not being an opposing party to the appellant, the AGQ considers she should not be impleaded as a defendant in the proceedings. In her brief, she states that she intends to limit her submissions to the sole question of her having been impleaded as a defendant. In fact, the only conclusion which the AGQ seeks in appeal is to dismiss the appellant's conclusion that she be

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16 *Ibid.*, par. 44-46.
17 *Ibid.*, par. 47-49.
18 *Ibid.*, par. 50-51.
19 *Ibid.*, par. 52-58.

ordered to pay judicial costs. At the appeal hearing, the AGQ also deferred to the Court of Quebec's appeal brief and submissions with respect to the judicial declaration the appellant seeks dealing with her future rights.

[35] The SAAQ and the *Conseil de la magistrature du Québec* did not submit appeal briefs.

ANALYSIS

The procedural issues

[36] The procedural issues which resulted in the dismissal of the appellant's proceedings in the Superior Court largely result from the unique context of the case.

[37] Indeed, it was the trial judge who, on her own initiative, decided to deny the appellant a hearing because she was wearing a head scarf by reason of her religious convictions. The trial judge thus raised on her own initiative an issue with constitutional overtones which had nothing to do whatsoever with the case before her. That decision was rendered without seeking prior submissions on the matter from the appellant.

[38] Moreover, the legal recourse set out in section 209.11 of the *Highway Safety Code* is rather unique. Indeed, it does not require the participation of a true defendant, the SAAQ being served with the application seeking the restitution of the motor vehicle, presumably so that it may verify whether the applicant is its true owner. In addition, the process becomes moot within 30 days of the seizure of the vehicle.

[39] In light of these unusual and unique circumstances, one can readily understand the difficulties the appellant and her attorneys encountered in identifying the proper procedural vehicle to assert her constitutional rights.

[40] Contrary to the position held by the Superior Court judge on this matter, declaratory relief cannot be readily excluded in this case, particularly when account is taken of subsection 24(1) of the *Canadian Charter* which invests a court with wide discretion to grant a remedy which it "considers appropriate and just in the circumstances" when a right guaranteed by that Charter has been infringed or denied.

[41] As the appellant noted in her *Amended Motion for Declaratory Relief*, this file raises procedural issues which, she contends, justify the use of a declaratory action:

> 11. Practically speaking, that case [dealing with the return of the motor vehicle] is now moot given that on March 14th, 2015, Plaintiff recovered her car;
>
> 12. There is therefore no need to proceed to a new hearing, to mandamus, judicial review, appeal or to involve the SAAQ, which never opposed Plaintiff's rights to proceed while wearing her *hijab*;

[42] Since it is impossible to proceed with a new hearing before the Court of Québec, the proceedings the appellant initiated thus seek to obtain judicial declarations concerning the interpretation and scope of the dress code set out in the *Regulation of the Court of Québec* with regard to her freedom of conscience and religion, as the appellant explicitly noted in her *Amended Motion for Declaratory Relief*:

> 16. The genuine problem can be described by the following questions:
>
> a. Does every person have the right to be heard in the Court of Québec wearing her *hijab* or her/his religious attire under the *Canadian Charter* and the *Québec Charter*?
>
> b. Can a judge ask a litigant to remove her *hijab* or her/his other religious attire under penalty of denying her/him access to justice?
>
> c. Does the Regulation of the Court of Québec in fact ban religious attire by requiring suitable dress?
>
> d. Does the refusal of the *hijab* constitute discrimination on the basis of religion?

[43] The proceedings the appellant initiated thus seek, *inter alia*, to solve a genuine problem resulting from the application and interpretation of the provisions of the *Regulation of the Court of Québec* dealing with the courtroom dress code. In this sense, the appellant's proceedings clearly raise a genuine problem for her, namely her right to wear a *hijab* before the Court of Québec notwithstanding the dress code set out in the *Regulation of the Court of Québec*.

[44] On the other hand, as the Superior Court judge noted, the appellant's proceedings are, at least in part, a form of judicial review since they also seek to challenge the validity of the trial judge's refusal to hear her case. The procedural difficulty here, however, is that decisions of the Court of Québec may only be properly challenged through an appeal or judicial review. As this Court has found on many occasions,[20] declaratory judgment proceedings are not a proper procedural vehicle to challenge court decisions. Fish, J.A., while still a member of this Court, discussed the matter plainly in *R.B. c. R.C.*:[21]

> Je suis aussi d'avis, toujours avec égards, que le recours déclaratoire ne s'applique pas aux décisions judiciaires. Comme la Cour l'a signalé dans l'affaire *Pouliot c. Communauté Urbaine de Montréal* [[1985] R.D.J. 257], on comprend facilement le motif du législateur. Si les décisions de justice étaient visées par les règles du jugement déclaratoire, cela équivaudrait en fait à un appel déguisé et servirait à remettre en question des décisions devenues finales.

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20 *R.B. c. R.C.*, [1996] R.D.J. 53 (C.A.), [1995] J.Q. n° 917 (QL); *Pouliot c. Montréal (Communauté urbaine de)*, [1985] R.D.J. 257 (C.A.), [1985] J.Q. n° 606 (QL), par. 14 and ff of the QL ed.; *Weitzman c. Westmount (Cité)*, [1990] R.J.Q. 1762 (C.A), [1990] J.Q. n° 908 (QL); *Pointe-Claire (Office municipal d'habitation) c. Coulombe*, [1996] R.D.J. 77 (C.A.); [1995] J.Q. n° 960, par. 13 of the QL ed.

21 *R.B. c. R.C.*, *supra*, note 20, par. 32 of the QL ed.

[45] It was with the purpose of addressing this procedural problem that the appellant amended her initial proceedings so as to allow for the possibility of deciding the issues she raises through judicial review. Indeed, paragraphs 12 a. to 12 c. of her *Amended Motion for Declaratory Relief* provide for the following:

> 12 a. To avoid the procedural argument announced by the Attorney General of Québec and the *Conseil de la magistrature du Québec,* Plaintiff adds the Court of Québec as Defendant and adds the SAAQ as mise-en-cause;
>
> 12 b. This being said, Plaintiff does not consider the present case a judicial review, but if this honourable Court would decide otherwise, all the parties and elements are present **to permit the quashing of Judge Marengo's decision**; In any event, with its superintending and reforming power, the Superior Court could have heard the present case even without amendments;
>
> 12 c. It is obvious that this case goes far beyond a now moot decision concerning a car made by Judge Marengo; its application affects all religious minorities which wear distinctive attire.
>
> [Emphasis added]

[46] Moreover, the appellant also amended her conclusions in appeal to add a specific conclusion dealing with the quashing of the Court of Québec decision, a conclusion which she was already seeking. This amendment was granted by the Court.

[47] The appellant has thus initiated hybrid proceedings comprising aspects of both a declaratory judgment and judicial review. In light of the very singular nature of the file and taking into account the fundamental constitutional rights at issue, the Superior Court judge should have used a flexible approach to the procedural questions favoring the recognition of the appellant's constitutional rights. His rigid approach resulted in the dismissal of all the declaratory remedies the appellant sought as well as in his refusal to consider the *de bene esse* judicial review application. The final result is unacceptable in a judicial system, such as ours, which favours the determination of rights over their negation by procedural means.

[48] Although the Superior Court judge recognized that the constitutional rights of the appellant were infringed, he left her without a remedy. Such an approach is not favoured by the Supreme Court of Canada, particularly where fundamental constitutional rights are at stake.

[49] As noted some 40 years ago by Justice Pigeon in *Vachon v. Attorney General (Québec)*:[22]

> In my view, the theory of nullity for some formal defects, elaborated in the cases on which the decisions in question are based, is contrary to the principles of the

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[22] *Vachon v. Attorney General (Québec)*, [1979] 1 S.C.R. 555, and 561-563.

present *Code of Civil Procedure.* It is quite true that art. 834 prohibits evocation and certain other remedies without prior authorization, but nowhere does the *Code* prohibit a declaratory action or a motion for a declaratory judgment in respect of claims that may be urged by an extraordinary remedy contemplated in this article. The *Code* has abolished the exceptions to the form which at least involved the rule that irregularities were waived by failure to take advantage of them within very short time limits (art. 176 of the 1897 *Code*). (...)

(...)

(...) The only consequence of resorting to an action or to a motion for a declaration rather than to an application for evocation in a case coming within art. 846 *C.C.P.*, is that the plaintiff does not obtain a staying order. Nothing in the *Code* provides for any other consequence; on the contrary, art. 2 states:

> 2. The rules of procedure in this Code are intended to render effective the substantive law and to ensure that it is carried out; and failing a provision to the contrary, failure to observe the rules which are not of public order can only affect a proceeding if the defect has not been remedied when it was possible to do so. ...

In one of the first pages of the report of the Commissioners who prepared the present *Code,* which was adopted without any major amendment, one reads concerning the general principles of this *Code:*

> ... Of course no one can deny that certain formalities are necessary in order to avoid leaving the administration of justice to the whim of pleaders or to the arbitrary ruling of the judge, to ensure the frank discussion of the issue in dispute, without the danger of being taken by surprise by one's adversary. But these formalities must be reduced to those necessary for achieving the purposes which are their justification. Otherwise they may even jeopardize the very rights which the procedure is designed to safeguard, and risk making the road to justice a veritable labyrinth.

(...)

Except in the case of a nullity enacted by a specific statutory provision allowing the courts no power to remedy it, the Supreme Court of Canada never hesitates to intervene to reverse a decision which dismisses an action on the merits for a formal defect. (...)

[Emphasis added]

[50] These principles have not changed with the new *Code of Civil Procedure*, as article 25 confirms:

25. The rules of this Code are designed to facilitate the resolution of disputes and to bring out the	**25.** Les règles du Code sont destinées à favoriser le règlement des différends

> substantive law and ensure that it is carried out.
>
> Failure to observe a rule that is not a public order rule does not prevent an application from being decided provided the failure is remedied in a timely manner; likewise, if no specific procedure is provided for exercising a right, any mode of proceeding may be used that is not inconsistent with the rules of this Code.
>
> et des litiges, à faire apparaître le droit et à en assurer la sanction.
>
> Le manquement à une règle qui n'est pas d'ordre public n'empêche pas, s'il y a été remédié en temps utile, de décider une demande; de même, il peut être suppléé à l'absence de moyen pour exercer un droit par toute procédure qui n'est pas incompatible avec les règles que le Code contient.

[51] As already noted, subsection 24(1) of the *Canadian Charter* also provides that anyone whose rights and freedoms under the Charter have been infringed or denied, "may obtain such remedy as the court considers appropriate and just in the circumstances".[23] This clearly includes remedies in the form of judicial declarations.[24]

[52] Moreover, judicial declarations are possible within the ambit of judicial review where the circumstances so warrant, as noted by Pierre Giroux in his comments concerning article 529 of the *Code of Civil Procedure* dealing with judicial review:[25]

> L'article 529 C.p.c. vise à simplifier et à regrouper les dispositions du code antérieur relativement à la révision judiciaire, mais ne restreint pas les types de réparations qu'un tribunal peut accorder. Les articles 34 et 49 C.p.c. permettent au tribunal d'accorder toute réparation appropriée. Seul un libellé clair aurait permis d'inférer que le législateur a voulu restreindre sa compétence inhérente [...], encore que le législateur ne pouvait constitutionnellement rendre ces conclusions limitatives [...].

[53] The Supreme Court of Canada has specified that courts may issue declaratory judgments without a cause of action and whether or not any consequential relief is available.[26] Moreover, at the very least where fundamental rights are at issue, courts have a broad discretion to define the appropriate remedies; they may even issue declaratory judgments where such relief was not specifically claimed in the proceedings, particularly where relief in the form of a "basket clause" has been included in the proceedings, [27] which is the case here.[28] Moreover, a court is not bound by the wording

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23 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, par. 24.

24 *Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, [2006] 1 S.C.R. 259, par. 81-82.

25 Luc Chamberland (dir.), *Le Grand collectif – Code de procédure civile, commentaires et annotations*, 2e éd., Cowansville, Yvon Blais, 2018, *Article 529* (Pierre Giroux), Vol. 2, p. 2343.

26 *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, par. 143; *Ewert v. Canada*, 2018 SCC 30, par. 81.

27 *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, p. 647-648.

28 Conclusion no. XI of the Appellant's *Amended Motion for Declaratory Judgment* provides for the following: "**GRANT** such other conclusions as the Court sees fit".

of the declarations sought by a litigant and it may therefore reword them in accordance to what it considers appropriate and just.[29]

[54] In summary, a judicial declaration, like judicial review, is discretionary relief over which courts have great flexibility, particularly where, as here, fundamental constitutional rights are at issue.

[55] A court may thus grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in contesting the declaration sought.[30]

[56] These criteria are met here:

(a) The Superior Court has jurisdiction over both declaratory judgments and judicial review.[31]

(b) Moreover, this is not a case where the moot character of the underlying dispute prevents a court from deciding the issues the appellant raised. While the appellant's motor vehicle impoundment case has now become moot, the issues related to the appellant's constitutional rights and to her right to be heard are real and distinct. They are important to the appellant herself and for the administration of justice. These are pressing and timely constitutional issues.[32]

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29 *Solosky v. The Queen*, [1980] 1 S.C.R. 821, p. 830-833.

30 *Ewert v. Canada*, 2018 SCC 30, par. 81; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, par. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, par. 46; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, p. 830-33.

31 *Code of civil procedure*, art. 33, 34, 49, 142, 529 and 530. The impugned decision of the first instance judge is either (a) a decision rendered in the course of a penal proceeding which is not subject to appeal under the *Code of penal procedure*, CQLR, c. C-25.1, or (b) a decision rendered in the course of a civil proceeding that may not be appealed as of right, thus allowing for judicial review in appropriate circumstances: *Trudel c. Re/Max 2001 MFL inc.*, 2013 QCCA 1396 (Yves-Marie Morissette, J.A., sitting alone); *Mondésir c. Asprakis*, 2010 QCCA 1780 (Pierre J. Dalphond, J.A., sitting alone).

32 As noted by Bertrand Lavoie in *Le fonctionnaire et le hijab*, Presses de l'Université de Montréal, 2018, p. 16 : « Depuis le milieu des années 2000 au Québec, on assiste à une mobilisation de divers acteurs sociaux et politiques qui présentent la laïcité comme une solution publique à ce « problème » du port de signes religieux. Ce qui est inédit, c'est le fait qu'une pratique religieuse jusqu'alors peu discuté publiquement devienne le centre de l'attention politique et médiatique. Et de façon symétrique, alors qu'elle n'était plus présente au sein des discussions publiques avant les années 2000, la laïcité est devenue un des thèmes importants du discours politique québécois contemporain, participant à une certaine reconfiguration des forces politiques, notamment nationalistes. En effet, la mobilisation du thème de la laïcité par les acteurs politiques québécois contribue, depuis plusieurs années, à un durcissement des configurations identitaires, au moyen d'une étanchéité plus affirmée de la catégorie « Québécois » (Eid, 2016). Le Québec devient en ce sens le théâtre d'un dissensus social important relativement aux enjeux de droit et de religion, favorisant la réflexion publique concernant les frontières identitaires et le rôle du droit de l'État ».

(c) The appellant clearly has a genuine interest in the issues she raises since she was denied her right to address a court because of her religious beliefs. She plainly has an interest to have her constitutional right to be heard by a court recognized and enforced without having to renounce her sincerely held religious beliefs.

(d) As for a genuine dispute, while the Court of Québec and the AGQ do not take a position with respect to the right of the appellant to wear a *hijab* in a courtroom, they resolutely contest the judicial declarations she seeks.

[57] Moreover, all the criteria for deciding the appellant's *de bene esse* judicial review application are satisfied.

[58] Indeed, these proceedings were filed in a timely fashion. The initial proceeding before the Superior Court was taken on March 27, 2015, some 31 days after the impugned decision of the trial judge. This is not an unreasonable timeframe for the purposes of initiating judicial review. On the contrary, the timeframe is exceedingly reasonable when account is taken of the fact the appellant – a single mother of modest means who initially had no legal counsel – had to secure the services of a lawyer to pursue an unexpected and important constitutional issue raised at the trial judge's own initiative.

[59] It is true that the proceedings initially identified the AGQ as defendant and the *Conseil de la magistrature du Québec* as an interested party. The appellant added the Court of Québec and the SAAQ as parties to the proceedings through her amended proceedings dated June 25, 2015 (filed July 3, 2015) where she sought a *de bene esse* judicial review. However, these parties have not argued that they are prejudiced by this, nor can any prejudice be identified in this respect. Taking into account all of the circumstances, the judicial review application is not tardy.

[60] The Superior Court judge nevertheless refused to adjudicate the *de bene esse* judicial review application on the ground that the appellant had not addressed the applicable standard of review. This was not a sufficient reason to deny judicial review. Reviewing courts have dealt with judicial review applications even when the parties assume a given standard of review or agree on a standard without making submissions on the matter. Given that it is the reviewing court's responsibility to determine the appropriate standard of review, the appellant cannot be denied judicial review simply on the ground that she did not specifically identify in her proceedings the applicable standard of review.

[61] In any event, it is obvious that the standard of review in this case is reasonableness. Indeed, if the decision of the trial judge is deemed an interpretation of the *Regulation of the Court of Québec* dealing with the court's dress code, then the

Dunsmuir v. New Brunswick[33] analysis suggests that the reasonableness standard applies. If the decision is characterized as being an exercise in judicial discretion, in *Doré v. Barreau du Québec*,[34] *Loyola High School v. Québec (Attorney General)*[35] (**"Loyola"**), and *Law Society of British Columbia v. Trinity Western University*,[36] the Supreme Court of Canada specifies that the reasonableness standard also applies.

[62] Contrary to the Superior Court judge's reasons, the appellant's *de bene esse* judicial review application is not moot since an important live issue still remains to be decided. While, from a narrow technical point of view, the appellant's motor vehicle impoundment case before the Court of Québec had become moot, this did not in itself preclude the reviewing court from quashing the decision refusing to hear her case because she was wearing a religious scarf.

[63] In short, all the criteria to address the issues raised by the appellant are satisfied. There is therefore no reason to deny the appellant constitutional remedies by applying a rigid procedural approach. It was therefore incumbent on the Superior Court judge to address the merits of the constitutional issues the appellant raised and the remedies she was seeking. Having declined to do so, it is now incumbent on this Court to decide these issues.

The Constitutional Issues

[64] Since the advent of the *Canadian Charter*, courts have firmly held that the fundamental right to "freedom of conscience and religion" set out in paragraph 2(*a*) thereof includes the right to religious expression. The purpose of paragraph 2(*a*) of the *Canadian Charter* is "to ensure that society does not interfere with profoundly [held] personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices".[37] In *R. v. Big M Drug Mart,* Dickson J. stated that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience:[38]

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs

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33 *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.
34 *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395.
35 *Loyola High School v. Québec (Attorney General),* 2015 SCC 12, [2015] 1 S.C.R. 613.
36 *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, par. 57-59.
37 *R. v. Edwards Books and Art Ltd.,* [1986] 2 S.C.R. 713, p. 759.
38 *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, p. 336-337.

> openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he 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. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".
>
> [Emphasis added]

[65] Freedom of conscience and religion — which entails both the right to hold religious beliefs and the right to act upon these beliefs — does not disappear or change when the concerned individual is dealing with courts. No party challenges that the courtrooms of the Court of Québec — and for that matter all courtrooms in Québec as throughout Canada — are spaces of religious neutrality. This does not mean, however, that judges may rely on the neutrality[39] of the courts alone as a justification for preventing litigants from accessing a courtroom simply because they are expressing sincerely held religious beliefs. In *Loyola*, Justice Abella wrote that the secular[40] nature of the State (or State neutrality in religious matters) does not imply the negation or extinction of religious beliefs, but rather respect for religious differences, insofar as such beliefs do not conflict with or harm overriding public interests:[41]

> [43] The context before us — state regulation of religious schools — poses the question of how to balance robust protection for the values underlying religious freedom with the values of a secular state. Part of secularism, however, is respect for religious differences. A secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm

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39 The expressions "neutrality of the State" and "secular State" are both used by judges of the Supreme Court of Canada, often to describe the same legal principle: compare *Loyola*, par. 43 (reproduced below at par. [65]) to *Mouvement laïque québécois*, par. 74 (reproduced below at par. [66]). I prefer to refer to "neutrality" rather than to "secularity".

40 See previous footnote.

41 *Loyola High School v. Québec (Attorney General), supra*, note 35, par. 43.

> overriding public interests. Nor can a secular state support or prefer the practices of one group over those of another: Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012), 45 *U.B.C. L. Rev.* 497, at pp. 498-99. The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them.
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> [Emphasis added]

[66] This conception of the neutrality of the State is firmly established in Canadian constitutional law, which prohibits the State from promoting the participation of believers to the exclusion of non-believers or vice versa. Justice Gascon expressed himself as follows in this regard in *Mouvement laïque Québécois v. Saguenay (City)*:[42]

> [74] By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 31 and 50-51). On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 of the *Canadian Charter*. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the *Canadian Charter*, but also with a view to promoting and enhancing diversity [...].
>
> [75] I would add that, in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the *Québec Charter* and the *Canadian Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs [...]. The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.
>
> [76] When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. It is prohibited from adhering to one religion to the exclusion of all others. Section 3 of the *Québec Charter* imposes a duty on the state to remain neutral in this regard. Today, the state's duty of neutrality has

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[42] *Mouvement laïque québécois v. Saguenay (City)*, 2015 CSC 16, [2015] 2 S.C.R. 3, par. 74-76.

> become a necessary consequence of enshrining the freedom of conscience and religion in the *Canadian Charter* and the *Québec Charter*.
>
> [Emphasis added]

[67] It follows that litigants are permitted to express their sincerely held religious beliefs, including with respect to religious clothing, and courts must accommodate the exercise of that right in a courtroom insofar as it does not conflict with or harm an overriding public interest. Freedom of religious expression does not stop at the door of a courtroom.

[68] Freedom of conscience and religion may rightly be restricted in a courtroom if the exercise of that right conflicts with or harms an overriding public interest, provided any such limit is demonstrably justified in a free and democratic society. But the basic constitutional right remains intact, including in the confines of a courtroom.

[69] As stated by Chief Justice McLachlin in *R. v. N.S.*, we must reject the view that holds all religious expressions by litigants are prohibited in courtrooms:[43]

> [50] At the other end of the spectrum lies the approach that says the courtroom must be a space in which individuals' particular religious convictions have no place. [...] Courtrooms should be "neutral" spaces, operating on "neutral" principles. Changes of procedure on religious grounds should therefore not be allowed, it is argued.
>
> [51] In my view, this option must also be rejected. It is inconsistent with Canadian jurisprudence, courtroom practice, and our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible. Importantly, it limits religious rights where there is no countervailing right and hence no reason to limit them. As such, it fails the proportionality test which has guided *Charter* jurisprudence since *Oakes* in 1986.
>
> [52] First, as already discussed, our jurisprudence teaches that clashes between rights should be approached by reconciling the rights through accommodation if possible, and in the end, if a conflict cannot be avoided, by case-by-case balancing: *Dagenais*. An absolute rule that courtrooms are secular spaces where religious belief plays no role would stand as a unique exception to this approach. No attempt to accommodate the witness's sincere religious belief would need to be made. No effort to minimize the intrusion on the right would need to be considered. The reconciliation between competing rights that we have advocated case after case would not be attempted. Why? Simply because the venue where the rights clash is a courtroom.
>
> [53] Second, to remove religion from the courtroom is not in the Canadian tradition. Canadians have since the country's inception taken oaths based on holy books — be they the Bible, the Koran or some other sacred text. The practice has been to respect religious traditions insofar as this is possible without risking trial

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[43] *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, par. 50-54.

> fairness or causing undue disruption in the proceedings. The *Canada Evidence Act*, R.S.C. 1985, c. C-5, now permits a witness to affirm instead of taking a religious oath, but it does not remove the option of the oath from the courtroom.
>
> [54] Third, the Canadian approach in the last 60 years to potential conflicts between freedom of religion and other values has been to respect the individual's religious belief and accommodate it if at all possible. Employers have been required to adapt workplace practices to accommodate employees' religious beliefs [...]. Schools, cities, legislatures and other institutions have followed the same path [...]. The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law. For over half a century this tradition has served us well. To depart from it would set the law down a new road, with unknown twists and turns.
>
> [Emphasis added]

[70] Restrictions on the practice of sincerely held religious beliefs may, however, be curtailed in a courtroom when the practice conflicts with some overriding public interest, such as another person's constitutional rights.

[71] An example of this is the case of *R. v. N.S.* There, the accused in a sexual assault criminal trial claimed that the religiously motivated desire of a witness to wear a full-body dress covering the entire body, including the face (*niqab*), while testifying would violate their constitutional right to a fair trial. In such a situation, where two different constitutional rights conflicted, the trial court was justified to enter into an inquiry to determine if it was necessary to restrict the rights of the individual witness for the sake of safeguarding the rights of the accused. As noted by Chief Justice McLachlin in that case:[44] "[t]he long-standing practice in Canadian courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial."

[72] Contrary to what the trial judge decided, the provisions of the *Regulation of the Court of Québec* dealing with the dress code do not prohibit a litigant from wearing a religious head scarf (*hijab*) in a courtroom when that practice results from a sincerely-held religious belief. It is only where that practice could conflict with an overriding public interest, such as another person's constitutional rights, that a court may restrict it in a courtroom environment. The provisions of the *Regulation of the Court of Québec* dealing with court attire, in and of themselves, do not express such an overriding public interest

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[44] *Ibid.*, par. 2. The majority of the judges hearing that case agreed with the reasons of Chief Justice McLachlin. Justice LeBel, with Justice Rothstein, though concurring in the result, expressed reservations about the proposed approach, and was rather of the view that the use of a *niquab* while testifying in a criminal trial should not be allowed. Nevertheless, Justice Lebel recognized that "[r]eligions are voices among others in the public space, which includes the courts." (*R. v. N.S.*, par. 73). As for Justice Abella, dissenting, she would have allowed the use of the *niquab* while providing testimony.

sufficient to restrict the constitutional right to freedom of religious expression. Requiring litigants to be suitably dressed in a courtroom is not a prohibition of sincerely held religious practices involving particular garments. Though the requirement to be suitably dressed also applies where a litigant appears in a courtroom wearing religious clothing – I will address this further below – it does not, on its own, prohibit such clothing.

[73] By interpreting the words "suitably dressed / convenablement vêtue" found in article 13 of the prior *Regulation of the Court of Québec* as forming an absolute bar to wearing a religious headscarf (*hijab*) in a courtroom, the February 24, 2015 decision failed to reconcile the terms of that regulation with the Constitution and the teachings of the Supreme Court of Canada in both *Loyola* and *N.S. v. R.*

[74] The underlying premise of the February 24, 2015, decision is that Canada is a secular state that does not allow litigants to wear religious clothing in a courtroom even when this is justified by a sincerely held religious belief. That premise finds no support in Canadian law. The February 25, 2015, decision is at odds with prevailing jurisprudential guidance with respect to the constitutional right of freedom of conscience and religion and, as such, cannot be deemed reasonable.

[75] To the extent this decision was the exercise of discretionary authority, it is also unreasonable since judicial discretion must always be exercised in a manner consistent with the *Canadian Charter* and the *Québec Charter*.[45]

[76] Far from weighing the constitutional values protecting the appellant's religious beliefs respecting the wearing of a *hijab*, the trial judge discounted altogether the appellant's right to religious expression in favour or an overriding and absolute principle of State secularity which, in her erroneous view, was expressed in the *Regulation of the Court of Québec*. As a result, this is not a case of a poor balancing between constitutional values and the regulatory objectives underlying the *Regulation of the Court of Québec*. Rather, in this case, no consideration at all was given to constitutional values or to balancing these values with regulatory objectives. A decision that ignores the Constitution and does not even begin to engage in the constitutional balancing exercise prescribed by the Supreme Court of Canada when freedom of conscience and religion is at issue cannot be considered reasonable.

[77] The impugned decision of February 24, 2015, is also unreasonable in that it ignores the constitutional rights of the appellant and either does not consider or ignores the recent guidance from the Supreme Court of Canada concerning both freedom of conscience and religion and the wearing of religious clothing in a courtroom.

[78] As a result, the decision should have been quashed by the Superior Court. It is now incumbent on this Court to so.

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[45] *Canadian Arab Federation v. Canada (Citizenship and Immigration)*, 2015 FCA 168, par. 19.

[79] Nevertheless, the quashing of the decision dated February 24, 2015, is not a full and sufficient remedy in this case since, in fact, the matter cannot be returned to the Court of Québec so as to allow the appellant to exercise her right to wear her *hijab* by pursuing her proceedings under section 209.11 of the *Highway Safety Code*. It follows that declaratory relief must be considered so as to provide the appellant an efficient and complete constitutional remedy.

[80] The appellant proposes that the two following declarations be issued:[46]

> DECLARE that the [Appellant's] right to freedom of religion as protected by article 2(a) of the *Canadian Charter* and 3 of the *Québec Charter*, was breached by the February 24, 2015, decision of Judge Marengo, in Court of Québec case 500-80-0302259-155;
>
> DECLARE that Rania El-Alloul has the right to be heard in the Court of Québec wearing her *hijab* or her other religious attire under the *Canadian Charter* and the *Québec Charter*.

[81] At the appeal hearing, the appellant's attorneys indicated that the proposed declarations could be replaced by any other declarations the Court deems fit or appropriate as a judicial response to the issues raised in the proceedings.

[82] Since the record establishes that the wearing of a *hijab* by the appellant at the February 24, 2015, hearing before the trial judge resulted from a sincerely held religious belief, a proposition which is not disputed, and since nothing in the record indicates that the appellant's use of this garment would have then conflicted with or harmed an overriding public interest or was not otherwise suitable in a courtroom, it is appropriate to declare that the appellant was entitled to be heard by a judge of the Court of Québec on February 24, 2015, wearing a head scarf (*hijab*) to testify and to make representations with respect to the proceeding she had then initiated under section 209.11 of the *Highway Safety Code*.

[83] The second declaration the appellant seeks deals with her future right to wear a *hijab* in the courtrooms of the Court of Québec. It is this second declaration which troubles the Court of Québec as well as the AGQ, the latter deferring to the arguments of that court on the issue.

[84] The Court of Québec submits that its judges must maintain their full authority to decide issues relating to the wearing of a *hijab* in the event the appellant would again appear before that court. Relying on the judgment of the Superior Court judge, the Court of Québec submits that nothing in the record indicates that the decision of the trial judge is followed by its other judges, nor does the record reveal that the appellant is a party to another proceeding in the Court of Québec or that she anticipates being a party to such a proceeding. The Court of Québec adds that, as the law now stands, the factual context

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[46] Appellant's Memorandum in Appeal, par. 117.

is of great importance when a court is called upon to determine the extent of the constitutional protection afforded to freedom of conscience and religion, as the factual context is important in all other disputes involving other values protected by the *Canadian Charter* and the *Québec Charter*.

[85] The Court of Québec thus submits that its judges must not be impeded from deciding in the future, on a case-by-case basis, whether the wearing of a *hijab* or any other form of religion clothing by the Appellant or any other litigant in its courtrooms forms part of a sincerely held religious belief. The Court of Québec fears that a judicial declaration would unduly hinder the authority of its judges in this matter. It relies on the following statements of Justice Iacobucci in *Syndicat Northcrest v. Anselem*:[47]

> [52] [...] Indeed, the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. [...]
>
> [53] Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony [...] as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. [...] Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom.

[86] It is accurate to state that the judges of the Court of Québec – as well as all trial judges from whatever jurisdiction - may in certain circumstances be called upon to determine the sincerity of a religious belief. However, such a determination is only useful where the sincerity of a practice founded on such beliefs is truly at issue in the dispute. As noted by Justice Iacobucci in *Syndicat Northcrest v. Anselem*,[48] a court "is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue" (emphasis added). Even then, the "inquiries into a claimant's sincerity must be as limited as possible"[49] (emphasis added).

[87] The circumstances in which the judges of the Court of Québec may exercise their authority are the issue here, not the authority itself to decide such questions. In these proceedings, there is in fact no challenge to the authority of the judges of the Court of Québec to inquire, where appropriate, into a claimant's sincerely held religious beliefs. The issues raised by these proceedings are rather when such an inquiry is appropriate and how should it be carried out in a free and democratic society in which freedom of conscience and religion is a fundamental constitutional value.

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47 *Syndicat Northcrest v. Anselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, par. 52-53.
48 *Ibid.*, par. 51.
49 *Ibid.*, par. 52.

[88] Indeed, it would be inappropriate for a court to carry out an inquiry concerning religious beliefs and practices every time a litigant appears before it dressed with some form of religious clothing. As Justice Abella noted in *Loyola*, the State does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests.

[89] It is not necessary to proceed in all cases with the validation of the sincerity of the religious convictions of a litigant who is wearing religious clothing, especially where that question is not a true issue in the proceedings. A court's authority to proceed to such a validation may be properly exercised where the judge has reasonable grounds to believe that the wearing of the religious clothing does not strictly result from a sincerely held religious belief or serves some ulterior motive. Each case depends on the context. We must rely on the common sense of trial judges to distinguish between those cases which really require further investigation and those that do not.

[90] Consequently, the concerns of the Court of Québec set out in its factum are justified, since the second declaration the appellant sought would provide her with an absolute and unchallengeable right to wear at all times any religious clothing of her choice before the Court of Québec, whatever the context, even where that practice would conflict with or harm overriding public interests or be exercised in a manner which is not suitable for a courtroom.

[91] That being stated, it is not necessary for a trial judge to test the sincerity of religious beliefs and practices each time someone appears in a courtroom wearing religious garments, particularly where such garments are well-known, such as a *hijab* for a Muslim woman, a Roman collar for a Catholic priest, a *kippa* for an orthodox Jew, etc. This is also the case for those litigants wearing a pendant or other suitable religious jewelry. Where the religious practice is well known and understood, there is rarely a need to proceed to an inquiry. As rightly noted by Justice Iacobucci in *Syndicat Northcrest v. Anselem*:[50] "an intrusive government inquiry into the nature of a claimant's beliefs would in itself threaten the values of religious liberty".

[92] In light of the multi-confessional fabric of Québec society, it is usually quite easy for a judge to recognize the difference between suitable religious attire and those cases where the individual litigant or witness is showing lack of respect for the court by his or her choice of clothing. The types of religious clothing worn in Québec are not numerous and are not generally difficult to identify. For quite a long time now, the courts have had little difficulty accommodating these types of attire.

[93] Of course, from time to time, there may occur situations which warrant further inquiry; it is incumbent on trial judges to identify these situations by using common sense. An example is the full facial covering, such as the *niqab*, which raises issues related to

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[50] *Ibid.*, par. 55, citing Tribe, Laurence H., *American Constitutional Law*, 2nd ed. Mineola, N.Y.: Foundation Press, 1988, p. 1244.

the proper identification of litigants, the proper assessment of the credibility of witnesses and the fairness of the judicial proceedings. Such a case was dealt with in *R. v. N.S.*

[94] In the appellant's case, however, we are dealing with a head scarf which does not cover the face. It is hard to conceive in which circumstances the wearing of such a religious head dress by a litigant in a courtroom would conflict with an overriding public interest, save those rare circumstances where a physical characteristic of the head (e.g. hair colour or form of the ears) would be a true issue in a trial. In such cases, it is the analytical framework set out in *R. v. N.S.* which then must be applied.

[95] Yet, the appellant was denied the right to be heard by reason only that she was contravening the dress code set out in the *Regulation of the Court of Québec*. If nothing in the record leads to the belief that the other judges of the Court of Québec hold the same interpretation of the dress code, the appellant was nevertheless denied access to the Court of Québec for this reason. It is thus appropriate to clarify the law with respect to court dress codes and the wearing of religious head scarf (*hijab*), as this issue appears to be the subject of controversy and misunderstanding, as evidenced by the decision of the trial judge in this case.

[96] As previously discussed, the dress code in the *Regulation of the Court of Québec* does not set out a general prohibition of religious clothing in a courtroom. Such clothing may be worn in a courtroom where (a) that practice results from a sincerely held religious belief; and (b) does not conflict with or harm an overriding public interest.

[97] If a judge clearly has the authority to assess the sincerity of the religious practice which results in the wearing of religious clothing in a courtroom, such an inquiry should usually proceed only in cases where there are reasons to doubt the sincerity of the religious practice at issue or where there is reason to believe that the practice conflicts with or harms an overriding public interest.

[98] Where the practice may conflict with or harm an overriding public interest, then it is incumbent on the judge to identify the interest that may be at issue and to carry out the balancing exercise required by the Supreme Court of Canada.

[99] Moreover, the rule set out in the *Regulation of the Court of Québec* providing that every person present in the courtroom must be suitably dressed also applies to religious clothing. Of course, this rule must be reconciled with the constitutional right at issue, but this does not mean that the rule does not apply. On the contrary, if the rule does not prohibit religious clothing, it applies nevertheless to those who choose to wear such garments. Thus, the litigant who avails himself of this right must always be "suitably dressed" in the courtroom, this requirement being understood in relation to the right claimed.

[100] As an example, if the scarf (*hijab*) has heinous printings on it or unsuitable or mocking signs, then a judge may justifiably intervene by referring to the court's dress code.

[101] As a result, the declaratory relief which is required in this case is not the one the appellant proposed. Instead, it is appropriate to declare that the *Regulation of the Court of Québec* does not impede her from wearing a head scarf (*hijab*) if that practice results from a sincerely held religious belief and does not conflict with or harm an overriding public interest. The declaration so articulated affirms the appellant's right to freedom of conscience and religion and sets aside the erroneous interpretation of the regulation made by the trial judge, while preserving the authority of the judges of the Court of Québec to intervene if circumstances warrant.

Legal Costs

[102] The Superior Court judge did not order costs. In light of the particularities of this case, I am of the same opinion. Indeed, the SAAQ did not oppose the wearing of a head scarf (*hijab*) by the appellant before the trial judge and did not actively participate in the proceedings. As for the other parties, though some opposed the judicial declarations sought by the appellant, they did not formally oppose her right to wear a head scarf (*hijab*) in the courtroom the trial judge presided.

[103] Since no party will be condemned to legal costs, it is not necessary to deal with the issue the AGQ raised concerning her having been impleaded as a defendant to the proceedings.

[104] In this matter, though the AGQ submits having no interest in the proceedings, it is appropriate to note that the audio recording of the September 22, 2016, hearing before the Superior Court shows that the AGQ's attorney argued the procedural issues at length which resulted in the dismissal of the appellant's proceedings. This is incompatible with a lack of interest in the proceedings. Whatever the case, the status of the AGQ as a defendant is a marginal issue in this file which has no practical consequences since there will be no order to pay legal costs.

CONCLUSIONS

[105] For these reasons, I would (a) allow the appeal; (b) set aside the judgment of the Superior Court of October 3, 2016; (c) quash the decision of the Court of Québec of February 24, 2015; (d) declare that the appellant was entitled to be heard by a judge of the Court of Québec on February 24, 2015, wearing a head scarf (*hijab*) to testify and to make representations with respect to the proceeding she had then initiated under section 209.11 of the *Highway Safety Code*; (e) further declare that the provisions of the *Regulation of the Court of Québec* dealing with a dress code do not forbid the appellant from wearing a head scarf (*hijab*) if that practice results from a sincerely held religious belief and does not conflict with or harm an overriding public interest; (f) the whole without legal costs.

ROBERT M. MAINVILLE, J.A.