

# Constitutional (mis)Adventures: Revisiting Quebec's Proposed Charter of Values

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# Constitutional (mis)Adventures: revisiting Quebec’s proposed Charter of Values

Dia Dabby\*

## I. INTRODUCTION

The *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*<sup>1</sup> was introduced by the Parti Québécois (“PQ”) in November 2013, amid months of speculation and anticipation. According to then Premier Pauline Marois, Bill 60 would be similar in scope to the *Charter of the French Language*,<sup>2</sup> and likely be cited for years to come as a “rallying project” for all Quebecers.<sup>3</sup> Bernard Drainville, author of the bill and Minister responsible for Democratic Institutions and Active Citizenship, presented Bill 60 as a real milestone in Quebec’s history: “these values, like our language, are our cement [...]”. We believe that once adopted, this charter will be a source of

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<sup>1</sup> Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st sess., 40th Leg., Quebec, 2013 [hereinafter “Bill 60”].

<sup>2</sup> *Charter of the French Language*, CQLR, c. C-11 [hereinafter “*Charter of the French Language*”].

<sup>3</sup> Robert Dutrisac « Charte des valeurs — Le PQ durcit sa position » *Le Devoir* (8 novembre 2013) online: <<http://www.ledevoir.com/politique/quebec/392166/le-pq-durcit-sa-position>>.

harmony and cohesion for Quebec.”<sup>4</sup> Language and values became legislatively intertwined through Bill 60’s larger social project, vested with the same power and social significance.

However, Bill 60 did not achieve the intended consensus, or even the status of law, because a provincial election was called — and subsequently lost — by the PQ minority government on April 7, 2014.<sup>5</sup> This article argues, nevertheless, that Bill 60 has left an indelible mark on Quebec society: it has raised foundational questions about the make-up of Quebec society as well its chosen model of, and vehicle for, integration. Moreover, the divided positions over Bill 60 reveal that this legislative project was much more than a simple law, and rather, as argued in this article, about reconfiguring the constitutional relationship that Quebecers entertain with the rest of Canada (“RoC”).

In the absence of litigated cases resulting from Bill 60’s actual enactment into law,<sup>6</sup> this article seeks to engage with the constitutional “misadventures” experienced in 2013-2014. By “constitutional”, I refer to Bill 60 — albeit a (potential) piece of provincial legislation — having the power to reshape the basic social contract that Quebecers have with the rest of Canada. I argue that Bill 60 was a constitutional intervention by another name. By “misadventures”, I borrow from the old French origin of this word, *mesaventure*, or, “to turn out badly”.<sup>7</sup>

This article draws on briefs submitted to the Commission des institutions before the National Assembly and the official report of debates, as well as relevant academic commentary and case law. In Part II, I offer a critical snapshot of Bill 60 in order to understand its scope and its potential implications on a constitutional level. This also includes a background to Bill 60, in terms of past confrontations with religious reasonable accommodation in Quebec. I also argue that while a number

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<sup>4</sup> *Id.* [translated by author]. Original, in French: « ces valeurs, comme notre langue, sont notre ciment [...]. Nous avons la conviction qu’une fois adoptée, cette charte sera source d’harmonie et de cohésion pour le Québec ».

<sup>5</sup> Tim Duboyce, “Quebec election 2014: Pauline Marois loses electoral Hail Mary” *CBC* (April 8, 2014), online: <<http://www.cbc.ca/news/canada/montreal/quebec-votes-2014/quebec-election-2014-pauline-marois-loses-electoral-hail-mary-1.2601935>>.

<sup>6</sup> The federal government cautioned against a possible legal challenge if the proposed charter of values was enacted into law: Mark Kennedy & Tobi Cohen, “Harper government warns of possible legal challenge to Quebec’s proposed values charter”, *National Post* (September 10, 2013) online: <[http://news.nationalpost.com/news/canada/canadian-politics/harper-government-warns-of-possible-legal-challenge-to-quebecs-proposed-values-charter#\\_federated=1](http://news.nationalpost.com/news/canada/canadian-politics/harper-government-warns-of-possible-legal-challenge-to-quebecs-proposed-values-charter#_federated=1)>.

<sup>7</sup> “misadventure, n.” in *OED Online* (Oxford University Press, September 2015) online: <<http://www.oed.com/view/Entry/119151?rkey=EHw9Lt&result=1&isAdvanced=false#eid>>.

of litigated cases about freedom of religion and reasonable accommodation have emerged from the Quebec context, one case in particular, *Multani v. Commission scolaire Marguerite-Bourgeois*,<sup>8</sup> has come to symbolize a schism in how religious accommodation is addressed in Quebec. By way of conclusion, this article suggests that Quebec's constructed role as "outlier" to the RoC, especially in regards to religious reasonable accommodation, is not really as different as is supposed, particularly in light of recent litigation in the rest of Canada. Ultimately, this article devotes more careful elaboration to accommodation, as conceived in Bill 60, how this would alter the meaning of accommodation under the Quebec Charter,<sup>9</sup> and the resulting tension with the Canadian Charter.<sup>10</sup>

## II. BILL 60: AN "EVERYTHING BUT THE KITCHEN SINK" APPROACH TO LAW MAKING

This section explains and critiques Bill 60. Ultimately, Bill 60 reshaped how public services were to be given and received — and consequently, the public face of the State. It unequivocally regulated how certain members of society (predominantly aimed at observant Muslims, Jews, Sikhs and other religious minorities, as well as the rare practising Catholic) could interact and engage with others in the public sphere, in the context of giving and receiving public services. In so doing, I suggest that Bill 60 legitimated a form of legislative "othering".

Structurally speaking, Bill 60 was drafted under 12 different headings.<sup>11</sup> Chapter I focused on the relationship between religious neutrality and the secular nature of public bodies (ss. 1-2); Chapter II set out the duties of neutrality in the context of public bodies (and their employees), as well as restricted the types of religious symbols that can be worn by personnel members of public bodies (ss. 3-5); Chapter III addressed the obligation of having uncovered faces, both in the offering and receiving of public services (ss. 6-7); beyond the personnel members of public bodies, Chapter IV identified the other persons targeted by Bill 60

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<sup>8</sup> [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.) [hereinafter "*Multani*"].

<sup>9</sup> *Charter of Human Rights and Freedoms*, CQLR, c. C-12 [hereinafter "Quebec Charter"].

<sup>10</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>11</sup> Bill 60, *supra*, note 1.

(ss. 8-14); Chapter V established how accommodation of religious requests would be handled, as well as the limits of these accommodation requests (ss. 15-18); Chapter VI articulated the implementation policies that each public body is expected to adopt, in order to put Bill 60 into practice. Particular rules are set out for the daycare setting (Chapters VII and VIII, ss. 27-32). Bill 60 also set out broad discretionary powers to the Minister responsible for this bill, in terms of its application and promotion (Chapter IX, ss. 33-35). Similar powers are also set out for the Government (Chapter X, ss. 36-37). As such, Bill 60 would modify important pieces of existing legislation, including the Quebec Charter, the *Educational Childcare Act*<sup>12</sup> and the *Act Respecting the National Assembly*<sup>13</sup> (Chapter XI, ss. 38-43). The final Chapter articulates the transitory measures (ss. 42-55). Given the broad scope of Bill 60, my comments will focus on the nature of public bodies and their personnel members, as well as the provisions on accommodation measures.

Having set out Bill 60's structure, the points raised in this Part speak both to legislative form and substance and address four areas: (1) theoretical framing; (2) re-defining *vivre-ensemble*; (3) scope and (4) accommodation frameworks. Building on this discussion, this section suggests that the content and structure of Bill 60 reinforced the narrative of a new social contract — that of a secular (sovereign) state.

## 1. Framing Secularism

This article suggests that a framework for thinking about secularism is first desirable, in order to unpack Bill 60, within the context of Quebec. This article draws on the works of Talal Asad<sup>14</sup> and Elizabeth Shakman Hurd to inform our understanding of Bill 60's approach to secularism. Indeed, Hurd understands secularism as a societal project, not sequentially but deeply interdependent: “[s]ecularism is not the absence of religion, but enacts a particular kind of presence. It appropriates religion: defining, shaping and even transforming it.”<sup>15</sup> Viewed through this lens, Bill 60 emerges first and foremost as a political project, seeking

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<sup>12</sup> *Educational Childcare Act*, CQLR, c. S-4.1.1.

<sup>13</sup> *Act Respecting the National Assembly*, CQLR, c. A-23.1.

<sup>14</sup> Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

<sup>15</sup> Elizabeth Shakman Hurd, “International politics after secularism” (2012) 38 *Review of International Studies* 943, at 955.

to alter the place that religion occupies in Quebec society. I argue that in reconfiguring the place of religion, this legislative project also sought to re-define the place that Quebec occupies in Canada through its amendments to Quebec's Charter.<sup>16</sup> More broadly, Bill 60's legislative refashioning substantively disconnected Quebecers from the promise of Canadian unity and the protections under the Charter,<sup>17</sup> as addressed further on in this article.

In returning to the place of religion in this discussion, I draw on Hurd's suggestion that it does not disappear, but rather, is reshaped. Within Quebec's context, immigration and education policies have led the way in (re)shaping how and under what circumstances we engage with cultural and religious diversity and artifacts. This resonates particularly within Quebec's "common civic framework",<sup>18</sup> often referred to as *vivre-ensemble*, which has been developed through a variety of legislative policies since the early 1990s. As noted by then Quebec Ministry of Cultural Communities and Immigration (now Ministry of Immigration, Diversity and Inclusion),

Living together is more than sharing the same institutions and interacting in official or functional situations. It's also feeling united by a shared sentiment of belonging to a common society and an acceptance to build tomorrow's society, enriched by each individual's contribution.<sup>19</sup>

At that time, *vivre-ensemble* was identified as a moral contract<sup>20</sup> between citizens and the State. This concept has evolved in Quebec over the last quarter century,<sup>21</sup> revolving increasingly around the management

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<sup>16</sup> *Supra*, note 9.

<sup>17</sup> *Supra*, note 10.

<sup>18</sup> Gérard Bouchard & Charles Taylor, *Building the Future: A Time for Reconciliation* (Quebec City: Government of Quebec, 2008), online: <<https://www.mce.gouv.qc.ca/publications/CCPARDC/rapport-final-integral-en.pdf>>, at 105 [hereinafter "Bouchard & Taylor, 'Building the Future'"].

<sup>19</sup> Direction des communication du ministère des communautés culturelles et de l'Immigration du Québec, *Au Québec pour bâtir ensemble: énoncé de politique en matière d'immigration et d'intégration* (1991), online: <<http://www.midi.gouv.qc.ca/publications/fr/ministere/Enonce-politique-immigration-integration-Quebec1991.pdf>>, at 88 [translated by author]. Original, in French: « Vivre ensemble, c'est plus que partager les mêmes institutions et interagir dans des situations officielles ou fonctionnelles. C'est aussi se sentir unis par un sentiment d'appartenance à une société commune et accepter de construire la société de demain que l'apport de chacun enrichira. »

<sup>20</sup> *Id.*, 16.

<sup>21</sup> See, for instance: Ministry of Education Québec, *Religion in Secular Schools: A New Perspective*, online: <<http://collections.banq.qc.ca/ark:/52327/bs40899>>; Conseil des relations interculturelles Québec, *Avis sur la prise en compte et la gestion de la diversité ethnoculturelle*

of religious diversity.<sup>22</sup> Later consultative works have translated “vivre-ensemble” to “regulat[ing] cohabitation”,<sup>23</sup> which speaks to a more structured (and structuring) relationship between individuals.

Asad reminds us that the project of secularism is also social, modified not only by a particular lived religious history, but also, by ongoing changes in its religious demographics.<sup>24</sup> In the context of Quebec, this resonates on two different registers: first, in Quebec’s choice of immigrants,<sup>25</sup> and second, in a shift in religious demographics. Over half of immigrants to Quebec in 2013 have a self-declared knowledge of the French language; this percentage is over two-thirds if considering the subcategory of skilled workers.<sup>26</sup> It should be noted that within this context, Quebec selects its own economic immigrants, but not its refugees or family class. In 2013, 34.8 per cent of immigrants to Quebec were from Africa (16.6 per cent from North Africa), 26.7 per cent from Asia (including the Middle East), 21.4 per cent from the Americas and 17 per cent from Europe.<sup>27</sup> Although the immigrant population comes to Quebec with generally higher language skills than previously, there has also been an increase in immigrants with a declared religion to this province in recent decades. According to the 2011

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(Québec, Bibliothèque et archives nationales du Québec, 2007), online: <<http://www.micc.gouv.qc.ca/publications/fr/cri/diversite/Avis-prise-compte-gestion-diversite.pdf>>; Ministère de l’éducation, loisir et le sport, *Comité consultatif sur l’intégration et l’accommodement raisonnable en milieu scolaire: une école québécoise inclusive: dialogue, valeurs et repères communs* (Québec, 2007), online: <[http://www.education.gouv.qc.ca/fileadmin/site\\_web/documents/dpse/formation\\_jeunes/RapportAccRaisonnable.pdf](http://www.education.gouv.qc.ca/fileadmin/site_web/documents/dpse/formation_jeunes/RapportAccRaisonnable.pdf)>.

<sup>22</sup> See Myriam Jézéquel, « Les enjeux de la formation aux compétences interculturelles pour l’accommodement des différences dans les services publics » in Conseil de l’Europe, *Accommodements institutionnels et citoyens : cadres juridiques et politiques pour interagir dans les sociétés plurielles* (Strasbourg : Éditions du Conseil de l’Europe, 2009) 319, at 319 (fn 3). See also Bouchard & Taylor, *Building the Future*, *supra*, note 18, at 105.

<sup>23</sup> Bouchard & Taylor, *Building the Future*, *supra*, note 18, at 105. See also at 135: “cohabitation cannot be supported by a secular equivalent of a religious doctrine but by means of the array of values and principles subject to an overlapping consensus. Reliance on common public values is intended to ensure the equal dignity of citizens in such a way that they can all adhere to the State’s key orientations according to their own conception of the world and of good.”

<sup>24</sup> Asad, *supra*, note 14, as cited in Valerie Stoker, “Zero Tolerance? Sikh Swords, School Safety, and Secularism in Québec” (2007) 75 *Journal of the American Academy of Religion* 814, at 816 [hereinafter “Stoker, ‘Zero Tolerance’”].

<sup>25</sup> *Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens* (February 5, 1991); *British North America Act* (U.K.), 30 & 31 Vict., c. 3, s. 95 [hereinafter “*Constitution Act 1867*”].

<sup>26</sup> Immigration, Diversité et Inclusion Québec, « Fiche synthèse sur l’immigration et la diversité ethnoculturelle au Québec » (2013), online: <[http://www.midi.gouv.qc.ca/publications/fr/recherches-statistiques/FICHE\\_syn\\_an2013.pdf](http://www.midi.gouv.qc.ca/publications/fr/recherches-statistiques/FICHE_syn_an2013.pdf)>, at 1.

<sup>27</sup> *Id.*

National Household Survey, there is a notable increase in the number of immigrants to Quebec with a declared religion between 1991-2000 (195 920) and 2001-2011 (380 830).<sup>28</sup> In my view, and drawing on Hurd's insights, demographic shifts, such as the ones noted, can sit uneasily with Quebec's sustained efforts at deconfessionalization<sup>29</sup> and other recent legislative projects<sup>30</sup> aimed at reshaping the secular narrative.

The shift in religious demographics in Quebec can be further evidenced through Bill 60's aggressive \$1.9 million media campaign,<sup>31</sup> seeking once again to challenge religious practices and illustrations thereof. Bill 60's media campaign relied heavily on the use of religiously textured language, notably *sacré* (or sacred), which was emblazoned in full-sized ads found in flyers, newspapers, online as well as metro stations. The Bible, Koran and Torah were "sacred", to the same degree as gender equality and religious neutrality of the State.<sup>32</sup> Reliance on the discourse of the "sacred" in this context hints that it is "now part of the discourse integral to functions and aspirations of the modern, secular state, in which the sacralization of individual citizen and collective people expresses a form of naturalized power".<sup>33</sup> This was also expressed through a controlled

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<sup>28</sup> Statistics Canada, *2011 National Household Survey: Data tables* (Cat. 99-010-X2011032), online: <<https://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/index-eng.cfm>>.

<sup>29</sup> *Supra*, note 21, as well as: Ministère de l'éducation, loisir et le sport, *Comité consultatif sur l'intégration et l'accommodement raisonnable en milieu scolaire: une école québécoise inclusive: dialogue, valeurs et repères communs*, *supra*, note 21; *Constitution Amendment, 1997 (Quebec)*, SI/97-141; Stoker, "Zero Tolerance", *supra*, note 24, at 816.

<sup>30</sup> Most notably: Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 1st sess., 39th Leg., Quebec, 2010 [hereinafter "Bill 94"].

<sup>31</sup> Various media outlets reported the cost of Bill 60's advertising campaign at \$1.9 million, comparable in cost to what the Quebec government has spent on the Plan Nord. See Véronique Prince, « Exclusif — Charte des valeurs québécoises: Offensive publicitaire de 1,9 millions de dollars » *TVA nouvelles* (September 10, 2013), online: <<http://tvanouvelles.ca/lcn/infos/national/archives/2013/09/20130910-115617.html>>; « Charte des valeurs: budget publicitaire « comparable » au Plan Nord, selon Québec » *Ici Radio-Canada* (13 September 2013), online: <<http://ici.radio-canada.ca/nouvelles/Politique/2013/09/13/001-budget-charte-plan-nord.shtml>>. As a point of comparison, the budget for the Bouchard-Taylor Commission (2007-2008) was estimated at 3.7 million dollars. See Tasha Kheiriddin & Martin Collacott, "Bouchard-Taylor report fails to make the grade" (July 2008) *Fraser Forum*, 14, at 14, retrieved online: <<http://search.proquest.com.proxy3.library.mcgill.ca/docview/229261657?accountid=12339>>.

<sup>32</sup> For image, see: Thomas Déri, « Débat sur les valeurs — Une « sacrée » propagande! » *Le Devoir* (September 21, 2013), online: <<http://www.ledevoir.com/politique/quebec/388030/une-sacree-propagande>>.

<sup>33</sup> Asad, *supra*, note 14, at 32.

crowdsourcing of public opinion prior to the unveiling of Bill 60,<sup>34</sup> via a dedicated (now defunct<sup>35</sup>) website and phone line to take citizens' voices and opinions into account.<sup>36</sup> Substantive "airtime" for citizens' exposure to religious diversity<sup>37</sup> during Bill 60's public hearings at the National Assembly also bolstered this approach to law making; this point will be further addressed in the following section (2) of this article.

Despite its clear framing as a social project — reshaping the contours of "religion" in Quebec, in response to its changing religious demographics — Bill 60 was put forth without scientific studies<sup>38</sup> or legal opinions<sup>39</sup> buttressing the actual need for, and validity of, such law. Insights drawn from both Hurd and Asad, as applied to Quebec's context,

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<sup>34</sup> It should be noted that the PQ did not publicly release the "raw" data, but rather, provided a curated compilation of received comments. See: <[http://web.archive.org/web/20131114000149/http://www.nosvaleurs.gouv.qc.ca/medias/pdf/tableau\\_compilation\\_des\\_commentaires.pdf](http://web.archive.org/web/20131114000149/http://www.nosvaleurs.gouv.qc.ca/medias/pdf/tableau_compilation_des_commentaires.pdf)> (November 11, 2013 snapshot).

<sup>35</sup> I accessed the PQ Charter of values website (<[www.nosvaleurs.gouv.qc.ca](http://www.nosvaleurs.gouv.qc.ca)>) via an Internet archive website (<<http://archive.org/web/>>), enabling me to retrieve content that has been removed from the active Internet webpages (see notes 33 and 81).

<sup>36</sup> « Charte des valeurs : Drainville satisfait des commentaires, l'opposition s'impatiente » *Ici Radio-Canada* (22 October 2013), online: <<http://ici.radio-canada.ca/nouvelles/Politique/2013/10/22/001-charte-valeurs-drainville-synthese-quebec.shtml>>. Prior to its unveiling before the National Assembly in November 2013, the PQ had released a five-point plan on this project in September 2013 via <[www.nosvaleurs.gouv.qc.ca](http://www.nosvaleurs.gouv.qc.ca)> (now defunct), which served as the foundation and invitation for citizen involvement.

<sup>37</sup> The case of the Pineault-Caron family in particular, marked Bill 60's public hearings. Geneviève Caron recounted her bewildering experience of entering a mosque in Morocco and watching men and women pray, in segregated spaces, "on all fours on a small carpet". Her husband, Claude Pineault, gave a similarly confounding account of his encounter with veiled women in a market in Tangiers, then extending his comments to the streets of Montreal. See Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 N° 112 (January 16, 2014), at 16h57 (Claude Pineault). Their xenophobic comments resulted in strong public condemnation. See, for example: Gabrielle Duchaine, Côte-Nord : retour chez les Pineault-Caron » *La Presse* (March 17, 2014), online: <<http://www.lapresse.ca/actualites/dossiers/le-quebec-au-temps-de-la-charte/201403/15/01-4748084-cote-nord-retour-chez-les-pineault-caron.php>>; « Commission sur la charte de laïcité : La vidéo de la famille Pineault-Caron devient virale » *TVA Nouvelles* (January 19, 2014), online: <<http://tvanouvelles.ca/lcn/infos/national/archives/2014/01/20140119-173842.html>>.

<sup>38</sup> The Barreau du Québec was very critical of the lack of scientific studies and impact in law in their brief (albeit not presented before the National Assembly, their brief can be found on their website): Barreau du Québec, *Projet de loi N° 60: Charte affirmant les valeurs de la laïcité et de neutralité religieuse de l'État ainsi que d'égalité entre les femmes et les hommes et encadrant les demandes d'accommodement* (December 19, 2013), online: <<http://www.barreau.qc.ca/pdf/medias/positions/2014/20140116-pl-60.pdf>> [hereinafter « Barreau du Québec, *Projet de loi N° 60* »].

<sup>39</sup> The PQ later admitted that no formal legal opinions had officially been requested for Bill 60: "Charte des valeurs: le PQ confirme l'absence d'avis juridique formel" *Le Devoir* May 1, 2014), online: <<http://www.ledevoir.com/politique/quebec/407126/charte-des-valeurs-le-pq-confirme-l-absence-d-avis-juridique-formel>>.

suggest on the one hand that secularist projects, like Bill 60 (and previous legislative attempts), do not remove religion from the public sphere, but simply, provide new contours. On the other, Bill 60 must be understood and engaged with in the context of shifting religious demographics, both in terms of medium and message. In building on the theoretical framing of this social project, the following section engages with how *vivre-ensemble* is conjugated with religious beliefs in Quebec.

## 2. Re-defining “Vivre-ensemble”

There has been a noted increase in the number of litigated cases on freedom of religion before the Supreme Court of Canada over the last decade. Almost all have originated from Quebec. Some have argued that the number of cases is disproportionate in provenance.<sup>40</sup> Consider, for example: the building of a sukkot and co-property regulations;<sup>41</sup> the contestation of municipal zoning by-laws by Jehovah’s Witnesses;<sup>42</sup> the wearing of a kirpan on school grounds;<sup>43</sup> the civil and religious obligations related to a *get* (Jewish divorce);<sup>44</sup> the challenges to a government program on ethics and religious culture;<sup>45</sup> and prayers before municipal council.<sup>46</sup> These cases have received great media attention in Quebec. They have provoked schisms both between courts (resulting in the consistent overturning of Quebec Court of Appeal decisions by the Supreme Court of Canada) and divisions along the lines of the linguistic make-up of the Supreme Court bench.<sup>47</sup> Sébastien Grammond refers to

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<sup>40</sup> Sujit Choudhry, “Special Issue: Rights Constitutionalism and the Canadian Charter of Rights and Freedoms: Rights Adjudication in a Plurinational State: The Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation” (2013) 50 Osgoode Hall L.J. 575, at para. 3 [hereinafter, “Choudhry, ‘Special Issue’”]. Choudhry speaks of *Multani* (*supra*, note 8), and *Amelem*, *Lafontaine*, *Bruker* and *Commission scolaire des Chênes* (*infra*, notes 41, 42, 44, 45) in this article.

<sup>41</sup> *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter “*Amselem*”].

<sup>42</sup> *Congrégation des témoins de Jéhovah de St-Jérôme Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45, [2004] 2 S.C.R. 650 (S.C.C.) [hereinafter “*Lafontaine*”].

<sup>43</sup> *Multani*, *supra*, note 8.

<sup>44</sup> *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607 (S.C.C.) [hereinafter “*Bruker*”].

<sup>45</sup> *L. (S.) v. Commission scolaire des Chênes*, [2012] S.C.J. No. 7, [2012] 1 S.C.R. 235 (S.C.C.) [hereinafter “*Commission scolaire des Chênes*”]; *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, 2015 SCC 12 (S.C.C.) [hereinafter “*Loyola*”].

<sup>46</sup> *Mouvement laïque québécois v. Saguenay (City)*, [2015] S.C.J. No. 16, 2015 SCC 16 (S.C.C.) [hereinafter “*Saguenay*”].

<sup>47</sup> Choudhry, “Special Issue”, *supra*, note 40, at para. 3.

these as “points of divergence”.<sup>48</sup> However, while most litigated cases of religious freedom in Quebec come from minority religious groups, it remains that most requests for religious accommodation come from Christian communities.<sup>49</sup> This prompts the question of how religious accommodations were actually perceived and conceived by Quebecers — and what constitutes “unjust” accommodation in this setting.

This section engages with illustrations of, and challenges to, Quebec’s model of *vivre-ensemble*. I argue that two initially disparate documents, namely the Bouchard-Taylor Report and the *Multani* decision, are employed as vehicles for discussing identity politics outside of the framing of language, relying instead on the language and politics of (religious) accommodation. The Bouchard-Taylor commission, known officially as the Consultation Commission on Accommodation Practices Related to Cultural Differences was established in February 2007 by then Premier Jean Charest “in response to public discontent concerning reasonable accommodation”.<sup>50</sup> This section first shows that in framing its legislative project, the PQ tied “reasonable accommodation crisis” with the Bouchard-Taylor commission, and did so, without referencing the case law that has been developed on reasonable accommodation. This PQ strategy, which can be understood as self-referential exercise, attempts to insulate this model of *vivre-ensemble* from the broader Canadian context. Following this, I argue that while a number of litigated cases about freedom of religion and reasonable accommodation have emerged from the Quebec context, one case in particular, *Multani*, has fuelled extensive

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<sup>48</sup> Choudhry, “Special Issue”, *supra*, note 40, at para. 3, citing Sébastien Grammond, « Conceptions canadienne et québécoise des droits fondamentaux et de la religion: convergence or conflit? » (2009) 43(1) R.J.T. 83 [hereinafter “Grammond, ‘Convergence ou conflit’”]. Grammond also suggests a split between judges on the basis of religion (Catholic/Protestant split). Given the current make-up and religious diversity on the Supreme Court bench, it is not clear from Grammond’s analysis where judges who do not fall into either of these categories would fall or align themselves (at 97-98).

<sup>49</sup> Commission des droits de la personne et de la jeunesse, *Synthèse des résultats. La ferveur religieuse et les demandes d’accommodement religieux: une comparaison intergroupe* (December 2007) (Cat. 2.120-4.21.1), online: <[http://www.cdpcj.qc.ca/publications/ferveur\\_religieuse\\_synthese.pdf](http://www.cdpcj.qc.ca/publications/ferveur_religieuse_synthese.pdf)>.

<sup>50</sup> Bouchard & Taylor, *Building the Future*, *supra*, note 18, at 17. The Hérouxville code, adopted in the early months of 2007, also engendered the creation of the Bouchard-Taylor Commission: see Dana Granovsky, “A Time for Reconciliation”?: *The Bouchard-Taylor Commission and Evolving Democratic Practices in Identity Politics* (University of British Columbia, Department of Political Science, M.A., 2009), at 8-9.

media reporting on religious accommodations and exceptions<sup>51</sup> and has come to symbolize the estrangement of Quebec politics from Canada's embrace.

Let us recall that *Multani* concerned a 12-year old Sikh boy who dropped his kirpan, a ceremonial dagger, in his school's courtyard. An administrative controversy arose as to whether the boy would be allowed to keep on wearing his kirpan at school. At that time, Gurbaj Singh Multani was in a secondary one (grade 7) welcome class for new immigrants at École Ste-Catherine Labouré, in LaSalle, a Montreal neighbourhood. These classes, known as *classes d'accueil*, are designed to encourage new students to Quebec to integrate into the public school system later on, both in terms of French language skills and general appreciation of local culture. School authorities worried that the presence of a kirpan on school grounds constituted a security concern for other students, as well as school personnel.<sup>52</sup> The school board (allowing the kirpan, under circumstances) and the governing body and council of commissioners of that same school board (requiring a symbolic kirpan instead) arrived at contradictory decisions. Lower court decisions were also divided on the place of the kirpan on school premises: whereas the Quebec Superior Court allowed it, following strict conditions, the Quebec Court of Appeal decided instead to prioritize safety and security concerns over those of individual rights to freedom of religion. Before the Supreme Court, it was recognized that religious observances, such as the wearing of a kirpan, were included in the right to freedom of religion.<sup>53</sup> Justice Charron, writing for the majority, noted that the school board's interference with Gurbaj Singh's freedom of religion was not insignificant, forcing him "to choose between leaving his kirpan at home and leaving the public school system".<sup>54</sup> For the majority, this was a constitutional decision rather than one that should be decided on in administrative law terms, as opined by Deschamps and Abella JJ. in their concurring opinion.<sup>55</sup> Moreover, Charron J. pointed out that a blanket prohibition of the kirpan, as asserted by the school board — on the basis

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<sup>51</sup> For example, Éric Bélanger, "The 2007 Provincial Election in Quebec" (2008) 2:1 *Canadian Political Science Review* 72, at 73.

<sup>52</sup> *Multani (tuteur de) c. Commission scolaire Marguerite-Bourgeoys*, [2002] J.Q. no 619, at para. 6 (Que. S.C.).

<sup>53</sup> *Multani*, *supra*, note 8, at paras. 36-39 (Charron J.).

<sup>54</sup> *Id.*, at para. 40 (Charron J.).

<sup>55</sup> *Id.*, at para. 132 (Deschamps and Abella JJ.).

that it would lead to an increase in violence on school grounds — is “contradicted by the evidence regarding the symbolic nature of the kirpan, [and] it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism”.<sup>56</sup>

*Multani* has been framed as a case where “religion wins”<sup>57</sup> and cited as an example of successful cross-cultural communication.<sup>58</sup> In reference to the former, “[s]heathed, sealed, and tucked away inside the folds of young *Multani*’s clothing, religion does not threaten any of the values or structural commitments of the rule of law”.<sup>59</sup> Letting religious beliefs win in *Multani*, in other words, did not jeopardize the established legal order. Religious accommodation in this key, however positive, can also perpetuate asymmetrical relations, according to some.<sup>60</sup> This portrayal of the kirpan, and its strict observance, albeit compelling, represents a choice in how to frame this belief for the legal apparatus.<sup>61</sup> More foundationally, however, *Multani* propelled the legal community into a broader conversation on the intersection of constitutional and administrative law values.<sup>62</sup>

“L’affaire du kirpan”, as *Multani* was known in Quebec, also fuelled the creation of the Bouchard-Taylor commission, alongside the Hérouxville

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<sup>56</sup> *Id.*, at paras. 71, 76 *in fine* (Charron J.).

<sup>57</sup> Benjamin Berger, “The Cultural Limits of Legal Tolerance” (2008) 21 Can. J.L. & Juris. 245, at para. 33 [hereinafter “Berger, ‘Cultural Limits’”].

<sup>58</sup> Howard Kislowicz, “Faithful Translations? Cross-Cultural Communication in Canadian Religious Freedom Litigation” (2014) 52 Osgoode Hall L.J. 141, at para. 77 [hereinafter “Kislowicz, ‘Faithful Translations’”].

<sup>59</sup> B.L. Berger, “Cultural Limits”, *supra*, note 57, at para. 33. See also Avigail Eisenberg, “Rights in the Age of Identity Politics” (2013) 50 Osgoode Hall L.J. 609 [hereinafter “Eisenberg, ‘Identity Politics’”].

<sup>60</sup> Colleen Sheppard, “Inclusion, Voice, and Process-Based Constitutionalism” (2013) 50 Osgoode Hall L.J. 547, at 572. See also Eisenberg, “Identity Politics”, *id.*, at paras. 15-16 (fn 37).

<sup>61</sup> See, in this way, Howard Kislowicz, “Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation” (2013) 39 Queen’s L.J. 175, at para. 67; Shauna Van Praagh, “Open House — ‘Portes ouvertes’: Classrooms as Sites of Interfaith Interface” in B.L. Berger & R. Moon, eds., *Religion and Public Authority in Canada* (London: Hart Publishing (forthcoming 2016)).

<sup>62</sup> See in this way, Jean-François Gaudreault-DesBiens, « Quelques angles mort du débat sur l’accommodement raisonnable à la lumière de la question du port de signes religieux à l’école publique : réflexions en forme de points d’interrogation » in Myriam Jézéquel, ed., *Les accommodements raisonnables. Quoi, comment, jusqu’où ? Des outils pour tous* (Cowansville, QC : Éditions Yvon Blais, 2007), 241-86; Paul Daly & Angela Cameron, “Furthering Substantive Equality through Administrative Law: Charter Values in Education” in B.L. Berger, J. Cameron & S. Lawrence, eds. (2013) 63 S.C.L.R. (2d) 169. See also *Commission scolaire des Chênes*, *supra*, note 45; *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.) and *Loyola*, *supra*, note 45.

Code (the latter crafting a severe code of conduct for immigrants).<sup>63</sup> The Bouchard-Taylor report was produced in May 2008, after a full year of public consultations, 13 commissioned research projects,<sup>64</sup> and 37 recommendations. Most pointedly, the report recommended that interculturalism, “described as Quebec’s version of the pluralist philosophy, just as multiculturalism is its Canadian version [...] [be] vigorously promote[d]”,<sup>65</sup> and a strong argument in favour of open secularism<sup>66</sup> as the pathway<sup>67</sup> forward in Quebec. Some recommendations were rejected out of hand, such as the removal of the crucifix behind the speaker at the National Assembly.<sup>68</sup> Others were pre-empted by initiatives from the National Assembly, such as the introduction of gender equality as an interpretive clause in the Quebec Charter.<sup>69</sup> The great majority of the recommendations, much like the report itself, languished after being released — save for academic commentary — as though the exercise of consultation was enough to relieve the public’s discomfort with religion. Nevertheless, the Bouchard-Taylor report found new life, however, as a touchstone for the PQ’s Bill 60, some five years after its initial publication.

The PQ chose to frame Bill 60 through the Bouchard-Taylor report, drawing once again on parameters of “public discontent” and “religious accommodation”. As such, the PQ dissociated itself from previous legislative projects to regulate religious accommodation in the public sphere, such as the Quebec Liberals’ (“PLQ”) Bill 94 in 2010, which sought to regulate the reception of public services with “uncovered” faces.<sup>70</sup> This political choice about framing can be interpreted as a result

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<sup>63</sup> The Hérouxville Code, adopted in the early months of 2007, also engendered the creation of the Bouchard-Taylor Commission: see Dana Granovsky, “*A Time for Reconciliation?*”: *The Bouchard-Taylor Commission and Evolving Democratic Practices in Identity Politics* (University of British Columbia, Department of Political Science, M.A., 2009), at 8-9.

<sup>64</sup> Bouchard & Taylor, *Building the Future*, *supra*, note 18, at 35.

<sup>65</sup> *Id.*, note 18, 257.

<sup>66</sup> “[O]pen secularism does not sacrifice the separation of State and Church and State neutrality towards religions for the benefit of believers’ freedom of religion. Instead, it offers an interpretation that achieves greater compatibility between the two purposes.”: Bouchard & Taylor, *Building the Future*, *supra*, note 18, at 148.

<sup>67</sup> Lori Beaman, “Battle over symbols: The “religion” of the minority versus the “culture” of the majority” (2012-2013) 28 J.L. Religion 67, at 75 [hereinafter “Beaman, ‘Battle over symbols’”].

<sup>68</sup> Quebec, National Assembly, *Journal des débats*, 38th Leg., 1st Sess., Vol. 40 N° 87 (May 22, 2008) at 15h10 (Jean Charest).

<sup>69</sup> Bouchard & Taylor, *Building the Future*, *supra*, note 18, at 267. *Infra*, note 133.

<sup>70</sup> Bill 94, *supra*, note 30. Accommodation was to be granted only under certain conditions. Bill 94 was also met with severe criticism. See, for example: Pascale Fournier & Erica See, “The

of not finding Bill 94 sufficiently broad in scope, or instead, finding the wide-reaching (and somewhat more indeterminate) conclusions espoused in the Bouchard-Taylor report more appealing for the PQ's newest rallying project. The Bouchard-Taylor report was also criticized for its focus and notably, its lack of external contextualization of religious diversity<sup>71</sup> — by not referring to the Ontario sharia debate,<sup>72</sup> or the September 11th attacks — actually served to bolster the PQ's self-referential cadre for Bill 60. It found credence in the Bouchard-Taylor report, which recommended the adoption of a white paper on secularism, to articulate a clear version and policy vision of Quebec's interculturalist model and formalize the “implicit secularis[t] model patiently edified in Québec”.<sup>73</sup> The Bouchard-Taylor Commission (and report), despite having been a creation of the PLQ, enabled the PQ to retain their populist “edge”, since “[consultation commissions] best advantage often lies at being exemplars of deliberative democracy in practice”.<sup>74</sup> This renewed focus on deliberative democracy enabled the PQ to develop their idea(l)

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‘Naked Face’ of Secular Exclusion: Bill 94 and the Privatization of Belief” (2012) 30 Windsor Y.B. Access Just. 63; Jennifer Selby, “Un/veiling Women’s Bodies: Secularism and Sexuality in Full-face Veil Prohibitions in France and Québec” (2014) *Studies in Religion* 1; Robert Leckey, “Face to Face” (2013) 19 *Social Identities: Journal for the Study of Race, Nation and Culture* 743; Lori G. Beaman, “‘It was all slightly unreal’: What’s Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?” (2011) 23 C.J.W.L. 442 [hereinafter “Beaman, ‘It was all slightly unreal’”]; Vrinda Narain, “Taking the ‘Culture’ out of Multiculturalism” (2014) 26:1 C.J.W.L. 116 [hereinafter “Narain, ‘Taking the ‘Culture’ out’”]. A private members’ bill was also introduced by MNA Fatima Houda-Pépin (then sitting as an independent) in the dying days of the 2014 legislative session: Bill 491, *An Act respecting the religious neutrality of the State and the fight against religious fundamentalism and to amend the Charter of human rights and freedoms and the Act respecting the Ministère du Conseil exécutif*, 1st sess., 39th Leg., Quebec (2014) [hereinafter “Bill 491”].

<sup>71</sup> Gada Mahrouse, “‘Reasonable accommodation’ in Quebec: the limits of participation and dialogue” (2010) 52 *Race Class* 85, at 91-92.

<sup>72</sup> Ontario, Ministry of the Attorney General, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (December 2004), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>> [hereinafter “Boyd report”].

<sup>73</sup> Dia Dabby, “When it comes to religious diversity in Québec, more laws do not mean better law” *The Montreal Gazette* (February 2, 2015), online: <<http://montrealgazette.com/news/quebec/opinion-when-it-comes-to-religious-diversity-in-quebec-more-laws-do-not-mean-better-law>>; Bouchard & Taylor, *Building the Future*, *supra*, note 18, at 154.

<sup>74</sup> Liora Salter, “The Public of Public Inquiries” in Laurent Dobuzinkis, Michael Howlett & John Laycock, eds., *Policy Analysis in Canada: The State of the Art* (Toronto: University of Toronto Press, 2007) 291, at 311.

narrative of the Quebec model of values, or as put differently, “a discursive space for the (re)assertion of Québécois nationhood”.<sup>75</sup>

While many of the litigated cases on religious rights have sparked intense and sustained public scrutiny, *Multani* occupies a unique position, pinpointed as the “starting point” for the “recognition of problems” related to religious reasonable accommodation. As such, *Multani* was about much more than whether a Sikh student could simply carry his kirpan on school premises: it marked a turning point in the discussion on reasonable accommodation and freedom of religion in Quebec.<sup>76</sup> It introduces a new phase in the chronology put forth by the Bouchard-Taylor report, as the first point under the heading of “A Time of turmoil” (March 2006 - May 2007);<sup>77</sup> as related by the report, “[t]he term accommodation entered public discourse and from then on became a hackneyed expression.”<sup>78</sup> Put differently, it became the point through which the before/after campaign was measured in terms of religious accommodations in Quebec. Ironically enough, the public education setting in Quebec had been the only one to engage in a deep and sustained discussion on deconfessionalization<sup>79</sup> prior to the Bouchard-Taylor commission. As Pauline Côté suggests, “[a]s a public issue, laïcité had almost no notoriety outside the public education sector before the start of the reasonable accommodation controversy.”<sup>80</sup>

Instead of focusing on what *Multani* did accomplish — namely, the Supreme Court of Canada decision engaged in an imperfect discussion on reasonable accommodation and built on the sense of inclusion through triumph of religious beliefs in the context of a schoolyard<sup>81</sup> — the Bill 60 hearings characterized *Multani* as a negative turning point in the story of

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<sup>75</sup> Emily Laxer, Rachel Dianne Carson & Anna C. Korteweg, “Articulating minority nationhood: cultural and political dimensions in Québec’s reasonable accommodation debate” (2014) 20:1 *Nations and Nationalism* 133, at 133 [hereinafter “Laxer *et al.*, ‘Articulating minority nationhood’”].

<sup>76</sup> Stoker, *supra*, note 24, at 816; Howard Kislowicz, “Law, Religion, and Feeling Included/Excluded: Case Studies in Canadian Religious Freedom Litigation” (2015) C.J.L.S./R.C.D.S. (forthcoming 2015) [hereinafter “Kislowicz, ‘Feeling Included/Excluded’”]; B.L. Berger, “Religious Diversity, Education, and the ‘Crisis’ in State Neutrality” (2014) 29 C.J.L.S./R.C.D.S. 103, at 118.

<sup>77</sup> Bouchard & Taylor, *Building the Future*, *supra*, note 18, at 7.

<sup>78</sup> *Id.*, at 53.

<sup>79</sup> *Supra*, note 29.

<sup>80</sup> Pauline Côté, “Québec and Reasonable Accommodation: Uses and Misuses of Public Consultations” in Lori Beaman & Peter Beyer, eds., *Religious Diversity in Canada* (Leiden: Brill, 2008) 41, at 61.

<sup>81</sup> See Kislowicz, “Feeling Included/Excluded”, *supra*, note 76, at 8-10.

religious accommodation in Quebec. The claim of Gurbaj Singh Multani was no longer about an immigrant trying to fit into his *classe d'accueil*, but rather, a decision made by a “disconnected” institution, the Supreme Court of Canada, on how to “live together” in Quebec.

In the PQ’s five-point plan released prior to Bill 60 (as part of their media campaign), 2006 is identified as the pivotal year, marking the “beginning” of highly mediatized cases of religious accommodation that caused deep unease in Quebec. Indeed, while *Multani* is not referenced explicitly by name, the time-frame, along with a reference to the works of the Bouchard-Taylor commission on reasonable accommodation, buttress the PQ’s argument that “clear rules regarding religious accommodation [which] would contribute to integration and social cohesion”<sup>82</sup> were needed — desperately.

Within the debates on Bill 60 before the National Assembly, the Federation of Montreal School Boards (“FMSB”) argued that the proposed restriction on the wearing of religious symbols, and conflicts arising from this proposed provision, would incur substantial costs to the school boards, both financially and administratively.<sup>83</sup> Returning to *Multani*, the FMSB underscored that the Marguerite-Bourgeoys school commission had to shoulder alone the costs associated with attempting to regulate the wearing of the kirpan in one of their schools, citing costs of over \$500,000 in legal fees alone.<sup>84</sup> Enforcing a ban on religious symbols by school boards (as proposed via section 5 of Bill 60) underscores a fundamental question as to whether this regulatory burden is simply a financial one, or perhaps, requires a more nuanced view of what “service provider” means in the context of education.<sup>85</sup>

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<sup>82</sup> [Translated by author]. Original, in French: « Depuis 2006, plusieurs cas d’accommodements religieux très médiatisés ont suscité un profond malaise au Québec. Pour préserver la paix sociale et favoriser l’harmonie, nous devons éviter de laisser les tensions s’accroître. Des règles claires en matières d’accommodement religieux contribueront à l’intégration et à la cohésion sociale. Elles seront bénéfiques pour tous les Québécois et Québécoises, incluant les nouveaux arrivants. Nous serons mieux servis par un État qui nous traite tous et toutes également. », online : <<http://web.archive.org/web/20140328134128/http://www.nosvaleurs.gouv.qc.ca/fr>> (March 28, 2014 snapshot).

<sup>83</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 N° 129 (February 18, 2014), at 17h03 (Josée Bouchard).

<sup>84</sup> *Id.* The FMSB makes a similar argument regarding the costs incurred by the Commission scolaire des chènes in their legal case (*infra*, note 129), arguing that the school board had to defend the contested ethics and religious culture program without State assistance, despite it being a program put into place by the Minister of Education.

<sup>85</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 N° 129 (February 18, 2014), at 17h50 (Nathalie Roy). While class time and lessons are clearly included in

*Multani* was employed as a segue way by Claire L'Heureux-Dubé, retired Supreme Court Justice, to pay closer attention to social context. She argues, in her capacity as a representative of the Juristes pour la laïcité et la neutralité religieuse de l'État (Jurists for secularism and neutrality of the State), that the decision on the kirpan marks the further development in legal thought on these civil freedoms — which she states are not absolute — and contrasts with fundamental freedoms (such as those to equality, right to life and a just and equitable process).<sup>86</sup> She underscores Bastarache J.'s dissenting opinion in *Amselem* and that of LeBel J. in *S. (N.)*,<sup>87</sup> to suggest that Quebec judges have a different voice from other judges sitting on the Supreme Court bench when it comes to questions of religious accommodation.<sup>88</sup> In her opinion, one must take Quebec's particular social context into account when making decisions about the place of religion.<sup>89</sup>

While other persons before the National Assembly hearings invoked "l'affaire du kirpan" in the context of a scenario or more anecdotally,<sup>90</sup> the Mouvement laïque québécois ("MLQ") contrasted *Multani* with a unanimous motion passed by the legislature, which effectively barred ceremonial daggers from the National Assembly. *Multani* is portrayed by the MLQ as a "bizarre" decision by the Supreme Court of Canada. On the other hand, the 2011 unanimous motion by the members of the

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Bill 60's understanding of "service provider", other activities fall in a far more nebulous grey zone. For instance, a student is not necessarily receiving a "service" between two classes or over the lunch hour: as such, one could question whether the absence of a "service" could inadvertently suspend the duty to enforce the ban on religious symbols: see Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 N° 129 (February 18, 2014), at 17h10 (Josée Bouchard) [translated by author]. Original, in French: « car un élève ne reçoit pas nécessairement un service entre deux cours ou sur l'heure du dîner, par exemple ».

<sup>86</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 N° 120 (February 7, 2014), at 09h50 (Claire L'Heureux-Dubé). See also Juristes pour la laïcité et la neutralité de l'État, *Mémoire présenté à la Commission des institutions, Assemblée nationale du Québec* (December 18, 2013), online: <<http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CI/mandats/Mandat-24537/memoires-deposes.html>>.

<sup>87</sup> *R. v. S. (N.)*, [2012] S.C.J. No. 72, [2012] 3 S.C.R. 726 [hereinafter "*S. (N.)*"].

<sup>88</sup> *Supra*, note 86.

<sup>89</sup> *Id.*

<sup>90</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 N° 110 (January 14, 2014); Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 N° 115 (January 22, 2014); Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 N° 116 (January 23, 2014).

National Assembly, adopted during the hearings on Bill 94,<sup>91</sup> — affirming the principle of secularism in the process — was welcomed as something “extraordinary”.<sup>92</sup>

In the public discourse of Bill 60, I suggest that *Multani* and the Bouchard-Taylor report occupy an important place in the framing of religious accommodation. *Multani* is constructed as the starting point: anything that occurred before 2006, either in law or politics, appears extraneous to the debate on values and accommodation in Quebec. Alternately, the Bouchard-Taylor report infuses Bill 60 with a new (old) narrative on belonging. Regulating shared spaces and relationships implies a deeply shared vision of society, but also, another way to engage with identity politics. Building on this re-definition of *vivre-ensemble* in the key of accommodation, the next section discusses the projected scope of Bill 60.

### 3. Scope: Nine-to-five Secularism

This section’s objective is to provide both critiques and explanations of certain provisions contained in Bill 60. A precursor to this section’s objective is to clearly indicate Bill 60’s intent.

Put bluntly, Bill 60 was far-reaching: it touched all public and para-public services. It articulated an expectation of results insofar as maintaining religious neutrality in the exercise of their functions.<sup>93</sup> This included government departments, municipalities, schools and school boards as well as university-level institutions, health and social services

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<sup>91</sup> The motion barring ceremonial daggers in the National Assembly can be found here: Quebec, National Assembly, *Votes and Proceedings*, 39th Leg., 2nd Sess., Vol. 41 N° 170 (February 9, 2011). This motion came one month after representatives of the World Sikh Organization were invited to testify in favour of women with covered faces receiving services: “Kirpan banned at Quebec National Assembly” *CBC* (February 9, 2011), online: <<http://www.cbc.ca/news/canada/montreal/kirpan-banned-at-que-national-assembly-1.1113333>>. The Quebec Superior Court recently upheld the motion to ban the kirpan from the National Assembly as part and parcel of parliamentary privilege: *Singh c. Québec (Procureur général)*, [2015] J.Q. no 10671.

<sup>92</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 N° 120 (January 21, 2014), at 11h20 (Michel Lincourt): « Dans le cas du kirpan, le droit de religion était plus important que le droit à la sécurité des enfants. Et le plus bizarre dans ce cas-là, dans le cas de la Cour suprême, c’est que la Cour suprême permet le port du kirpan dans une école mais l’interdit dans les tribunaux puis l’interdit dans les avions, hein? Je veux dire, c’est... Puis tous les députés ici ont voté la résolution interdisant le port du kirpan dans l’enceinte de l’Assemblée nationale, n’est-ce pas, hein, en affirmant le principe de la laïcité. Voici, là, un vote unanime et qui a été salué par tout le monde comme étant quelque chose d’extraordinaire. »

<sup>93</sup> Bill 60, *supra*, note 1, s. 3.

agencies and public institutions, members of the National Assembly<sup>94</sup> as well as persons duly named by the provincial government exercising judicial or adjudicative functions.<sup>95</sup>

The “public” in Bill 60’s “public bodies” was ambitious, but also, contentious since it encompassed public actors who habitually benefitted from a certain level of state deference in the scope of their functions, including doctors, judges and third party partnerships. For instance, doctors, considered to be neither employees nor representatives of the State, were included in Bill 60’s purview despite being “self-employed workers” in employment law terms.<sup>96</sup> Provincially appointed judges were also included in Bill 60’s scope, placing contentious limits on their judicial independence and impartiality, but also, potentially limiting diversity in provincial judicial and adjudicative nominations.<sup>97</sup> Equating judges with those exercising adjudicative or quasi-judicial functions, as did Bill 60, is institutionally problematic, especially in light of the 2011 Bastarache report on judicial nominations,<sup>98</sup> since members of the latter are actually given a policy mandate.<sup>99</sup> Bill 60’s inclusion of both types of

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<sup>94</sup> Bill 60, *supra*, note 1, s. 2 and Sch. I. Acts of civil disobedience were also noted following its proposal, most notably through the Jewish General Hospital’s explicit (and very public) refusal to apply Bill 60 if enacted into law: Marian Scott, “Civil disobedience and the secularism charter” *Montreal Gazette* (December 26, 2013), online: <<http://www.montrealgazette.com/life/Civil+disobedience+secularism+charter/9328663/story.html>>.

<sup>95</sup> Bill 60, *supra*, note 1, ss. 8, 13. Public health and social institutions were scheduled to benefit from a five-year transition period, substantially longer than other public bodies: Bill 60, *id.*, ss. 44-46.

<sup>96</sup> Fédération des médecins omnipraticiens du Québec, *Mémoire de la Fédération des médecins omnipraticiens du Québec présenté à la Commission des institutions : concernant le projet de loi 60* (December 2013), online: <<http://www.fmoq.org/Lists/FMOQDocumentLibrary/fr/Affaires%20Syndicales/Prises%20de%20position/2013-12-Memoire-Charte-FMOQ.pdf>>, at 3, 5.

<sup>97</sup> Barreau du Québec, *Projet de loi N° 60*, *supra*, note 38, at 19-23. The Barreau du Québec argues the impact of Bill 60 on the constitutional principle of judicial independence remains unclear; accordingly, the legislator must show caution in imposing restrictions or obligations on those exercising judicial or adjudicative functions. The Bouchard-Taylor Report recommended a “duty of circumspection” for members of the National Assembly, judges, crown prosecutors, police officers and prison guards: see Bouchard & Taylor, *Building the Future*, *supra*, note 18, at 150-51 (fn 38).

<sup>98</sup> Commission d’enquête sur le processus de nomination des juges de la Cour du Québec, des cours municipales et des membres du Tribunal administratif du Québec, *Rapport* (January 19, 2011), online: <<http://www.cepnj.gouv.qc.ca/rapport.html>>. While the report dealt with allegations of political influence, the notion of the neutral judge is substantially addressed. See *infra*, note 99.

<sup>99</sup> This point is addressed explicitly in the context of judicial nominations in Quebec: see Roderick Macdonald, *Parametres of Politics in Judicial Appointments* (September 1, 2010) (Study Commissioned by the Commission of Inquiry into the Appointment Process for Judges in Quebec), online: <<http://www.cepnj.gouv.qc.ca/etudes-des-experts.html>>, at 13. In that same report, Macdonald questions the validity of having a neutral judiciary.

decision-makers would effectively — and explicitly — label them with a political mandate, significantly undermining judicial notions of independence and impartiality. Finally, Bill 60 also was extended to any person or partnership that has entered into a service contract or subsidy agreement with a public body.<sup>100</sup> This meant, for example, that the duty of religious neutrality would impede publicly subsidized daycares from having employees who wear religious garb.<sup>101</sup> This brief incursion into the scope of Bill 60 suggests that the focus on “public bodies” is central to Bill 60’s line of argument, since the weight of implementation rested squarely on the public institution’s shoulders.

Perhaps most controversial, Bill 60 introduced obligations for all personnel members of the aforementioned public bodies to embrace “facial” neutrality in the course of providing services.<sup>102</sup> A reciprocal obligation was also introduced for people receiving the aforementioned public services to also present themselves, faces uncovered.<sup>103</sup> Put differently, faces had to be uncovered in the context of providing or receiving public services. Bill 60 provides little elaboration — or legislative guidance — on the “service receiver” side, beyond the obligation of an uncovered face. Focus, instead, is on the “service provider” side, where personnel members were to be considered natural and organic “extensions” of the public bodies, which “must remain neutral in religious matters and reflect the secular nature of the State”.<sup>104</sup> Non-compliance with stipulated restrictions would result in a “dialogue” with the public body, before resulting in disciplinary measures (if subsequent infraction), metered out by said public body.<sup>105</sup> As such, when present on work grounds (and in the exercise of their functions), no personnel member could have prominent religious symbols — this meant that one would have to put away their hijab, take off their turban, and

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<sup>100</sup> Bill 60, *supra*, note 1, s. 10.

<sup>101</sup> *Id.*, note 1, ss. 27-31. See also: Association des garderies privées du Québec, *Mémoire sur le projet de loi 60* (December 19, 2013), online: <<http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CI/mandats/Mandat-24537/memoires-deposes.html>>, at 3-4. For a discussion on an earlier directive banning religious instruction in publicly subsidized daycares in Quebec (known as “CPEs”) in 2010, see Shauna Van Praagh, “‘Inside Out/Outside In’: Coexistence and Cross-Pollination of Religion and State” in René Provost, ed., *Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada* (Oxford: Oxford University Press, 2014), at 121-42.

<sup>102</sup> Bill 60, *supra*, note 1, ss. 3-6.

<sup>103</sup> *Id.*, ss. 7, 22.

<sup>104</sup> *Id.*, ss. 1-4.

<sup>105</sup> *Id.*, s. 14.

remove their kippa. Some have referred to this as the duty of “reasonable sacrifice” by personnel members.<sup>106</sup> Put differently, or bureaucratically, this required a nine-to-five secularism: no restrictions were made to employees in their off-hours or their private lives, except as service receivers.

The pictogram released as part of Bill 60’s wide media campaign, illustrated the permissible and prohibited proclamations of faith.<sup>107</sup> As such, a small cross, Star of David ring or crescent moon earrings were considered “inconspicuous” religious symbols of faith for personnel members in the course of their duties. On the other hand, “obtrusive” religious symbols included the hijab, burka, kippa, turban and oversized cross. Less clear, however, were situations of “facial neutrality” for personnel members beyond those wearing the hijab (the niqab and burka were considered implicitly part of the hijab range of coverings). Consider, for instance, women wearing other kinds of “coverings”, such as a Hassidic woman’s wig (or women or men who might be wearing wigs for other reasons);<sup>108</sup> or an Indian woman’s *pallu* (long end of the sari). One could also reflect upon men sporting beards as part of their religious beliefs, which include Sikhs, Jews and Muslims,<sup>109</sup> amongst others. None of the aforementioned situations are adequately addressed in the legislative provisions, or via the debates before the National Assembly. These situations also suggest that ethnicity and/or cultural heritage (such as the *pallu*, for instance) can be weaved into the debates over religious faith. These signs of omission reify the range of “acceptable” and “unacceptable” voices and symbols in this most recent

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<sup>106</sup> The duty of “reasonable sacrifice” (*sacrifice raisonnable*) refers to a curtailing of religious freedom while on work premises, but not in one’s private sphere of life and belief. See « 60 chercheurs universitaires pour la laïcité, contre le projet de Loi 60 », *Mémoire présenté à la Commission des institutions siégeant en janvier 2014* (December 20, 2013), online: <<http://www.lecre.umontreal.ca/wp-content/uploads/2014/02/Le-mémoire-60-chercheurs-universitaires-pour-la-laïcité-contre-le-projet-de-loi-60.pdf>>, at 18-21.

<sup>107</sup> Philip Authier, “Quebec releases controversial ‘values charter’, proposes that anyone giving, receiving public services would need faces uncovered”, *National Post* (September 13, 2013), online: <[http://news.nationalpost.com/news/canada/quebec-releases-controversial-values-charter-says-anyone-giving-receiving-public-services-needs-face-uncovered#\\_federated=1](http://news.nationalpost.com/news/canada/quebec-releases-controversial-values-charter-says-anyone-giving-receiving-public-services-needs-face-uncovered#_federated=1)>.

<sup>108</sup> Richard Moon also discusses the place of wigs and Bill 60 in *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014), at 120-21. Within broader discussions on secularism, it has been noted that the headscarf ban in Turkey has been extended to employees who replace their headscarf with a wig: see Amélie Barras, *Refashioning Secularism in France and in Turkey: The Case of the Headscarf Ban* (Abingdon, Oxon: Routledge, 2014), at 49.

<sup>109</sup> The beard, as a religious expression of faith, has been endorsed by the United States Supreme Court in the context of a Muslim prisoner. See *Holt v. Hobbs*, 574 U.S. \_\_\_\_ (2015).

debate on religious accommodation. This article argues, however, that the concession of “unobtrusive” symbols simply reproduces how religion was thought of as being private, wearable and entirely removable. Put differently, it revealed a desire by the State for minority religions to replicate Christian symbols of faith, crafting at once secular and religious representations. Most notably, the illustration of the crescent moon earrings in the Bill 60 pictogram, as an illustration of Muslim faith, underscores the symbolic (and somewhat confused) understanding of religion and nature of religious symbols that is entertained in this context.<sup>110</sup>

More fundamentally, this compromise on “unobtrusive” symbols unveiled — no pun intended — the “cultural transformation of religious symbols [...] allow[ing] for the preservation of a majority religious hegemony in the name of culture”.<sup>111</sup> This transformation of religion to culture, while beyond the scope of this article, also finds credence in the opening of Bill 60, which allows for the recognition of “emblematic and toponymic elements of Québec’s cultural heritage that testify to its history”.<sup>112</sup> In the first day of hearings before the National Assembly, Bernard Drainville explains his interpretation of the opening of Bill 60 to his interlocutor. During this exchange, he explicitly acknowledged that Christian iconography, prevalent in the Quebec landscape, would retain a preferential (one can read now cultural) place: “That is what led me to say that crosses, like the cross on the Mount-Royal, the wayside crosses, the references to saints in the Quebec landscape, would be protected with the Charter [Bill 60].”<sup>113</sup> In nine-to-five secularism, majority culture takes precedence over minority religions; these power relations are also replayed in the context of the precarious frameworks of accommodation envisioned by Bill 60, as addressed in the next section.

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<sup>110</sup> Symbolic representations of religion have been suggested elsewhere as an alternative to “conspicuous” religious symbols: in *Multani*, an initial suggestion of compromise, *in lieu* of an actual sheathed ceremonial dagger, was a symbolic one, worn as a pendant (*Multani, supra*, note 8, at para. 5). This has also been used in France following the Stasi report by then president Jacques Chirac, who suggested that a hand of Fatima could be worn instead of the veil. See Amélie Barras & Dia Dabby, “Only Skin Deep? Revising the Secular Narrative through Circumcision?” in Heather Shipley, ed., *Globalized Religion and Sexuality* (Leiden: Brill, 2014) 86, at 92 (fn 12).

<sup>111</sup> Beaman, “Battle over symbols”, *supra*, note 67, at 68.

<sup>112</sup> Bill 60, *supra*, note 1, s. 1.

<sup>113</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg., 1st Sess., Vol. 43 No. 110 (January 14 2014), at 12h20 (Bernard Drainville) [translated by author]. Original, in French: “C’est ce qui m’a amené à dire que les croix comme la croix du Mont-Royal, les croix du chemin, les références aux saints dans le paysage québécois allaient être protégées avec la charte.”

#### 4. Precarious Frameworks of Accommodation

This section focuses on the frameworks of accommodation engendered through Bill 60. I explore how accommodation is formulated through the provisions set out in Chapter V of Bill 60 (*i.e.*, ss. 15-18), as well as the effects of the Bill's preamble and proportionality mechanism on the Quebec Charter. As such, I discuss the disparate frameworks of accommodation, normative additions to the preambles and the unbalancing of the proportionality test found in Bill 60. Indeed, in spite of robust case law on reasonable accommodation in Canada,<sup>114</sup> Bill 60 involved a new analytical framework to manage religious requests.<sup>115</sup> The consequences of this approach to reasonable accommodation were twofold. First, Bill 60 effectively disassociated Quebec from an ongoing pan-Canadian jurisprudential conversation on reasonable accommodation. Second, while the bill set out accommodation structures on religious requests, it was implacable with regards to accommodation of religious symbols,<sup>116</sup> effectively curtailing the right to freedom of religion. Indeed, although Bill 60 did not explicitly modify the protection of freedom of religion in the Quebec Charter,<sup>117</sup> Bill 60's accommodation frameworks and imposed duties of religious neutrality, would have made it practically impossible to respect. Where accommodation of religious requests were feasible — and therefore did not concern the duties of “facial neutrality” — Bill 60 would have created an unwieldy multiplicity of accommodation frameworks, since each institution, or public body, was responsible for developing their own implementation policy, consistent with their “own mission and characteristics”.<sup>118</sup> This denotes a further consequence to Bill 60's accommodation structures; namely, promoting contradictory

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<sup>114</sup> Including: *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536 (S.C.C.); *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] S.C.J. No. 80, [1990] 2 S.C.R. 489 (S.C.C.); *Commission scolaire régionale de Chambly v. Bergevin*, [1994] S.C.J. No. 57, [1994] 2 S.C.R. 525 (S.C.C.); *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.); *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3 (S.C.C.); *Multani*, *supra*, note 8; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.).

<sup>115</sup> Bill 60, *supra*, note 1, ss. 15-17.

<sup>116</sup> *Id.*, s. 18.

<sup>117</sup> Quebec Charter, *supra*, note 9, s. 3. For a broader discussion of this aspect of Bill 60 and s. 2(a) of the Charter, see Katherine Kaufman, *Conflicting Identities: Québec Secularism and the Promise of Freedom of Religion in Canada* (London School of Economics, M. Sc., 2014) [unpublished, on file with the author].

<sup>118</sup> Bill 60, *supra*, note 1, ss. 19-26.

locations (centralized and decentralized) for institutional decision-making. Within the network of health establishments, for instance, this would have resulted in a dizzying array of administrative structures for medical residents who frequently change institutions within the framework of their medical training and specialization.<sup>119</sup> By contrast, within the school system, accommodation decisions would have been left in the hands of the school boards, rather than the individual schools,<sup>120</sup> which, it is suggested, would leave little room to reflect the diverse school bodies. Building on the identified consequences of Bill 60's analytical framework of reasonable accommodation, this section focuses specifically on its effects on the Quebec Charter's accommodation provisions, the preamble and its proportionality mechanism.

Bill 60 would have hampered the scope of rights and freedoms for the first time since the Quebec Charter was adopted,<sup>121</sup> through the entrenchment of state secularism, gender equality and the elaboration of a definitive framework for religious accommodations in that same Quebec Charter. The Quebec Charter, understood as a quasi-constitutional document in Quebec, has precedence over all other laws, except when explicitly stated.<sup>122</sup> It functions both as a bill of rights and a human rights code and also regulates private relationships between persons: it is a unique document in the Canadian legal landscape. The proposed amendments in Bill 60 would have amended and altered the Quebec Charter's basic vocation as a tool of protection in Quebec society.

Three types of preambles are usually recognized within constitutional documents, according to Liav Orgad: ceremonial-symbolic (with/without persuasive force and non-legally binding), interpretive (acts as a blueprint) and substantive (legally binding and enforceable).<sup>123</sup> In the context of Bill 60, more text would have added to the preamble of

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<sup>119</sup> Fédération des médecins résidents du Québec, *Mémoire de la Fédération des médecins résidents du Québec : Projet de loi n° 60* (December 18, 2013), online: <<http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CI/mandats/Mandat-24537/memoires-deposes.html>>, at 3.

<sup>120</sup> Bill 60, *supra*, note 1, s. 17.

<sup>121</sup> Quebec Charter, *supra*, note 9, as cited by Commission des droit de la personne et des droits de la jeunesse, *Summary: Brief to the National Assembly Commission on Institutions — Bill 60* (February 2014, Cat.2. 113-2.12.1), online: <[http://www.cdpedj.qc.ca/Publications/memoire-resume\\_PL\\_60\\_charte\\_valeurs\\_EN.pdf](http://www.cdpedj.qc.ca/Publications/memoire-resume_PL_60_charte_valeurs_EN.pdf)>, at 1 [hereinafter "CDPDJ, Bill 60 Brief"].

<sup>122</sup> André Tremblay, *Droit constitutionnel*, 2d ed. (Montreal: Éditions Thémis, 2000), at 370.

<sup>123</sup> Liav Orgad, "The Preamble in Constitutional Interpretation" (2010) 8 I-CON 714, at 722-31 [hereinafter "Orgad, 'The Preamble'"].

the Quebec Charter, a quasi-constitutional document, to explicitly protect the primacy of the French language, gender equality and state secularism.<sup>124</sup> Understood through Orgad's typology of preambles, this article argues that Bill 60's amendments would have added substantive content to the preamble through concrete guarantees rather than societal aspirations. This shift would have occurred through the inclusion of "source of sovereignty" ("Quebec nation"), "national identity" ("primacy of the French language") as well as "religion" ("separation of religions and State and the religious neutrality and secular nature of the State") into the preamble,<sup>125</sup> which had been considered, until now, "ceremonial-symbolic" in nature. In focusing on crafting a historical narrative and curating a national, sovereign identity, the additions to the preamble would arguably have had a "disintegrative" effect, "driving people apart and contributing to social tension. This occurs when a preamble reflects only the story of a dominant group".<sup>126</sup>

Perhaps most damaging to the structure of the Quebec Charter was the modifications to the proportionality test, which would have resulted in irreparable prejudice and disrupted the very mechanism responsible for ensuring a just balancing of rights. Indeed, the derogation provision, contained in the Quebec Charter, would have enforced Bill 60's new reading of rights,<sup>127</sup> including its new proportionality test. Redirecting proportionality analysis in such a manner would have unequivocally transformed the nature of the social contract that Quebecers had

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<sup>124</sup> Bill 60, *supra*, note 1, s. 40 : "The preamble to the Charter of human rights and freedoms (chapter C-12) is amended by inserting the following paragraph after the fourth paragraph: 'Whereas equality between women and men and the primacy of the French language as well as the separation of religions and State and the religious neutrality and secular nature of the State are fundamental values of the Quebec nation;'. It should be noted that the third paragraph of the Quebec Charter already protects gender equality explicitly.

<sup>125</sup> *Id.*, 716-18. The discussion of the supremacy of God and rule of law in the preamble of the Canadian Charter, *supra*, note 10, has been the subject of further academic scrutiny. See, for instance: Lorne Sossin, "The 'Supremacy of God', Human Dignity and the Charter of Rights and Freedoms" (2003) 52 U.N.B. L.J. 223; David M. Brown, "Freedom from or Freedom for? Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 U.B.C. L. Rev. 551; Jonathon Penney & Robert J. Danay, "The Embarrassing Preamble? Understanding the Supremacy of God and the Charter" (2006) 39 U.B.C. L. Rev. 287; Orgad, "The Preamble", *supra*, note 124, at 723.

<sup>126</sup> Orgad, "The Preamble", *supra*, note 123, at 731.

<sup>127</sup> Bill 60, *supra*, note 1, s. 41; Quebec Charter, *supra*, note 9, s. 52. Section 52 bears reproduction here in full: "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter."

entertained, until now, with the rest of Canada. The revised (proposed additions in italics) proportionality test bears reproduction in full here:

In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. *In exercising those freedoms and rights, a person shall also maintain a proper regard for the values of equality between women and men and the primacy of the French language, as well as the separation of religions and State and the religious neutrality and secular nature of the State, while making allowance for the emblematic and toponymic elements of Québec's cultural heritage that testify to its history.*

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.<sup>128</sup>

As such, section 9.1 of the Quebec Charter, understood as “the analog to section 1 of the *Canadian Charter of Rights and Freedoms*”,<sup>129</sup> would have been seriously distorted by the addition of the italicized text. The inclusion of gender equality here amounts to a problematic redundancy: gender equality already benefits from explicit protection under the preamble, anti-discrimination provisions<sup>130</sup> as well as a 2008 law that inserted an unequivocal guarantee of gender equality in the Quebec Charter.<sup>131</sup> Its addition here would “in effect create an imbalance that would be contrary to the *Charter of Human Rights and Freedoms*”.<sup>132</sup> Similar concerns can also be raised about the inclusion of the primacy of the French language, since it would have unravelled equal protection accorded on the basis of language, as well as the right to express oneself in the language of one's choice.<sup>133</sup> As the Commission des droits de la personne et droit de la jeunesse argues in their brief submitted to the National Assembly on Bill 60, including “primacy” would necessary lead to a hierarchical understanding of rights, which would distort the “structure and purpose of the Charter of Human Rights

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<sup>128</sup> Bill 60, *supra*, note 1, s. 41.

<sup>129</sup> Choudhry, “Special Issue”, *supra*, note 40, at para. 28; *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 980 (S.C.C.); *Ford v. Québec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 779-81 (S.C.C.); *Saguenay*, *supra*, note 46, at para. 90.

<sup>130</sup> Quebec Charter, *supra*, note 9, at preamble, ss. 10, 50.1.

<sup>131</sup> *An Act to amend the Charter of human rights and freedoms*, S.Q. 2008, c. 15, s. 2.

<sup>132</sup> CDPDJ, Bill 60 Brief, *supra*, note 121, at 4.

<sup>133</sup> *Quebec Charter*, *supra*, note 9, at s. 10.

and Freedoms”;<sup>134</sup> In unpacking this amendment further, the inclusions reveal themselves to be even more perplexing. Consider, then:

- (1) “separation of religion and the State”;
- (2) “religious neutrality and the secular nature of the State”; and
- (3) the “emblematic and toponymic elements of Quebec’s cultural heritage that testify to its history”.<sup>135</sup>

The first two points introduce a principle — state secularism — that does not find legal footing, either in the Quebec Charter or the Canadian Charter.<sup>136</sup> More pointedly, this article suggests that Bill 60, an ordinary piece of legislation, attempted to displace existing constitutional principles and enshrine a new constitutional principle, that of state secularism. The final proposed addition to section 9.1 of the Quebec Charter reads like a legislative laundry list, articulated awkwardly, in an effort to protect Quebec’s cultural patrimony, as discussed previously. Its reference to “making allowances for its emblematic and toponymic elements” arguably invites a discretionary approach to balancing fundamental rights and freedoms under the Quebec Charter, which contradicts the intended purpose and scope of proportionality tests. Furthermore, these last amendments to the Quebec Charter would have undone the resemblance that the proportionality test would have had with its federal counterpart,<sup>137</sup> both on a structural, but also foundational, plane.

The long arm of the law, as explored through Bill 60’s proposed provisions, reveals a myopic approach to *vivre-ensemble*, opening the door to various constitutional *mesaventures*. Re-working Quebec’s brand of *vivre-ensemble* through Bill 60 would also impact how Quebecers “live together” with the rest of Canada, but also, how Quebecers “live together” with each other. The inclusions, redundancies and incoherencies make this legislative project particularly difficult to envisage in everyday life, or its effect in everyday law.<sup>138</sup> Furthermore, the PQ government was willing to go to bat for Bill 60, going as far as saying they would invoke the notwithstanding clause, if necessary, to carry out their

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<sup>134</sup> CDPDJ, Bill 60 Brief, *supra*, note 121, at 4.

<sup>135</sup> Bill 60, *supra*, note 1, s. 41.

<sup>136</sup> As underscored in *Saguenay*, *supra*, note 46, at para. 71, the duty of religious neutrality results from an evolving interpretation of freedom of religion and conscience.

<sup>137</sup> *Supra*, note 129.

<sup>138</sup> Roderick A. Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen’s University Press, 2002).

legislative project.<sup>139</sup> Use of the notwithstanding clause, often understood as a point of no return, both politically and legally, holds heavy symbolism in the discussion on Bill 60's constitutional intervention. Proposed legislative choices suggest, therefore, a serious attempt at reframing Quebecers' relationships in the Canadian constitutional context.

### III. CONCLUSION

"All happy families are happy alike; all unhappy families are unhappy in their own way."<sup>140</sup>

"I believe, and I think most Canadians believe that it is offensive that someone would hide their identity at the very moment where they are committing to join the Canadian family."<sup>141</sup>

Families are rarely straightforward, less so their internal politics; there are usually a few eccentric uncles hiding away and private feuds that make no sense to outsiders. Families also carry their particular code of belonging with them ("values"), which may or may not resonate with interlopers. By way of conclusion, this Part considers the idea of these "black sheep" in the context of the Canadian constitutional family. As elaborated in the earlier Parts of this article, Bill 60, as a secularism project, had a broad scope, but provided a focused outlet for the continuation of language and identity politics. Through a detailed examination of Bill 60, I exposed several inconsistencies and constitutional flaws in the proposed textual provisions, which suggested a disconnection of the proportionality test from its federal counterpart, and an embedded hierarchy of rights and values. Moreover, in investigating the sources of authority on which the PQ relied to shape their legislative project, most

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<sup>139</sup> As indicated in news reports before the 2014 provincial election: Canadian Press, "Marois would use notwithstanding clause to ensure charter of values' survival" (March 31, 2014), online: <<http://globalnews.ca/news/1241139/marois-would-use-notwithstanding-clause-to-ensure-charter-of-values-survival/>>.

<sup>140</sup> Leo Tolstoy, *Anna Karenina*, translated by Louise & Aylmer Maude (Oxford: Oxford University Press, 1995) at 1, as cited by Roderick Macdonald in "Pluralistic Human Rights? Universal Human Wrongs?" in René Provost & Colleen Sheppard, eds., *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 15, at 16.

<sup>141</sup> Former Canadian Prime Minister Stephen Harper, as cited in Morgan Lowrie, "Harper says Ottawa will appeal ruling allowing veil during citizenship oath", *The Globe and Mail* (February 12, 2015), online: <<http://www.theglobeandmail.com/news/national/harper-says-ottawa-will-appeal-ruling-allowing-veil-during-citizenship-oath/article22979142/>>.

notably the Bouchard-Taylor report, I showed that the legislative hearings on Bill 60 pointed to *Multani* as the watershed moment in “accommodation politics” in Quebec, further reinforcing the public’s discontent with a Supreme Court decision (Part II). The quotes at the outset of this article by Drainville and Marois — Bill 60 as marshalling Quebecers much like the French language debates of the 1980s — illustrate this argument, where language is inextricably linked with state secularism in order to defend their broader project for “all” Quebecers.<sup>142</sup> As observed by some, “the difficulty in defining these cultural characteristics, and specifying their relationship to state power, continues to be productive of (re)articulations of Québec national identity.”<sup>143</sup> Interwoven into these exercises of politics (identity, language) is a deeper discourse, that of Quebec as continual “outlier” to the Canadian constitutional family: the exercise of isolation through law (redefining the duties of accommodation and restricting appeals to proportionality) as well as resurgence of Quebec identity through the Bouchard-Taylor commission<sup>144</sup> and *Multani*, could serve to distinguish Quebec’s legal positioning. This uncle does not want to sit down at the family table.

However, this article suggests that recent litigation in the RoC critically challenges Quebec’s stance of requiring a differential attitude and legal cadre for managing religious diversity. Indeed, cases involving niqabs in courtroom testimony and citizenship ceremonies<sup>145</sup> underscore

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<sup>142</sup> Drawing on commonalities (language, values) can also reveal embedded social hierarchies: see Sirma Bilge, “Reading the Racial Subtext of the Québécois Accommodation Controversy: An Analytics of Racialized Governmentality” (2013) 40:1 *Politikon* 157, at 158: “this tacit common language, together with unarticulated shared assumptions and entitlements upon which it relies, is racially structured, shaped by the dominant racial formation in Québec and oriented by its white habitus.”

<sup>143</sup> Laxer *et al.*, “Articulating minority nationhood”, *supra*, note 75, at 139.

<sup>144</sup> *Id.*, at 134.

<sup>145</sup> *S. (N.)*, *supra*, note 87; *Ishaq v. Canada (Minister of Citizenship and Immigration)*, [2015] F.C.J. No. 158, 2015 FC 156 (F.C.), affd [2015] F.C.J. No. 1071, 2015 FCA 194 (F.C.A.) [hereinafter “*Ishaq*”]. The socio-legal fall-out of the *Ishaq* decision is beyond the scope of this article and consequently, not addressed here.

For a discussion on religious diversity in Canada and the recent tribulations involving the niqab in particular, see, for example: Trevor C.W. Farrow, “Re-Framing the Sharia Arbitration Debate” (2006) 15:2 *Const. Forum* 79, 81; Beaman, “It was all slightly unreal”, *supra*, note 70; Narain, “Taking the Culture out”, *supra*, note 70; Natasha Bakht, “In Your Face: Piercing the Veil of Ignorance about Niqab-Wearing Women” (2014) 24(3) *Social & Legal Studies* 419; Faisal Bhabha, “R. v. NS: What’s Fair in a Trial? The Supreme Court of Canada’s Divided Decision on the Niqab in the Courtroom” (2014) 50 *Alta. L. Rev.* 871; Lori Chambers & Jen Roth, “Prejudice Unveiled: The Niqab in Court” (2014) 29 *C.J.L.S./R.C.D.S.* 381; Fathima Cader, “Made you look: Niqabs, the Muslim Canadian Congress, and R. v. N.S.” (2013) 31 *Windsor Y.B. Access Just.* 67; Canadian

that it is the lawfulness of the laws that are challenged. In this context, like that of Quebec, civic inclusion is misconceived as acquiescence to all law and not merely obedience to lawful law.<sup>146</sup> Moreover, ongoing litigation over the accreditation of a proposed faith-based law school<sup>147</sup> challenges the place and purpose of law schools and their graduates as actors in, and agents of, the legal system.<sup>148</sup> The notions of both “service providers” and “service receivers”, to borrow from Bill 60, are as contested in recent Canadian litigation on religious diversity. These cases suggest that a more nuanced view of how religion is managed in<sup>149</sup> and outside Quebec is needed.<sup>150</sup>

Bill 60 enabled the PQ to redefine their political project, sovereignty, in terms that resonate in today’s society in Quebec, namely through institutional design.<sup>151</sup> This article suggests that in shifting the focus from language to culture/religion/race, Bill 60 attempted to reshape the way in which Quebecers conceive of their relationship with each other, as well as with the rest of the country. It is also submitted that the language used — now of religion, culture and to a more subtle extent, race — also resonate in

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Council of Muslim Women, *Women in Niqab Speak: A Study of the Niqab in Canada* (2013), online: <[http://ccmw.com/wp-content/uploads/2013/10/WEB\\_EN\\_WiNiqab\\_FINAL.pdf](http://ccmw.com/wp-content/uploads/2013/10/WEB_EN_WiNiqab_FINAL.pdf)>.

<sup>146</sup> See, in this way: B.L. Berger, “Belonging to Law: Religious Difference, Secularism and the Conditions of Civic Inclusion” (2014) 24:1 *Social & Legal Studies* 47, at 55: “obedience to the law c[omes] to serve as a diagnostic for civic inclusion.”

<sup>147</sup> *Trinity Western University v. Law Society of Upper Canada*, [2015] O.J. No. 3492, 2015 ONSC 4250 (Ont. Div. Ct.); *Trinity Western University v. Nova Scotia Barristers’ Society*, [2015] N.S.J. No. 32, 2015 NSSC 25 (N.S.S.C.).

<sup>148</sup> See, for example: Alice Wooley, “Equality Rights, Freedom of Religion and the Training of Canadian Lawyers” (2014) 17 *Legal Ethics* 437; Elaine Craig, “TWU: A Reply to Proponents of Approval” (2014) 37 *Dalhousie L.J.* 621; Dwight G. Newman, “On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada” (2013) 22:3 *Const. Forum* 1; Elaine Craig, “The Case for the Federation of Law Societies Rejecting Trinity Western University’s Proposed Law Degree Program” (2013) 25 *C.J.W.L.* 148; Howard Kislowicz, “Book Review: Free to Believe: Rethinking Freedom of Conscience and Religion in Canada, by Mary Anne Waldron” (2015) 52 *Osgoode Hall L.J.* 303, at 307 (fn 22).

<sup>149</sup> This point is further buttressed in light of recent Supreme Court decisions from Quebec, namely *Loyola*, *supra*, note 45 and *Saguenay*, *supra*, note 46.

<sup>150</sup> A poll conducted in Canada in September 2013 on the proposed Quebec charter of values received mixed support: “[m]ore than two-thirds of respondents to an Angus-Reid poll [...] would ban kirpans; almost as many would prohibit public servants from wearing burqas.”: Anna Mehler Paperny, “Poll: Rest of Canada decries Quebec’s charter, but opposes some religious symbols” *Global News* (September 11, 2013), online: <<http://globalnews.ca/news/834241/poll-rest-of-canada-decries-quebecs-charter-but-opposes-some-religious-symbols/>>.

<sup>151</sup> Roderick Macdonald made this argument about constitution making in Canada and political membership. See “Three Centuries of Constitution Making in Canada: Will there be a Fourth?” (1996) 30 *U.B.C. L. Rev.* 211, at 216 [hereinafter “Macdonald, ‘Three Centuries’”].

the discussions in the RoC on this subject; as such, on a close examination, Quebec's construction as constitutional "outlier" starts to wane.

In this article, I have engaged with Bill 60 and the broader phenomenon of identity politics and constitutional relationships in Canada. I have argued that Bill 60 revealed a legislative project that went far beyond a simple law. Bill 60 was a constitutional intervention by another name. Reliance on legislative action, rather than on strategic litigation and subsequent judicial action, has been deeply characteristic of Quebec politics and movements for social change and thus should come as no surprise that law reform was the PQ's vehicle of choice.<sup>152</sup> While the dust is still settling around this proposed bill, its failure can likely be linked to its politics of estrangement — the "divide and conquer" stratagem — not on the basis of sovereignty through language, but rather, through the framing of accommodation through religion. Nevertheless, the PLQ, currently in power in Quebec, has brought the regulation of religious accommodation back into the public sphere in the closing days of the spring 2015 legislative session.<sup>153</sup> As eloquently stated by one author, "[l]aw reform rarely provides the solutions to the social problems that the law is trying to regulate. It usually only solves problems by giving ongoing social problems a new expression and a new form."<sup>154</sup>

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<sup>152</sup> The feminist movement in Quebec in the early 1970s favoured legislative transformation and the redefinition of women's everyday power; this approach differed from the rest of Canada, where legal action was chosen as privileged place for redefining women's status: Jennifer Stoddart, « Des lois et des droits. Considérations à propos d'un cheminement distinct » (1995) 36:1 *Les Cahiers de droit* 9, at 11. Thanks to Colleen Sheppard for bringing this point to my attention.

<sup>153</sup> It is beyond the scope of this article to engage with the content and particularities of this legislative project: see Bill 62, *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for religious accommodation requests in certain bodies*, 1st sess., 41st Leg., Quebec, 2015.

<sup>154</sup> Macdonald, "Three Centuries", *supra*, note 151.

