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# Rights Adjudication in a Plurinational State: The Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation

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# Rights Adjudication in a Plurinational State: The Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation

## **Abstract**

A disproportionate number of the Supreme Court of Canada's recent cases on freedom of religion come out of Quebec and involve claims for reasonable accommodation. These decisions represent a point of national cleavage in two respects. First, in each case the Quebec Court of Appeal rejected the section 2(a) claims, and the Supreme Court of Canada overturned its decision. Second, the Supreme Court has often divided on national lines with one or more francophone judges from Quebec writing a concurrence or a sharp dissent. Moreover, francophone judges from outside Quebec have also broken ranks with their colleagues. The cleavages on the Supreme Court have sometimes tracked a large and arguably growing divide between Quebec and the rest of Canada on these questions. I link this line of cases to earlier disputes about the constitutionality of Quebec's policies to promote the French language that were ultimately resolved by the Court. The fact that the Court spoke in a single voice in those earlier cases can be explained, in part, by the need to preserve its institutional legitimacy. This time, the point of dispute is not language, but religion. The Supreme Court is groping incrementally toward a kind of consensus position on the character of the "neutral" state to close this divide within the Court against the backdrop of an intense political debate on these issues in Quebec.

## **Keywords**

Freedom of religion; Canada. Canadian Charter of Rights and Freedoms; Canada. Supreme Court; Québec (Province). Cour d'appel

## Rights Adjudication in a Plurinational State: the Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation

SUJIT CHOUDHRY\*

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**NB:** This article was completed prior to the Supreme Court of Canada's recent decision in *R v S(N)*, 2012 SCC 72, SCJ No 12. This case dealt with the question of reasonable accommodation in the context of criminal trials. As the appeal came from Ontario, it is not part of the line of cases I focus on here.

Un nombre disproportionné des causes récentes de la Cour suprême du Canada sur la liberté de religion proviennent du Québec et font intervenir des demandes d'accommodements raisonnables. Ces décisions représentent à deux égards un point de clivage national. Premièrement, dans toutes les causes, la Cour d'appel du Québec a rejeté les demandes en vertu de l'article 2a) et la Cour suprême du Canada a renversé cette décision. Deuxièmement, la Cour suprême du Canada a souvent été divisée en raison de critères nationaux, alors qu'un ou plusieurs juges francophones du Québec rédigeaient un assentiment ou une dissidence marquée. De plus, des juges francophones de l'extérieur du Québec ont également rompu les rangs de leurs collègues. Les clivages de la Cour suprême dénotent parfois une grande division et, comme on pourrait en argumenter, une division croissante entre le Québec et le reste du Canada sur ces questions. Je relie cet ensemble de causes à des disputes antérieures sur la constitutionnalité des politiques du Québec visant à promouvoir la langue française, question qui a été résolue en dernier ressort par la Cour. Lors de ces causes antérieures, le fait que la Cour se soit exprimée à l'unisson peut s'expliquer en partie par le besoin de préserver sa légitimité institutionnelle. Cette fois-ci, le point en litige n'est pas la langue, mais plutôt la religion. La Cour suprême se dirige à tâtons vers une position de plus en plus consensuelle sur le caractère « neutre » de l'état pour clore cette division de la Cour sur la toile de fond d'un débat politique intense sur ces questions au Québec.

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**THE *CHARTER'S* GUARANTEE** of freedom of religion has been both central and peripheral to Canadian constitutional jurisprudence. On the one hand, two of the earliest cases under the *Charter* arose under section 2(a)—*Big M*<sup>2</sup> and *Edwards Books*.<sup>3</sup> In addition to marking important occasions for the Supreme Court of Canada to assert its power of judicial review over a politically controversial legislative policy (Sunday closing laws), the Court used those judgments to set out some of the basic framework of *Charter* adjudication, such as the purposive approach to interpreting *Charter* guarantees<sup>4</sup> and the idea that deference is warranted under section 1 in some circumstances.<sup>5</sup> But for many years section

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
  2. *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M*].
  3. *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 35 DLR (4th) 1 [*Edwards Books*].
  4. *Big M*, *supra* note 2.
  5. *Edwards Books*, *supra* note 3.

2(a) lay fallow, generating few appeals that made their way to the Supreme Court. Important doctrinal issues under section 2(a) remained unaddressed, and cases concerning religious freedom could not contribute to the development of the broader edifice of *Charter* doctrine—most notably, questions of evidence under section 1 and constitutional remedies.

Over the past decade, this picture has changed dramatically. In *Lafontaine*,<sup>6</sup> *Reference re Same-Sex Marriage*,<sup>7</sup> *Multani*,<sup>8</sup> *Bruker*,<sup>9</sup> *Hutterian Brethren*,<sup>10</sup> *AC*,<sup>11</sup> and *SL*,<sup>12</sup> the Court added considerable detail to the constitutional doctrine surrounding section 2(a). The Court has now grappled with what constitutes a religion, the elements for making out a successful section 2(a) claim, and the requisite issues of evidence.<sup>13</sup> The Court has also squarely addressed the question of reasonable accommodation, adapting for the *Charter* an idea originally developed under human rights codes<sup>14</sup> while limiting its reach to individual decisions and declining to extend it to laws of general application.<sup>15</sup> In addition, some of these cases were argued on the basis of both administrative law and *Charter* grounds

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6. *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, 2 SCR 650 [*Lafontaine* cited to SCC].
  7. *Same-Sex Marriage, Re*, 2004 SCC 79, 3 SCR 698 [*Reference re Same-Sex Marriage*].
  8. *Multani v Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, 1 SCR 256 [*Multani* cited to SCC].
  9. *Bruker v Marcovitz*, 2007 SCC 54, 3 SCR 607 [*Bruker* cited to SCC].
  10. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, 2 SCR 567 [*Hutterian Brethren*].
  11. *Manitoba (Director of Child and Family Services) v C(A)*, 2009 SCC 30, 2 SCR 181 [AC].
  12. *SL v Commission scolaire des Chênes*, 2012 SCC 7, 1 SCR 235 [*SL* cited to SCC].
  13. *Syndicat Northcrest v Amselem*, 2004 SCC 47, 2 SCR 551 [*Amselem* cited to SCC]; *Multani*, *supra* note 8; *Bruker*, *supra* note 9; *Hutterian Brethren*, *supra* note 10; and *SL*, *supra* note 12.
  14. *Multani*, *supra* note 8.
  15. *Hutterian Brethren*, *supra* note 10. Note that *Hutterian Brethren* contradicts *Reference re Same-Sex Marriage* and *Edwards Books* on this point. In those earlier judgments, the Court held that the presence of a religious exemption to facially neutral rules—a form of reasonable accommodation—rendered the laws constitutional under the minimal impairment branch of the *Oakes* test. The logical corollary of this proposition is that the lack of such an exemption/accommodation would have rendered these laws unconstitutional. So the real question in *Hutterian Brethren* was not whether legislation can be found unconstitutional for failure to make a reasonable accommodation. Rather, the issue is the appropriate constitutional remedy in these cases: a constitutional exemption for the claimant under s 24(1) of the *Charter*, the reading-in of an exemption under s 52(1) of the *Charter*, or a declaration of invalidity (perhaps suspended) permitting the legislature to amend the law to provide for an exemption.

(*Chamberlain*,<sup>16</sup> *Trinity Western*,<sup>17</sup> *Lafontaine*, and *Multani*), with the Court opting for the former as the basis for its decision<sup>18</sup> and in the process producing a *Charter*-inflected administrative law. The Court has also been required to grapple with the vexing problem of the conflict between religious freedom and the right to equality, especially in the context of sexual orientation.<sup>19</sup> There is a large and interesting critical literature on the jurisprudence, which discusses not only the wide range of doctrinal issues raised, but also the broader political disputes out of which the cases have arisen.<sup>20</sup>

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16. *Chamberlain v Surrey School District No 36*, 2002 SCC 86, 4 SCR 710 [*Chamberlain*].
  17. *Trinity Western University v College of Teachers (British Columbia)*, 2001 SCC 31, 1 SCR 772 [*Trinity Western*].
  18. The Court was sometimes divided on this point: *Lafontaine*, *supra* note 6; *Multani*, *supra* note 8.
  19. *Reference re Same-Sex Marriage*, *supra* note 7; *Chamberlain*, *supra* note 16; and *Trinity Western*, *supra* note 17.
  20. Benjamin L Berger, "Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed" (2011) 19:2 *Const Forum Const* 41; Benjamin L Berger, "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61:4 *UTLJ* 579; José Woehrling, "Quand la Cour suprême s'applique à restreindre la portée de la liberté de religion: l'arrêt *Alberta c. Hutterian Brethren of Wilson Colony* (2009)" (2011) 45:1 *RJT* 7; Sara Weinrib, "An Exemption for Sincere Believers: The Challenge of *Alberta v Hutterian Brethren of Wilson Colony*" (2011) 56:3 *McGill LJ* 719; Howard Kislowicz, Richard Haigh & Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom" (2010-2011) 48:3 *Alta L Rev* 679; Luc Tremblay, "The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name?" (2010-2011) 15:1 *Rev Const Stud* 35; Benjamin L Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 *Sup Ct L Rev* (2d) 25; Louis-Philippe Lampron, "Pour que la Tempête ne s'étende jamais hors du verre d'eau: réflexions sur la protection des convictions religieuses au Canada" (2010) 55:4 *McGill LJ* 743; Nathalie Des Rosiers, "Freedom of Religion at the Supreme Court in 2009: Multiculturalism at the Crossroads?" (2010) 51 *Sup Ct L Rev* (2d) 73; Robert E Charney, "How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief" (2010) 51 *Sup Ct L Rev* (2d) 47; Richard Moon, "Accommodation Without Compromise: Comment on *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 *Sup Ct L Rev* (2d) 95; Sara Weinrib, "The Emergence of the Third Step of the Oakes Test in *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 68:2 *UT Fac L Rev* 77; FC DeCoste, "Caesar's Faith: Limited Government and Freedom of Religion in *Bruker v. Marcovitz*" (2009) 32:1 *Dal LJ* 153; Margaret H Ogilvie, "*Bruker v. Marcovitz*: (Get)ting Over Freedoms (Like Contract and Religion) in Canada" (2009) 24:2 *NJCL* 173; Mahmud Jamal, "Recent Developments in Freedom of Religion" (2009) 27 *NJCL* 253; Benjamin L Berger, "The Cultural Limits of Legal Tolerance" (2008) 21:2 *Can JL & Jur* 245; Benjamin L Berger, "Moral Judgment, Criminal Law and the Constitutional Protection of Religion" (2008) 40 *Sup Ct L Rev* (2d) 513; Louise Langevin et al, "L'affaire *Bruker c. Marcovitz*: variations sur un thème" (2008)

I want to come at this body of case law from a different angle. One of the most striking features of the Court's recent jurisprudence on section 2(a) is that a disproportionate number of cases come out of Quebec<sup>21</sup> and, indeed, were adjudicated under the *Quebec Charter*:<sup>22</sup> *Amselem*, *Lafontaine*, *Multani*, *Bruker* and *SL*. I will suggest that these cases all involve claims for reasonable accommodation. Moreover, as Sébastien Grammond has acutely observed, these decisions represent a point of national cleavage in two respects.<sup>23</sup> First, in each case the Quebec Court of Appeal rejected the section 2(a) claim, and the Supreme Court of Canada overturned its decision. Second, these national divisions are arguably present on the Supreme Court itself. The Court has often divided on national lines, with one or more francophone judges from Quebec either writing a concurrence (Justice LeBel in *Lafontaine*) or a sharp dissent (Justice Deschamps in *Bruker*). Moreover, francophone judges from outside Quebec have also broken ranks with their colleagues through dissents (Justice Bastarache in *Amselem*) and concurrences (Justice Charron in *Multani*). Though the Court often divides, it does so exceedingly rarely along these lines. The plurinational dimension of the Court's recent section 2(a) case law is brought into even sharper relief when it is juxtaposed with the intense and contemporaneous debate within Quebec over

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49:4 *Les Cahiers de Droit* 655; Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45:2 *Osgoode Hall LJ* 277; José Woehrling, "La place de la religion dans les écoles publiques du Québec" (2007) 41:3 *RJT* 651; Pierre Bosset & Pail Eid, "Droit et religion: de l'accommodement raisonnable à un dialogue internormatif?" (2007) 41:2 *RJT* 513; Kathryn Bromley Chan, "The Duelling Narratives of Religious Freedom: A Comment on *Syndicat Northcrest v. Amselem*" (2005-2006) 43:2 *Alta L Rev* 451; Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005) 29 *Sup Ct L Rev* (2d) 169; David M Brown, "Neutrality or Privilege? A Comment on Religious Freedom" (2005) 29 *Sup Ct L Rev* (2d) 221; Richard Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 *Sup Ct L Rev* (2d) 201; Richard Moon, "Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on *Trinity Western University v. B.C. College of Teachers* and *Chamberlain v. Surrey School Board District 36*" (2003) 8:2 *Rev Const Stud* 228; Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms" (2003) 41:1 *Brandeis LJ* 563; Benjamin L Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 *CJLS* 39; Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008); Howard Adelman & Pierre Anctil, eds, *Religion, Culture, and the State: Reflections on the Bouchard-Taylor Report* (Toronto: University of Toronto Press, 2011); Sébastien Grammond, "Conceptions canadienne et québécoise des droits fondamentaux et de la religion: convergence or conflit?" (2009) 43:1 *RJT* 83.

21. *Lafontaine*, *supra* note 6; *Multani*, *supra* note 8; *Bruker*, *supra* note 9; *SL*, *supra* note 12; and *Amselem*, *supra* note 13.

22. *Charter of Human Rights and Freedoms*, RSQ, c C-12 [*Quebec Charter*].

23. Grammond, *supra* note 20.

the accommodation of religious minorities, in which the Court's decisions—especially *Multani*—are a central part. These debates have highlighted a large and arguably growing divide between Quebec and the rest of Canada (RoC) with respect to the strong claims for neutrality and secular democracy advanced by Quebec's francophone political elites. The cleavages on the Supreme Court have sometimes tracked these larger political divides.

In this article, I address the plurinational dimension of the Supreme Court's recent religious freedom cases by focusing on divisions within the Court itself. I link this line of case law to an earlier episode of Canadian constitutional politics when the *Charter*, as the instrument of pan-Canadian nation building, was used to intervene in our seemingly endless debates over national unity. This was evident through a series of legal disputes under the *Charter* regarding the constitutionality of Quebec's policies to promote the French language, which were ultimately resolved by the Court. What we may now be witnessing is a new chapter in the complex story of Quebec, Canada, and the *Charter*. This time, however, the point of dispute is not language, but religion. The Quebec cases, as a group, have brought this issue before the Court. I think the Supreme Court is aware of this broader political context and is groping incrementally towards a kind of consensus position on the character of the "neutral" state in order to close this divide against the backdrop of an intense political debate on these issues in Quebec.

## I. LINGUISTIC NATION BUILDING, THE *CHARTER*, AND THE SUPREME COURT

Let me provide some intellectual and political context for my argument by revisiting the history of Quebec's language policies, the *Charter*, and the Supreme Court. There is a familiar story here: The *Charter* was adopted as an instrument of pan-Canadian nation building to compete with the centrifugal effects of Quebec nationalism.<sup>24</sup> Until the 1960s, Quebec's constitutional claims had been defensive, aimed at safeguarding its existing areas of jurisdiction. In the 1960s, Quebec's goals shifted to ethno-national linguistic nation building and expansion of its jurisdiction over social and economic policy. The basic political objective of the *Charter* was to combat Quebec nationalism by regulating linguistic nation building in Quebec and by constituting a pan-Canadian political community.

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24. See Sujit Choudhry, "Bills of Rights as Instruments of Nation Building in Multinational States: The Canadian *Charter* and Quebec Nationalism" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 233.



In regulative terms, the *Charter* imposes legal restraints on minority nation building by entrenching rights to interprovincial mobility and to minority language education. Both rights can be understood as a response to potential or actual policies of linguistic nation building within Quebec. Indeed, Quebec objected to both protections precisely on that basis. In addition, the *Charter* was intended to function constitutively as the germ of a common Canadian nationalism. In a federal state such as Canada, where citizens share *Charter* rights irrespective of language or province of residence, the *Charter* serves as a transcendent form of political identification—the spine of common citizenship that unites members of a linguistically diverse and geographically dispersed polity.

The clash between the *Charter* and Quebec's nation-building policies generated three important cases before the Supreme Court.<sup>25</sup> In all three cases, the Court found these policies to be unconstitutional. In *Ford v Quebec (Attorney General)*,<sup>26</sup> the Court struck down a provision in Quebec's *Charter of the French Language*<sup>27</sup> that required outdoor commercial signage to be exclusively in French. According to the Court, the law was disproportionate to the objective of ensuring that Quebec's "visage linguistique" be French. Instead, a measure requiring that French be predominant would have sufficed. There were also two important cases regarding minority language education. A flashpoint during the adoption of the *Charter* was the "Canada Clause," which grants citizens educated in English at the primary level anywhere in Canada the right to have their children educated in English in Quebec.<sup>28</sup> This right was specifically directed at a provision in Quebec's *Charter of the French Language* that required those individuals to educate their children in French in order to promote the linguistic integration of interprovincial migrants to Quebec in the same way that international migrants were encouraged to integrate. This provision was struck down by the Court in one of its earliest decisions under the *Charter*: *Quebec Protestant School Board*.<sup>29</sup> The *Charter* also grants children who have received schooling in English anywhere else in the country the right to continue schooling in English in Quebec. In *Solski (Tutor of) v Quebec (Attorney General)*,<sup>30</sup> the Court rejected an attempt to

25. See Sujit Choudhry & Richard Stacey, "Independent or Dependent? Constitutional Courts in Divided Societies" in Colin Harvey & Alex Schwartz, eds, *Rights in Divided Societies* (Oxford: Hart, 2012) 87 at 104-112.

26. [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford*].

27. RSQ, c C-11.

28. *Charter*, *supra* note 1, s 23.

29. *Quebec Assn of Protestant School Boards v Quebec (Attorney General) (No 2)*, [1984] 2 SCR 66, 10 DLR (4th) 321 [*Quebec Protestant School Board*].

30. 2005 SCC 14, 1 SCR 201 [*Solski*].

construe this right narrowly and read down the challenged provision to comply with the *Charter*.

There are three noteworthy features of these decisions. First, in all three cases, Quebec lost, and the *Charter* did indeed serve to constrain Quebec's ability to establish French as the common language of political, economic, and social life in that province. Second, while the Court applied the *Charter* to limit Quebec's linguistic nation-building policies, it nonetheless accepted that the purpose underlying these policies met the legitimate objective test. The constitutional defect in the laws was that, as framed or construed by the government, they failed at the minimal impairment stage of the proportionality analysis. Third, the judgments were unanimous and were handed down by "The Court" as an institution rather than by an individual judge with whom the rest of the Court concurred. Collective authorship by the entire Court is rare and indicates the greatest possible degree of consensus among the justices.

These pieces all fit together. Their significance becomes clear if one recalls that the Court is a regionally representative body, with three of nine judges coming from Quebec, three from Ontario, and one from British Columbia, the Prairies, and Atlantic Canada, respectively. However, Quebec's representation is special, as is reflected by the fact that it is the only province whose representation has always been legally guaranteed. When the Court's membership was enlarged to nine in 1949, the *Supreme Court Act* was amended to require that three of the judges be from Quebec.<sup>31</sup> Later, the *Constitution Act, 1982* entrenched Quebec's representation on the Court by requiring that changes thereto be made by unanimous federal and provincial consent.<sup>32</sup> By contrast, the regional distribution of the remaining seats is a matter of constitutional convention and is not provided by a statute or constitutional provision. An important justification for the special rules governing Quebec's representation on the Court is that the Supreme Court takes civil law appeals from Quebec and therefore requires judges with the requisite expertise. But the deeper rationale is that the composition of the Court reflects and institutionalizes the plurinational character of Canada. Quebec is a constituent nation in Canada's plurinational federation, with boundaries drawn to create a permanent francophone majority and with jurisdiction to adopt public policies that protect French as the common public language of economic, political, and social life in that province. Quebec's national status entitles it to a guaranteed minimum level of representation in a federal institution—such as the Supreme Court—that makes important decisions delimiting the scope of Quebec's power

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31. *Supreme Court Act*, RSC 1985, c S-26, s 6.

32. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 41.

to pursue such policies. A Court that ruled on these issues without judges from Quebec would be widely perceived as constitutionally illegitimate within that province.<sup>33</sup>

This much is well known. But far less thought has been given to the interesting question of how the plurinational character of the Court's membership is supposed to play out in adjudication, especially with respect to cases arising out of Quebec. As a technical matter, the Quebec judges enjoy no special powers relative to other judges, either individually or collectively. But with regard to cases of special interest to Quebec—for example, those that concern the power of Quebec to engage in linguistic nation building—as a matter of constitutional practice, the Quebec judges might play a different institutional role in the Court's decision making.

Consider the following counter-factual scenario: Imagine that in *Ford*, *Quebec Protestant School Board*, and *Solski*, the Court had divided on national lines. The Quebec judges voted to uphold the policies under challenge, perhaps finding that while there had been a breach of a *Charter* right, the breach was justified under section 1. A majority of the Court, however, struck them down. Moreover, imagine that the majority went further than holding that the measures were disproportionate, as the Court actually did. Rather, it held that the objective of preserving and enhancing the status of French as Quebec's common language was per se illegitimate, because the language laws in question sought to redistribute economic and political power away from Anglophones toward Francophones and were therefore discriminatory. Moreover, when it rendered judgment in those appeals, the Quebec justices were all francophone and the justices from the rest of Canada were all anglophone, so that the division on the Court in this hypothetical scenario would not only have pitted Quebec against the RoC justices, but also francophone versus anglophone justices. Under this hypothetical scenario, the disagreement on the Court would have been basic and fundamental, and it would have been plurinational in character.

If this had happened, the dissent by the Quebec judges would have been more than the routine disagreement that occurs on multi-member courts in the common law world, including the Supreme Court of Canada. Given the political origins of the *Charter* and the singular importance of the challenged laws to modern Quebec nationalism, a Court divided on national lines would have served to undermine the legitimacy of the *Charter*, and perhaps even the

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33. See Sujit Choudhry, "Not a New Constitutional Court: The Canadian *Charter*, the Supreme Court and Quebec Nationalism" in Pasquale Pasquino & Francesca Billi, eds, *The Political Origins of Constitutional Courts: Italy, Germany, France, Poland, Canada, United Kingdom* (Rome: Adriano Olivetti Foundation, 2009) 39 at 53-66.

Court itself, within Quebec. This would have been a disaster. The decision to speak unanimously as a single institution indicates an awareness that, with respect to these divisive issues, it was important to present a collective front that transcended the national divide built into the Court's design. The Court's choice emphasized the fact that what drove the judgment was not the national origin of the individual judge authoring the opinion, but the Court's collective understanding of the *Charter* and its relationship to the project of Quebec nationalism. Framing its holding in this way protected both the legitimacy of the *Charter* and the Court itself. Moreover, in these three cases, the judgments occupied an intermediate position between polar extremes. The Court struck down the provisions under challenge, but left space for Quebec to pursue those policies by accepting Quebec's objectives as constitutionally legitimate.<sup>34</sup> Thus, the constitutional flaw was framed as the proportionality of the response, not the very idea of the policy itself.

We now come back to the question of how Quebec's representation on the Court affects how the Court resolves cases. What role did the Quebec judges play in the Court's internal deliberations on the Quebec language cases? We do not, and may never, really know. There are two conceptual possibilities, which we can term the bargaining and the deliberative accounts. On the bargaining account, the Quebec judges had political leverage because of the political costs of a dissenting judgment to the *Charter* and the Court. Their leverage was insufficient to save Quebec's legislation, but it was enough to shape the manner in which it was struck down. As the price for a unanimous judgment, the Quebec judges were able to negotiate the acceptance of the legality of Quebec's legislative objective, thereby allowing Quebec to enact a more narrowly-tailored policy that would pursue the same goal and survive a subsequent constitutional challenge.

But this is too simplistic a picture of how judges interact on a multi-member court, especially when they work within an institution governed by a highly specialized, technical, and professional discourse that renders inadmissible such crude political horse-trading. The deliberative account offers an alternative explanation. What the Quebec judges brought to these cases was an alertness to, and an understanding of, the roots of modern Quebec nationalism. To a

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34. The *Quebec Protestant School Board* is ambiguous on this point and can be read either to impliedly suggest that the objective of preserving and enhancing the status of French as Quebec's common language was per se illegitimate or that the means chosen were disproportionate. Of important context is that the judgment is an early, pre-*Oakes* decision, handed down before the Court determined the doctrinal framework for s 1. As a consequence, the judgment must be interpreted through the lens of the subsequent development in the jurisprudence.

considerable extent, this nationalism arose as a defensive response to Ottawa's dramatically increased role in economic and social policies after the Second World War. Federal policy activism meant an increase in the importance of federal institutions, especially the federal bureaucracy, which worked in English and in which francophone Quebecers were a small minority. Another factor was enormous social change within Quebec. After the war, Quebec underwent massive urbanization and industrialization, and Anglophones dominated many professions, including positions of economic leadership. These demographic and economic shifts underscored and reinforced the role of language as the basis for the unequal distribution of economic power within the province. Quebec responded by mobilizing Francophones around linguistic nation building, which encompassed the construction of a set of economic and political institutions to ensure the survival of a modern, francophone society. The Quebec judges on the Supreme Court, as members of Quebec's elite who had lived through these transformations and were indeed products of them, brought to the conference table an understanding of both the origins and importance of these policies and were therefore able to persuade their colleagues from outside the province of their constitutional legitimacy. This led the Court to hold that the legislative objectives were justified under section 1, although the means chosen did not pass constitutional muster.

## II. THE QUEBEC RELIGION CASES AND THE DUTY TO ACCOMMODATE

### A. THE CONSTITUTIONAL POLITICS OF REASONABLE ACCOMMODATION

It is against this intellectual and political backdrop that we should read the Supreme Court's recent religion cases that originated in Quebec. As we shall see, reasonable accommodation is at the root of *Amselem*, *Lafontaine*, *Multani*, *Bruker*, and *SL*, even if these cases were not brought or analyzed in that way. The duty to accommodate was originally developed in the jurisprudence under human rights codes. It arose in the employment context, in cases involving adverse effects discrimination arising from the unequal impact of a facially-neutral policy or rule on groups identified by a prohibited ground of discrimination. Under human rights codes, employers could defend such policies as bona fide occupational requirements if they met a test of proportionality.<sup>35</sup> The Supreme

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35. *Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, [1985] 2 SCR 536, 52 OR (2d) 799.

Court took the view that a facially-neutral rule would fail this test if it could be modified in its application to the affected group—for example, by granting an exemption. This duty to accommodate was, however, subject to a requirement that it not impose undue hardship on the employer. Determining what constitutes undue hardship is a fact-specific inquiry that includes consideration of the rights of other employees, the costs of accommodation, and the interests served by the impugned policy (*e.g.*, safety). In principle, the duty to accommodate applies to all grounds of discrimination—for example, disability, sex, age, and of course, religion.

The duty to accommodate was incorporated into the *Charter* in a number of stages. Initially, in *Eldridge v British Columbia (Attorney General)*,<sup>36</sup> the Supreme Court held in a section 15 challenge that the duty to accommodate was part of the minimal impairment analysis under the *Oakes* test.<sup>37</sup> Although *Eldridge* was a case involving discrimination on the basis of disability, the analysis extended in principle to all prohibited grounds of discrimination under section 15, including religion. Some section 15 claims that allege discrimination on the basis of religion, however, can also be framed as infringements of section 2(a) if interference with religious conduct is at stake. It was only a matter of time, therefore, before reasonable accommodation arguments were made under section 2(a)—as first occurred in *Amselem*.

The decisions in *Amselem*, *Lafontaine*, *Multani*, *Bruker*, and *SL* were handed down during a period of intense debate within Quebec over claims by members of minority religious communities (*e.g.*, Jews, Muslims, and Sikhs). The claims sought modification of existing institutions, practices, and rules on the ground that they discriminated against these communities on the basis of religion. In political discourse, these claims were lumped together as claims for accommodation. As the Consultation Commission on Accommodation Practices Related to Cultural Differences (the Bouchard-Taylor Commission)<sup>38</sup> noted, such claims are nothing new in Quebec. However, they reached a new level of intensity between March 2006 and May 2007, sparked by the Supreme Court's decision in *Multani*. Indeed, they became campaign issues during the 2008 and 2012 elections. The need for any governing party in Quebec to have significant support from some segment of the nationalist electorate has led the major political parties to formulate policies in response. While in government in 2010, the Liberal Party

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36. [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].

37. *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

38. *Building the Future: A Time for Reconciliation* (Quebec: Government of Quebec, 2008) [Bouchard-Taylor Report].

introduced Bill 94,<sup>39</sup> which would have prohibited civil servants and anyone doing business with the government (including those receiving services) from wearing any religious garment that covers the face. The Parti Québécois, which recently won the largest number of seats in the 2012 provincial election, campaigned on the promise to introduce a Charter of Secularism that would ban public employees from wearing “overt” religious symbols.<sup>40</sup>

Political debates on accommodation became so heated that they prompted the creation of the Bouchard-Taylor Commission with the short-term goal of temporarily removing this issue from the public policy agenda for the 2008 election. It is fair to say that accommodation has emerged as a new dimension in the politics of collective identity in Quebec, adding questions about secular democracy to longstanding concerns about language policy. Upon closer examination, however, there was considerable variation in the kinds of religious practices that gave rise to these claims, the precise character of the accommodation sought, the types of parties against whom such claims were made, and the institutional contexts within which the claims were made. For example, while most of the accommodations at issue were sought in government institutions (*e.g.*, public schools), some arose in the broader public sector (*e.g.*, hospitals), and yet others in clearly private contexts (*e.g.*, private schools and condominiums) by individuals whose relationships with those organizations were governed by contract. In addition, the spheres within which those institutions operated—health care, education, political participation, housing, and sports—varied as well. A wide range of institutional policies were placed at issue concerning diet (*e.g.*, in hospitals), dress codes (*e.g.*, in public employment), the delivery of health services, and voting procedures. Finally, the accommodations sought varied, taking the form of exemptions (*e.g.*, to permit the wearing of a *kirpan* at schools), new public programs (*e.g.*, to provide for female physicians at a patient’s request), subsidies to private entities (*e.g.*, to private religious schools), and reallocation of existing physical space (*e.g.*, to create prayer rooms in public universities). Indeed, some of the claims by religious minorities were not for accommodation of their religious practices at all; rather, they argued that public institutions should be prohibited from engaging in practices that endorsed the majority faith (*e.g.*, the practice of reciting a Christian prayer at municipal council meetings).<sup>41</sup>

39. *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 1st Sess, 39th Leg, Quebec, 2010.

40. Parti Québécois, “L’avenir du Québec est entre vos mains : la plateforme électorale du Parti Québécois” (4 August 2012), online: <[http://pq.org/actualite/communiqués/lavenir\\_du\\_quebec\\_est\\_entre\\_vos\\_mains\\_consultez\\_notre\\_plateforme\\_electorale](http://pq.org/actualite/communiqués/lavenir_du_quebec_est_entre_vos_mains_consultez_notre_plateforme_electorale)>.

41. Bouchard-Taylor Report, *supra* note 38.



As we shall see, the case law focuses on a much narrower cluster of situations that clearly raise the duty to accommodate in its narrower, legal sense. The gap between political discourse and legal argument raises the question of whether it is illuminating to read the Supreme Court's decisions in their broader political context, given the lack of precision with which the term accommodation is used. But it would be deeply artificial to push the broader political context away for two reasons.

First, on questions of accommodation, there is an intimate connection between law and politics. Some of the most politically controversial examples of accommodation were brought in legal proceedings on the basis of the *Quebec Charter* and the *Charter*. As the Bouchard-Taylor Report noted, religious minorities are not seeking to act illegally; rather, they are advancing their claims by asserting constitutional and statutory rights in administrative tribunals and courts. The debate over accommodation is not just about the particular claims advanced. It is also about the legal instruments that are the basis of these claims, and about the proposals to change the legal status quo and thereby overrule the courts. For example, the Parti Québécois' proposed Charter of Secularism would amend the *Quebec Charter* to eliminate the duty to accommodate in certain circumstances where it had previously been judicially recognized. It is vital that we offer a fair account of the jurisprudence to inform those broader debates.

Second, the Supreme Court itself has been drawn into the politics of accommodation within Quebec. This was especially the case in *Multani*, which held that a Sikh boy had the right to wear a *kirpan* to school under strict conditions. The Court was sharply attacked for placing religious freedom above the safety of schools, and for lacking common sense. Indeed, *Multani* was probably the single most important reason for the establishment of the Bouchard-Taylor Commission. Moreover, there is no sharp divide between the concepts, distinctions, and frameworks employed in the political discourse and judicial decision making. In addition, the Court is likely aware of the broader political context surrounding its judgments, and it is plausible to read the trajectory of its jurisprudence—from division to tentative consensus—as an attempt to speak in a single institutional voice in order to protect its own legitimacy and that of the *Charter*.

There is another dimension to the politics of accommodation in Quebec that buttresses the last point. By no means are the issues raised by claims for accommodation confined to Quebec. Across Canada, there are questions about the legitimate scope of accommodation—that is, what accommodations for religious practices count as reasonable? We only need to look at Ontario, where the furor over the use of *shari'a* law to govern property division and spousal



support for Muslim couples through marriage contracts prompted a legislative ban on this practice.<sup>42</sup> But one of the most striking features of the politics of accommodation is an increasing gulf between public attitudes in Quebec and those in the RoC. Revealing evidence comes from a public opinion poll in 2007,<sup>43</sup> at the height of the accommodation controversy. On a range of particular examples, respondents in the RoC were much more willing to accept claims for accommodation than Quebeckers, for example permitting Muslim women who wear hijabs to teach in public schools (75% in the RoC versus 48% in Quebec), permitting Muslim girls to wear hijabs in public schools (70% in the RoC versus 43% in Quebec), permitting Jewish physicians to wear yarmulkes in hospitals (75% in the RoC versus 47% in Quebec), and permitting prayer facilities in colleges or universities (66% in the RoC versus 33% in Quebec).<sup>44</sup> The Bouchard-Taylor Report cited other poll findings that reached the same conclusion.<sup>45</sup> These findings are buttressed by anecdotal evidence: In no other province are questions of accommodation as intense or as central to provincial politics, especially during provincial election campaigns. Indeed, nothing approaching Bill 94 and the Quebec Charter of Secularism has been proposed by any major political party in the RoC.

In short, questions of accommodation have become a point of cleavage between Quebec and the RoC. The roots of the particular salience of secularism in Quebec lie in the origins of modern Quebec nationalism. A central element of Quebec's Quiet Revolution was rejection of the institutionalized role of the Roman Catholic Church in the delivery of health care, education, and social services, and of its related role as the arbiter of public morality in the service of conservative values. The replacement of the Church in these realms by newly created state institutions, coupled with a liberal social morality free from the strictures of the Church, marked the foundation of modern Quebec. To be sure, this kind of institutional transformation was not unique to Quebec; a parallel process occurred in the other provinces. But the rejection of the institutional role of the Church in Quebec was a central element of nationalist mobilization in the 1950s. Indeed, it can be said that modern Quebec nationalism is as much about secular nation building as it was about linguistic nation building.

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42. *Family Statute Law Amendment Act, 2006*, SO 2006, c C-1.

43. Jack Jedwab, "Reasonable Accommodation of Immigrants and Religious Minorities and the Quebec Distinction" (2007), online: Association for Canadian Studies, <<http://www.acs-aec.ca/pdf/polls/11932375929163.pdf>>.

44. *Ibid* at 2.

45. *Ibid* at 66.

What this means is that the politics of accommodation assumes an additional dimension in Quebec. Along with language policy, it has become part of the politics of plurinationalism. The jurisprudence on accommodation is thus a new element of a larger debate over the relationship between the *Charter*, the Supreme Court, and Quebec nationalism. At the advent of the *Charter*, this could not have been foreseen. So, we must assess the roles of the Court and the *Charter* as centralizing checks not only on linguistic nation building, but also on secular nation building. The same institutional issues arise for the Court as in language cases. If the Court were to persistently divide along national lines in its religion cases, this would pose challenges to the legitimacy of the *Charter* and the Supreme Court within Quebec. As we shall see, the pattern on the Court is not so neat. Instead of the Quebec judges penning concurrences or dissents as a bloc, there is a pattern in which some of the francophone judges from within and outside Quebec part company with their colleagues. But as Grammond argues, they appear to share a distinct “Quebecois” approach to these issues, which might be a product of sharing the same legal, professional, educational, and cultural milieu.<sup>46</sup> The fact that the case law manifested such divisions, particularly against the backdrop of ongoing public controversy in Quebec, is politically salient and creates the pressure for consensus on the Court.

## B. REASONABLE ACCOMMODATION AND SECTION 2(A)

The decisions on reasonable accommodation were handed down while Canada’s constitutional jurisprudence on freedom of religion was very much a work in progress. In the liberal constitutional tradition, the stance of states toward religion combines an attitude of non-endorsement and non-interference. Non-endorsement means that the state has no official religion, but instead has a secular identity that renders it neutral among contending faiths. Non-interference means that individuals have the unfettered right to choose their religious affiliation, or to reject it entirely, within a legal framework that guarantees that these choices are free from force or fraud.

The Court’s early jurisprudence on the *Charter* began to incorporate these ideas into Canadian constitutional law. Section 2(a) of the *Charter* guarantees “freedom of conscience and religion,” which is clearly a constitutional guarantee of non-interference. Thus, in *Big M* the Court held that section 2(a) entrenches freedom *to* and freedom *from* religion, and it built both freedoms around the notion of state coercion. This section guarantees the right to hold religious

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46. Grammond, *supra* note 20 at 90.

beliefs, to communicate them publicly, and to act upon them. It also protects individuals from coercive measures that interfere with those activities. The Court in *Big M* also held that section 2(a) protects individuals against coerced religious affiliation, declaration, and conduct. However, the status of non-endorsement was much weaker in these earlier cases. Indeed, the early *Charter* cases did not adopt such a doctrine, in part because of the absence of an obvious textual hook to do so—for example, the *Charter* has no analog to the American anti-establishment clause.<sup>47</sup>

To be sure, some of the same work can be done by a suitably expansive doctrine of non-interference. For example, compelled religious observance can be condemned not only on the basis of non-endorsement, but also on the basis of non-interference. Moreover, the Court extended the notion of compulsion or coercion beyond the use of criminal sanctions to include economic incentives and psychological or social pressure. This broadened the scope of both the freedom to and the freedom from religion to include policies that create economic incentives not to engage in religious observance,<sup>48</sup> as well as psychological pressure to engage in official religious observance (at least in the Ontario Court of Appeal).<sup>49</sup> However, the notion of non-endorsement extends conceptually beyond even the broadest definition of coercive measures to an array of public policies that do not include elements of coercion. It includes, for example, the adoption of an official religion and its symbolic endorsement (*e.g.*, the reading of the Lord's Prayer at sessions of the Legislative Assembly of Ontario). In addition, there are policies that do not endorse a religion but that involve the intermingling of the state with religious matters (*e.g.*, funding for religious schools, delegating the authority to marry to religious officials, or the enforcement of religious law). These would likely run afoul of non-endorsement but not of non-interference so long as religious institutions were not given a *de jure* or *de facto* monopoly over areas of public policy. And while the Court has held that religious objectives for legislation were impermissible *per se* under section 1,<sup>50</sup> this is not a free-standing constitutional doctrine of non-endorsement because it is only engaged when a *Charter* right has been breached. It provides a basis for ruling out certain justifications of rights-limiting policies, not an independent basis for impugning the constitutionality of government action.

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47. The anti-establishment clause states that "Congress shall make no law respecting an establishment of religion . . ." US Const Amends I.

48. *Edwards Books*, *supra* note 3.

49. *Freitag v Penetanguishene (Town)* (1999), 47 OR 3d 301, 179 DLR (4th) 150 (CA); *Zylberberg v Sudbury (Bd of Education)* (1988), 65 OR (2d) 641, 52 DLR (4th) 577 (CA).

50. *Big M*, *supra* note 2.

The Quebec cases raised a new issue for the Court under section 2(a): reasonable accommodation. What the Quebec cases show is that the Quebec judges on the Supreme Court resisted claims for reasonable accommodation by articulating, defending, and developing the doctrine of non-endorsement under the constitutional banner of the “neutral state.” This idea played out at several stages of the constitutional analysis. In *Amselem*, the neutral state was used by the dissenting judges (whose number included Justices LeBel and Deschamps) as the basis for their refusal to incorporate the notion of reasonable accommodation into article 9.1 of the *Quebec Charter*, the analog to section 1 of the *Charter*. Justice LeBel’s dissent in *Lafontaine*, in which he mistakenly characterized the claim as one for positive assistance to support religious practices, can also be explained on the basis of the concern that accepting the constitutional claim would undermine the neutrality of the state. In *Bruker*, the neutral state was at the heart of Justice Deschamps’ forceful dissent, in which she refused to accept that an agreement to grant a *get* (divorce) pursuant to Jewish law was justiciable in the ordinary courts. In *Multani*, it may have been one of the unstated reasons for Justice Deschamps’ concurrence, which would have resolved the appeal on non-constitutional, administrative law grounds as opposed to invoking the *Charter*. I now turn to these cases.

### C. AMSELEM

*Amselem* was a private dispute, but one with important constitutional implications. It arose from a disagreement between a group of Jewish condominium owners and the condominium corporation over the formers’ erection of *succahs* on their balconies, which are used in the observance of the religious festival of Succot. The erection of these structures violated the building by-laws, which were facially neutral but prohibited the use of balconies for this purpose. Because this was a dispute between private parties in Quebec, the *Quebec Charter*—rather than the *Charter*—governed the dispute. This was the first case in which the plurinational dimension of a dispute was reflected in the split on the Supreme Court. The majority judgment, penned by Justice Iacobucci, was joined by the other anglophone judges (save Justice Binnie), while the principal dissent was written by Justice Bastarache and joined by the two remaining francophone judges, Justices LeBel and Deschamps.

In the lower courts, the case was framed as a claim for accommodation.<sup>51</sup> The claimants argued that the by-laws infringed their right to engage in conduct

51. *Syndicat Northcrest v Amselem*, [2002] RJQ 906, JQ no 705 (CA) [*Amselem* (CA)], aff’d [1998] RJQ 1892, RDI 489 (CS civ).

rooted in their religious beliefs. According to the claimants, this entitled them to an accommodation in the form of an exemption from the operation of the by-laws for the duration of Succot. Curiously, the language of reasonable accommodation was not carried forward into the Supreme Court, but the gist of the legal claim remained the same. Importantly, this was the first reasonable accommodation case under freedom of religion to arise from Quebec. Moreover, the case was understood by the entire Court to be of constitutional significance. The majority and dissents, notwithstanding their deep disagreement, agreed on a basic interpretive issue: Although the appeal was being decided under the *Quebec Charter*, the interpretation of the freedom of religion under the *Charter* would be identical.

The divergent approaches of the majority and principal dissent on the limitation analysis bear careful examination. Section 9.1 of the *Quebec Charter* provides that the rights guaranteed by the *Charter* are subject to limitations in the name of “democratic values, public order and the general well-being of the citizens of Québec.”<sup>52</sup> There was an important and revealing difference in how the majority and the principal dissent conceptualized the interpretation of section 9.1 and applied it to the case at hand. For the majority, the interpretation of section 9.1, even in private disputes, was very similar to a standard section 1 analysis under the *Charter*. The majority therefore enumerated the countervailing rights of the other co-owners that were also protected by the *Quebec Charter*—their rights to property and security—which in turn undergirded three concerns about the erection of *succahs*: safety (*succahs* would obstruct fire escapes), economic (*succahs* would lower the value of the property), and aesthetic (*succahs* would disrupt the uniform external appearance of the building). The majority then considered the importance of these interests. Since the majority found that the safety and economic interests were real, the issue was the degree to which they were impaired by accommodation. The majority considered the impairment quite minimal. The conclusion was highly fact-specific, in a manner typical of a section 1 analysis, involving a close examination of the limited duration of the accommodation and its physical design (which minimized safety and economic concerns). In short, the majority’s section 9.1 analysis was in substance identical to a minimal impairment analysis under section 1, which might have reached a different conclusion had one or more of these factual details been different. Moreover, although the majority did not expressly invoke the duty to accommodate, its analysis was materially the same.

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52. *Quebec Charter*, *supra* note 22.

The majority treated the purported aesthetic interest differently. In addition to holding that the aesthetic impact of the *succahs* was minimal, the majority went further and opined:

In a multiethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities — and is in many ways an example thereof for other societies —, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all democratic societies. Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others. In this regard, I must point out, with respect, that labelling an individual's steadfast adherence to his or her religious beliefs "intransigence", as Morin J.A. asserted at para. 64 [in his judgment in the Quebec Court of Appeal], does not further an enlightened resolution of the dispute before us.<sup>53</sup>

The majority doubted whether aesthetic interests were sufficiently important, even in principle, to constitute a legitimate reason to restrict religious freedom. But it also came very close to saying that the assertion of these interests was in fact motivated by a rejection of the very idea of religious diversity, which is an inadmissible reason to limit a guaranteed right under the *Quebec Charter* and no doubt under the *Charter* as well. The majority's strong rebuke to Justice Morin for his criticism of the rights-claimants fits with this reading of its reasons.<sup>54</sup>

The principal dissent is a study in contrasts. Justice Bastarache took pains to emphasize that the limitation analysis under section 9.1 "is clearly different from the duty to accommodate."<sup>55</sup> By implication, this is how he characterized the majority's approach to section 9.1. Rather, Justice Bastarache proposed that the appropriate framework is the "reconciliation of rights."<sup>56</sup> What turns on Justice Bastarache's distinction between accommodation and reconciliation? For Justice Bastarache, a reasonable accommodation analysis entailed "a simple inquiry into the relative importance of the infringement of the co-owners' rights" and was "a question of simply comparing the inconvenience for one party with the inconvenience for the other ..."<sup>57</sup> So the reconciliation of rights must be a different kind of exercise. How? On its very terms, the rights of others—in this case, other co-owners—must count in the reconciliation of rights. But the rights of others

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53. *Amselem*, *supra* note 13 at para 87, referring to *Amselem* (CA), *supra* note 50.

54. *Amselem*, *supra* note 13.

55. *Ibid* at para 154.

56. *Ibid*.

57. *Ibid*.

also count under the duty to accommodate. What is the additional element? Justice Bastarache seems to suggest that it may consist of “the demands of social existence,”<sup>58</sup> “the public interest,”<sup>59</sup> or more precisely, “the common interest of all citizens of Quebec.”<sup>60</sup>

This suggests that there is a collective interest at stake in what the majority characterized as a private dispute between property owners, which cannot be reduced to the rights of the co-owners resisting the claim for reasonable accommodation. But the principal dissent never quite states what this additional, collective interest is. Towards the end of its reasons, however, the principal dissent offered a clue when it said, “it should be noted that all the co-owners have an interest in maintaining harmony in the co-owned property . . . .”<sup>61</sup> What kind of harmony is this? Why would it be jeopardized by the *succahs*? The principal dissent is maddeningly vague.

There are three possible interpretations of harmony: aesthetic, legal, and political. The aesthetic interpretation is that harmony means visual harmony. The difficulty is that this is an interest protected by the rights of each objecting co-owner; it is not a collective interest that goes above and beyond the individual owners. The legal interpretation of harmony is that in the civil law tradition that underpins the interpretation of the *Quebec Charter*, one must interpret rights to avoid any potential conflict between them—that is, one must harmonize their meanings. This is a more plausible reading of Justice Bastarache’s reasons, but again, it goes to the reconciliation of the competing rights of the co-owners and does not explain what the collective interest in harmony is. The political interpretation is the most persuasive. On this account, the crucial detail is that the balconies on which the *succahs* were erected were part of the common portions of the building, although reserved for the exclusive use of the owners of the condominiums to which they were attached. The unstated collective interest at stake related to the character of these common portions shared by individuals who disagreed on questions of faith. To engage in religiously rooted conduct in these common portions could give rise to conflict, because it would alter the character of those spaces in ways that did not accord with the religious beliefs of others who had an equal legal right to those spaces. Moreover, conflict on a piece of private property could fuel broader social conflict. To avoid social conflict, those spaces should be free of religious conduct. They should be free from religious identity; they should be neutral.

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58. *Ibid* at para 151.

59. *Ibid* at para 154.

60. *Ibid*.

61. *Ibid* at para 172.

Thus, at the root of this reconstruction of the principal dissent in *Amslem* is the idea that neutrality is a means for avoiding conflict and for maintaining harmony in a religiously diverse community. This idea is applied in the context of a private dispute. The doctrine of neutrality (or non-endorsement), however, originated as a public law doctrine applicable to public institutions and property. It arose during the Protestant Reformation as a tool for preventing political conflict in religiously diverse political communities, where the basic question of constitutional design was what the official state religion should be. This gave rise to horrible civil wars, and ultimately, the solution was to banish religion from public institutions, establish a neutral state that had no official religious identity, and make religious belief a private matter.

#### D. LAFONTAINE

This theory of the religiously neutral state—implicit in the principal dissent in *Amslem*—is set out explicitly in Justice LeBel's dissenting reasons in *Lafontaine*, which was handed down at the same time. The plurality dissent in *Amslem* and Justice LeBel's dissent in *Lafontaine* must be read together, although oddly enough they do not cross-reference each other. *Lafontaine* concerned an attempt by a congregation of Jehovah's Witnesses to build a place of worship. The municipality's zoning by-law designated a particular zone of the city for places of worship, where the congregation was unable to purchase a parcel of land. Instead, it purchased land zoned for commercial use and applied to the city to have the property rezoned. The city denied the claim without reasons, and the congregation challenged this refusal on both administrative law and *Charter* grounds.

The majority held that the municipality breached a common law duty of fairness owed to the congregation and did not address the constitutional issues. The dissenting judges,<sup>62</sup> by contrast, dealt with the *Charter* argument. The undisputed starting point of the claim was that section 2(a) protected the right to build a place of worship, and it would be unconstitutional for the municipality to create legal barriers that prevented a congregation from doing so. But, as the dissent put it, this was not the issue before the Court because of key findings of fact: Land zoned for places of worship was available for purchase and the congregation had been unable or unwilling to purchase it. The issue, therefore,

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62. Justices Bastarache and Deschamps, who joined the principal dissent in *Amslem*, concurred with Justice LeBel's dissent in *Lafontaine*. Justice Major wrote a separate dissent, concurring with Justice LeBel's conclusion that there was no violation of freedom of religion and that the Court of Appeal could not review the trial judge's finding of fact about the availability of land zoned for places of worship.



was whether section 2(a) imposed an obligation on a municipality to rezone land for use as a place of worship in circumstances where land zoned for this use was available for purchase. In the lower courts, this was framed as a claim for reasonable accommodation. In essence, the argument was that the refusal to rezone the land was a breach of section 2(a) and that the minimally impairing alternative was to rezone the particular parcel of land in question, while leaving the zoning by-laws in place.

The dissenting judges' rejection of the claim was anchored in a theory of religious neutrality. According to Justice LeBel, the state's duty of neutrality is the product of a long-term process that involved the gradual separation of church and state over a number of centuries as part of the secularization of public institutions. The net result is a framework for religion-state relations, which "imposes on the state and public authorities in relation to all religions and citizens, a duty of religious neutrality ... ." <sup>63</sup> He insisted that "it is no longer the state's place to give active support to any one particular religion."<sup>64</sup> The role of the state, in his view, "is limited to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship,"<sup>65</sup> such that "the practice of religion and the choices it implies relate more to individuals' private lives or to voluntary associations."<sup>66</sup>

On Justice LeBel's account, the idea of the neutral state is the purpose underlying and shaping the interpretation of section 2(a). On his argument, once the state has set up a legal framework for freedom of religion, its job is done. It is under no duty to ensure that religious communities are able to successfully pursue their religious projects within that framework. One implication is that section 2(a) is a negative right, not—save in exceptional circumstances—a positive one. Another, more subtle, implication is that the privatization of faith is bundled with a libertarian approach to the distribution of material resources through markets. The state owes no positive duty to redistribute material resources toward religious groups even if those resources may be necessary to enable them to pursue their religious projects.

For Justice LeBel, the fatal flaw of the constitutional claim was that it was a positive request for the municipality's assistance to rezone the land in the face of the congregation's inability to purchase land already zoned and available for that

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63. *Lafontaine*, *supra* note 6 at para 65.

64. *Ibid* at para 68.

65. *Ibid*.

66. *Ibid* at para 67.

purpose. The unstated implication is that the principal barrier to this transaction was financial and that rezoning would be a form of subsidy, presumably enabling the congregation to purchase less expensive land and use it for religious purposes. A right to positive assistance of this kind would contravene the duty of neutrality and hence was beyond the scope of section 2(a).

In essence, the dissent attributed the congregation's inability to purchase land on which to construct a place of worship to private actors and markets, not to the municipality. Markets and the decisions of private market actors operate in an institutional space free from *Charter* scrutiny. Hence whatever hardship may have resulted from that private sphere was beyond the concern of constitutional law. The difficulty with this argument is that the scarcity of land zoned for places of worship, which in turn determined the availability and price of that land, was caused by the municipality's policy decision, namely, the zoning by-law. Moreover, the by-law operated as an impediment to land use, in the form of a legal duty not to use the land for certain purposes. The congregation's claim for an exemption was therefore rooted in a *negative* right to build a place of worship on privately owned land, which the zoning by-law interfered with.

Indeed, in many situations, what the duty to accommodate requires is an exemption from a rule of general application—that is, for the state to refrain from acting. This is particularly true for religious communities who wish to be exempt from the application of duties. This was the case in *Lafontaine*. It was also true in *Amselem* (exemption from the condominium by-laws). Thus, the duty to accommodate is in fact often a negative, not a positive, right. The difficulty with Justice LeBel's reasons is further illustrated by a hypothetical situation. Imagine that the municipality had decided not to zone *any* land for places of worship so that private markets for such land did not exist. A congregation that purchased private property zoned for commercial use could credibly argue that the municipality was interfering with its *negative* right to build a place of worship without state interference, and they could frame a section 2(a) claim on this basis. The difference between this scenario and the one facing the Court in *Lafontaine* is one of degree—not of kind.

As a result, the negative/positive rights distinction does not really explain Justice LeBel's dissent in *Lafontaine*. Here is another explanation: There is an important ambiguity between two different conceptions of a positive obligation arising from the duty to accommodate. In one sense, the duty is a positive right in some circumstances because it requires the establishment of new programs, the allocation of public funds for them, and the creation of new institutions to deliver them. An example would be the provision of separate prenatal classes to

women who object on religious grounds to the attendance of men. But there is a second sense in which the duty to accommodate imposes positive obligations on the state, irrespective of its legal form as a negative or positive right. *Any* claim for accommodation by members of a religious minority implies that the state must act to modify its norms, practices, and institutions from the *status quo* in support of religious observance. If one regards religious observance strictly as a private matter, which takes place within the framework of liberal rights alongside a strictly neutral state that acts neither to impede nor to support religious conduct because it is entirely indifferent to it, then on this view accommodation appears to cross a line. Accommodations of religious conduct could be construed as some kind of official approval or endorsement of the beliefs that underpin that conduct, which then undercut a claim to state indifference. Acting to support a religious practice could connote acting in the name of such practice by institutionalizing and legitimizing it. On this view, accommodations threaten the very secular character of the state. This is what may have concerned Justice LeBel. Because the majority declined to rule on the constitutional question, it did not set out a counter-vision to address the nature of the section 2(a) breach and, more fundamentally, Justice LeBel's theory of the neutral state.

#### E. *BRUKER*

The case that provided a platform for these competing visions to come to the fore was *Bruker*. The parties had been married under both civil law and Jewish law. The marriage broke down and divorce proceedings were commenced, which resulted in a legal divorce settlement. At issue was an agreement between the parties to appear before a rabbinical court to obtain a Jewish divorce (*a get*). This agreement constituted a clause in the divorce settlement, but the husband did not comply. As a consequence, while the wife obtained a civil divorce, she was still married under Jewish law. If she chose to re-marry, any children born to the second marriage would have been illegitimate in the eyes of her faith.

The wife brought the action to seek damages for breach of the agreement. The key question on which the Court sharply divided was the threshold question of the justiciability of the agreement in the civil courts. The agreement created an obligation on the parties to engage the institutional machinery and rules of the Jewish legal system, and the point in dispute was whether these features of the agreement rendered it unenforceable in the secular legal system. The differing approaches of the majority and the dissent on this narrow point were anchored in an underlying, deeper disagreement over the theory of the neutral state.

The majority judgment written by Justice Abella appears to have set out a two-pronged test to address the issue. The first question asked whether the

procedures surrounding the negotiation of the agreement, its form, and the legal intent behind it were akin to those that characterize contracts in general. This requirement was met, because the agreement had been negotiated by adults, who were advised by legal counsel, “as part of a voluntary exchange of commitments intended to have legally enforceable consequences.”<sup>67</sup> The second question was whether the agreement was nonetheless unenforceable because it was against public order. For the majority, this was a context-specific question to be addressed in each case. The overall question was whether the agreement was “consistent with our laws, policies, and democratic values.”<sup>68</sup> As illustrations, the majority suggested that an agreement that violated custody or employment laws would contravene public order and be unenforceable.

The Court’s understanding of public order is clearly in its infancy, but some sense of the direction in which it may head can be gleaned from statements made at the outset of the majority’s reasons. On one hand, the majority held that Canadians have “[t]he right to have differences protected,”<sup>69</sup> because of Canada’s commitment to multiculturalism, which entails the “recognition that ethnic, religious or cultural differences will be acknowledged and respected.”<sup>70</sup> But there are limits: “[T]he assertion of a right based on difference” must be “compatible with Canada’s fundamental values,” and determination of such compatibility is a “complex, nuanced, fact-specific exercise that defies bright-line application.”<sup>71</sup> Although this framework was not set out under the *Charter*, it addresses the same sorts of issues that would arise under a section 1 analysis. Moreover, its case-dependent approach is identical to the assessment of the reasonableness of claims for religious accommodation. There is therefore an interpretive continuity between *Bruker* and the jurisprudence on reasonable accommodation, which justifies treating them as an integrated whole even if the claim in *Bruker* was not for reasonable accommodation per se under section 2(a).

Justice Deschamps dissented sharply on the theory of public order. She set the tenor for her reasons at the outset, suggesting that it was “obvious that in the twenty-first century”<sup>72</sup> religious obligations did not provide a cause of action cognizable to the civil legal system. She went on to ground her stance in the theory of neutrality, the application of which she extended beyond the legislature

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67. *Bruker*, *supra* note 9 at para 47.

68. *Ibid* at para 62.

69. *Ibid* at para 2.

70. *Ibid* at para 1.

71. *Ibid* at para 2.

72. *Ibid* at para 101.

and the executive—as set out in *Lafontaine*—to the courts. She appeared to offer two reasons for developing the theory in this direction. First, in a religiously diverse society, the judiciary must resolve legal disputes among adherents of different faiths. Her concern seems to be that it would be difficult for the courts to play this role if they were engulfed in resolving disputes based on “religious precepts and undertakings.”<sup>73</sup> Thus, just as the theory of neutrality protects the state from being drawn into religious conflict by placing it above the fray, so too does it protect the judiciary. Second, her concern is that by enforcing religious rules, courts may legitimize them and reinforce their social meanings. The difficulty is that these social meanings may contradict other fundamental values in the constitutional order. In the case at hand, for example, Justice Deschamps raised the concern that enforcing the obligation to give a *get* legitimizes the corollary of failing to obtain a *get*—*i.e.*, that children born to parents who have not obtained a divorce under Jewish law are illegitimate. She asked rhetorically whether enforcing such a rule would attach “opprobrium to a child born to unmarried parents ...”<sup>74</sup>

Justice Deschamps’ reasons are at times emotional and reflect a deep anxiety over the potential consequences of the majority ruling. She states that rendering the agreement justiciable would undermine the “hard-won gains”<sup>75</sup> of Canadian society in the march toward neutrality. She asks whether the decision opens the door to using the civil courts “to penalize ... failure to pay the Islamic *mahr*, refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays, etc.”<sup>76</sup> What is even more striking about Justice Deschamps’ dissent is how she anchors the theory of state neutrality and its legal operation in this case in a broader political narrative about the evolution of modern Quebec. At the heart of her account of modern Quebec is the Quiet Revolution, which she refers to twice in her reasons,<sup>77</sup> and its stance on the relationship between religion and state. This is a move of deep constitutional significance because, as the debate over reasonable accommodation demonstrates, these issues have a particular salience in Quebec, which Justice Deschamps seems to be acknowledging. Moreover, the Quiet Revolution was the beginning of modern Quebec nationalism. To be clear, Justice Deschamps does refer to the neutrality of “the

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73. *Ibid* at para 102.

74. *Ibid* at para 182.

75. *Ibid* at para 103.

76. *Ibid* at para 184.

77. *Ibid* at paras 120, 182.

Canadian state<sup>78</sup> and Canada's openness to all religions. By invoking the Quiet Revolution, however, she may be suggesting that Quebec's distinctive identity ought to condition how the courts approach these issues in cases arising from that province. Thus, while she suggests that the neutrality of the state is a concept in both "Canadian and Quebec law,"<sup>79</sup> she may be seeking to highlight that the way these issues play out within the province is a function of legal principles rooted in that province and, by implication, in its identity. By contrast, the majority does not refer to the Quebec Revolution or the fact that issues of religion-state relations have a particular salience in that province, thereby rejecting the idea that the Quebec character of the case is legally important.

By way of conclusion, it is interesting to observe who did and did not concur with Justice Deschamps' dissent. Justice Charron (another francophone judge albeit from outside Quebec), who was appointed to the Supreme Court after *Amselem* and *Lafontaine*, signed onto her reasons while Justice LeBel joined the majority judgment, leaving Justice Deschamps to restate, defend, and develop the theory of the neutral state that he had espoused in *Lafontaine*. What prompted Justice LeBel's change of heart we may never know.

#### F. *MULTANI*

I now turn to *Multani*, a highly controversial decision that provoked a public outcry in Quebec and prompted the creation of the Bouchard-Taylor Commission. A Sikh boy argued that he had a constitutional right to wear a ceremonial dagger, a *kirpan*, underneath his clothing at school. The school board originally granted him permission to do so, subject to conditions to ensure the *kirpan* was sealed within his clothing and therefore did not pose a risk to his safety or the safety of other students. The school's governing board refused to approve this agreement on the basis that it contravened a prohibition in the school's code of conduct on the carrying of weapons. The claimant appealed this decision administratively and challenged the refusal to grant him permission on constitutional and administrative law grounds.

A majority of the Supreme Court held that the wearing of a *kirpan* fell within the scope of section 2(a), but legitimate safety concerns required that it be worn subject to the conditions originally set by the school. According to the Court, this was a reasonable accommodation. I want to draw attention to Justice Deschamps' concurrence, which would have resolved the issue on administrative law grounds. *Multani* is one of a series of section 2(a) cases brought under both

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78. *Ibid* at para 182.

79. *Ibid* at para 184.

the *Charter* and administrative law (the others are *Trinity Western*, *Chamberlain*, and *Lafontaine*). The Court has yet to set out a satisfactory legal framework for determining whether to resolve cases on the basis of administrative law or the *Charter*, where a choice between the two is available. This question divided the Court in *Multani*. The dissent drew a distinction between challenges to decisions or orders on the one hand and norms of general application on the other, arguing that the *Charter* is available only to challenge the constitutionality of the latter, whereas for the former, only administrative law is available.

The dissent gave two justifications for this proposition. First, the text of section 1 of the *Charter* refers to a “law,” and it therefore contemplates its use only for challenges to norms of general application that either take the form of a law or have a law-like structure. The negative implication is that the *Charter* as a whole is not appropriate for reviewing individual administrative decisions and orders. As the majority noted, the main difficulty with this argument is that section 1 refers to limitations that are “prescribed by law,” a broad term that encompasses norms as well as decisions or orders made pursuant to them. It also contradicts a long and well-established line of precedents on *Charter* application, which have held that the application of the *Charter* to law-making by legislative bodies carries with it the implication that the *Charter* applies to bodies that act pursuant to legal authorization. This principle has been applied in a number of high profile *Charter* cases (e.g., *Slaight Communications*,<sup>80</sup> *Eldridge*,<sup>81</sup> *Ross*,<sup>82</sup> and *Little Sisters*<sup>83</sup>). If the individual decision lies beyond the scope of legal authorization, then this means that the section 1 defense fails at the outset because the decision is not prescribed by law—it does not mean that the *Charter* is inapplicable to such disputes. Indeed, this is how the *Charter* works in the criminal procedure context (especially in section 8 cases).

Second, the dissent argued that the notion of reasonable accommodation fits uncomfortably within the framework of section 1 and is better dealt with as a matter of administrative law. The dissent’s reasoning is unclear, but it seems to turn on a distinction between “microcosmic” and “macrocosmic” legal analysis.<sup>84</sup> A microcosmic legal analysis focuses on the particular circumstances of individuals and private parties, whereas a macrocosmic analysis necessitates attention to

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80. *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight Communications*].

81. *Eldridge*, *supra* note 36.

82. *Attis v New Brunswick School District No 15*, [1996] 1 SCR 825, 133 DLR (4th) 1 [*Ross*].

83. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, 2 SCR 1120 [*Little Sisters*].

84. *Multani*, *supra* note 8 at para 132.

“societal interests,”<sup>85</sup> “social facts,”<sup>86</sup> and “wider social implications,”<sup>87</sup> thus placing the individual against the state. It follows, the dissent reasoned, that “[t]hese separate streams — public versus individual — should be kept distinct.”<sup>88</sup> This argument does not hold together. On the one hand, it has long been recognized that administrative law cases have a macrocosmic character if they involve challenges to the legality of policies, which may take the form of legal norms through secondary legislation. Moreover, judicial review under administrative law, by definition, involves challenges to the legality of government decisions, even if the underlying dispute that gives rise to the administrative decision is between private parties. In many cases, there is no private dimension at all, such as in *Multani*. Conversely, there is nothing in the structure of section 1 that precludes its application to individual decisions. To be sure, section 1 may require calibration to deal with those situations, but the Court has never said that section 1 is inapt for these circumstances.

The best justification for the dissent is found in the following paragraph:

The scope of the *Canadian Charter* is broad. Section 52 of the *Constitution Act, 1982* guarantees the supremacy of the Constitution of Canada. This incomparable tool can be used to invalidate laws that infringe fundamental rights and are not justified by societal goals of fundamental importance. However, where the concepts specific to administrative law are sufficient to resolve a dispute, it is unnecessary to resort to the *Canadian Charter*.<sup>89</sup>

The dissent is gesturing to the doctrine of constitutional avoidance. In legal systems around the world, there is a general rule that counsels courts to resolve constitutional challenges on non-constitutional grounds, if possible. The best-known example is the general rule that statutes should be interpreted in a manner consistent with constitutional rules, if the language permits. The principle behind the doctrine is that the power of constitutional judicial review should only be used when absolutely necessary, because it establishes hard constraints on legislative power and limits subsequent political decision-making. Resolving cases on a non-constitutional basis therefore preserves a space for ongoing democratic debate.<sup>90</sup>

The preference for administrative law over constitutional grounds of review could be justified on the same basis. As Evan Fox-Decent puts it, “common-law

85. *Ibid.*

86. *Ibid* at para 133.

87. *Ibid* at para 134.

88. *Ibid.*

89. *Ibid* at para 135.

90. Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962).



judicial review permits the legislature to have the last word through ordinary democratic means.<sup>91</sup> Read alongside Justice Deschamps' clear concerns about claims for reasonable accommodation and how they may collide with public order,<sup>92</sup> this argument may be particularly salient in cases involving reasonable accommodation. Like *Multani*, it preserves a space for a legislated response to the question of reasonable accommodation of religious practices. The legislative process provides a platform for the inclusion of a broader set of social interests—such as the idea of the neutral state—in framing a comprehensive legislative response to these claims across a variety of institutional contexts, from public schools to universities, hospitals, and public sector workplaces. It also allows for the legislature to set constraints on case-by-case decision making by the courts in reasonable accommodation cases. Indeed, the pains Justice Deschamps took to distinguish between reasonable accommodation and minimal impairment is highly suggestive, because it implies that a legislated framework for resolving these claims need not comply with the duty to accommodate precisely because of the broader array of relevant interests at play.

### III. CONCLUSION: *SL* AND OPEN SECULARISM?

When the *Charter* was adopted, the great conflict between a pan-Canadian bill of rights and Quebec nationalism was expected to centre on questions of language. To be sure, legislative efforts by the government of Quebec to establish French as the common public language of economic, political, and social life, by regulating the language of the marketplace and the education system, have been flashpoints of constitutional conflict. But as the *Charter* enters its third decade, religion-state relations have emerged as a new dimension of the politics of plurinationalism in Canada, with a divide emerging between Quebec and the RoC on questions of reasonable accommodation. This should not be surprising, since the Quiet Revolution was about an integrated project of linguistic and secular nation building, centred around the institutions of the Quebec state.

While Quebec's language policies generated important cases under the *Charter* soon after its adoption, issues of religion have only done so in the last decade. Moreover, the approach of the Court in these two sets of cases is a study

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91. Evan Fox-Decent, "The Charter and Administrative Law: Cross-Fertilization in Public Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 169 at 181.

92. *Bruker*, *supra* note 9.

in contrasts. On challenges involving Quebec's language policies, the Court did not divide on national lines. Rather, it spoke unanimously in its institutional voice with no apparent split between francophone and anglophone justices. One might argue that it worked to present a united front in order to protect its own legitimacy as well as that of the *Charter*. Its jurisprudence on reasonable accommodation, centred in Quebec, is markedly different. Not only has the Court been divided, but its francophone judges have penned separate concurrences or dissents that map onto this cleavage, articulating theories of religion-state relations that echo the discourses of political elites in Quebec. This division poses a risk to the legitimacy of both the *Charter* and the Court itself against the backdrop of ongoing political controversy in Quebec.

The Supreme Court may be attempting to reach a consensus on reasonable accommodation across the Quebec-Canada divide out of an awareness of these risks. The decision in which it did so is *SL*, yet another Quebec case, this one concerning instruction on religion in public schools. For decades, public education in Quebec was organized on the basis of language and religious denomination. Through constitutional amendment, these arrangements were finally abolished in 1995 and replaced with a system organized solely on the basis of language. When schools were structured along religious lines, there was mandatory instruction on religion and morals. This instruction was eventually replaced with an Ethics and Religious Culture (ERC) Program that, on its face, provides education about different religious traditions and ethics. Attendance is mandatory.

In *SL*, Roman Catholic parents brought a constitutional challenge to the ERC Program, arguing that compulsory attendance interfered with their section 2(a) rights to educate their children according to their religious values. In particular, they argued that the program imparted cultural relativism and that, as a consequence, they were entitled to reasonable accommodation in the form of an exemption from mandatory attendance. The Court unanimously dismissed the claim, with a majority judgment written by Justice Deschamps, holding that the parents had not discharged their burden of proving that the program had the effect of interfering with the parents' ability to impart their religious values to their children. She did not reach the constitutional issue. As Justice LeBel pointed out in his concurrence, an evidentiary gap arose as a result of bringing the case against the ERC Program in the abstract instead of against its implementation in schools, which had not yet occurred. According to Justice LeBel, only then would it be possible to assess its potential impact on religious freedom. So, the ERC Program may reappear before the Court.

When it does, the challenge may come not only from religious parents accusing the state of excessive secularism, but also from parents opposed to any teaching about religion in the public educational system, who would accuse the school of indirectly promoting religion by teaching students about it. This second set of parents could argue—drawing on the theory of religious neutrality set out by Justice LeBel in *Lafontaine* and Justice Deschamps in *Bruker*—that the public education system is under a duty to remain above the religious fray and to refrain from providing religious instruction at all, to protect the system from becoming a site of inter-faith conflict and to protect the Court from legitimizing regressive religious practices. Whereas the religious parents in *SL* claimed that the ERC Program interfered with their freedom *to* religion, in a subsequent case a second set of parents could counter that the program interfered with their freedom *from* religion.

This case would place the court in the crossfire between two competing constitutional claims, both framed in terms of section 2(a). Justice Deschamps appears to have anticipated this future dilemma and offered a response to pre-empt it. She reframed the theory of religious neutrality she had championed in *Bruker*, by rejecting “absolute neutrality”<sup>93</sup> in favor of “a realistic and non-absolutist approach” that “shows respect for all postures toward religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.”<sup>94</sup> This modified or softened doctrine of neutrality was necessary both because “[t]he societal changes that Canada has undergone since the middle of the last century have brought with them a new social philosophy that favours the recognition of minority rights,”<sup>95</sup> and because of “the multicultural reality of Canadian society.”<sup>96</sup>

This is a sharp departure from the theory of the neutral state set out by Justice Bastarache in *Amselem*, Justice LeBel in *Lafontaine*, and Justice Deschamps in *Bruker*. It remains unclear whether they would have resolved those earlier cases differently on the basis of the new principle set out in *SL*. The opportunity to clarify these issues may come soon. The Parti Quebecois has formed the government in Quebec. Its election platform included a commitment to propose a Charter of Secularism that would define Quebec as a secular state, presumably in order to condition the interpretation of undue hardship and constrict the scope of the duty to accommodate under the *Quebec Charter*. However, in what way the courts would interpret such amendments, and what bearing they would

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93. *SL*, *supra* note 12 at para 31.

94. *Ibid* at para 32.

95. *Ibid* at para 1.

96. *Ibid* at para 21.

have on the interpretation of the *Charter*, are entirely different questions. The Court's modified theory of neutrality suggests that these legislative initiatives may face constitutional difficulties. *SL* may have been an effort by the Court to forge a unified position ahead of the constitutional battles to come.