Court File No. C50534

# COURT OF APPEAL FOR ONTARIO

**IN THE MATTER OF** criminal proceedings against Maksud S. and Magbul S., currently at the preliminary inquiry stage in the Ontario Court of Justice before the Honourable Mr. Justice Weisman, wherein N.S. is the complainant;

**AND IN THE MATTER OF an application** in the nature of certiorari and mandamus for an extraordinary remedy pursuant to Part XXVI of the *Criminal Code of Canada* and/or an originating application for relief pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms.*

**B E T W E E N:**

**HER MAJESTY THE QUEEN**

Respondent

-and-

**N.S.**

Complainant/Appellant

-and-

**MAKSUD S.**

Respondent

-and-

**MAGBUL S.**

Respondent

-and-

**WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF),**
**CRIMINAL LAWYERS' ASSOCIATION,**
**CANADIAN CIVIL LIBERTIES ASSOCIATION,**
**ONTARIO HUMAN RIGHTS COMMISSION,**
**and THE MUSLIM CANADIAN CONGRESS**

Interveners

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# FACTUM OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND

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## PART I - NATURE OF APPEAL

1. The Appellant seeks an order of this Court affirming her right to access the Canadian criminal justice system and to wear her niqab while testifying at the preliminary inquiry and trial of the accused.

2. Further, she asserts her rights from the uniquely disadvantaged position of being a complainant in a sexual assault prosecution – a category of witness that has historically paid a greater price for justice than have others.[1]

3. The parties and courts below have presented this case as primarily involving a tension between the rights of the accused to full answer and defence and the complainant's right to freedom of religion. An exclusive focus on the complainant's s.2(a) *Charter* rights, however, fails to address the complainant's s.7 and s.15 *Charter* rights, and the significant social, legal and political consequences of a Court order requiring a Muslim, niqab-wearing, sexual assault complainant to remove her niqab at the behest of two male accused.

4. The Supreme Court of Canada has noted the "need for an acute sensitivity to context" when defining the content of the accuseds' rights to full answer and defence in harmony with the security of the person, equality and other *Charter* rights of sexual assault complainants.[2] The sexual assault context of this case requires the Court's acute sensitivity to the history of legal and procedural norms which re-victimize sexual assault complainants and reinforce their inequality. Rape mythologies and stereotypes of complainants continue to pervade the prosecution of sexual

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[1] *R v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577 at p.665 (Per L'Heureux Dube J., dissenting in part); *R. v. Osolin*, [1993] 4 S.C.R. 595 at pp. 624-625(per L'Heureux Dube J. in dissent); R. *v. Mills*, [1999] 3 S.C.R. 668 at para.58; Backhouse, Constance, *Carnal Crimes: Sexual Assault Law in Canada 1900-1975* (Toronto: Irwin Law, 2008) at pp.287-297; *Natasha Bakht, "What's in a Face?* Demeanour Evidence in the Sexual Assault Context" in Elizabeth Sheehy ed., *Sexual Assault Law, Practice and Activisim in a post Jane Doe Era* (Ottawa: University of Ottawa Press, 2010)(forthcoming) at p.3 ("Bakht , *What's In A Face*"). See also references, *infra* at note 3.

[2] *R v. Mills, supra* at paras.72 and 93

assault, particularly in the examination and assessment of complainants' credibility, despite developments intended to limit their influence.[3]

5. Sexual assault complainants are subjected to scrutiny and invasive demands suffered by no other group in the criminal trial process. Ordinary legal principles and procedures are distorted to create unnecessary and arbitrary obstacles to their evidence. For example, in this case, the accused sought, and obtained, an order of the preliminary inquiry judge that the complainant either remove her niqab or not be permitted to testify despite:

- The absence of jurisdiction for a preliminary inquiry judge to grant *Charter* relief;
- The accused adducing no evidence whatsoever in relation to the alleged infringement of their *Charter* or other rights;
- A shifting of the onus that would normally apply to a *Charter* applicant, in this case the accused, onto the complainant to justify herself;
- The limited purposes of the preliminary inquiry, which do not include making findings of credibility;
- The denial of the complainant's right to the advice of counsel (at least initially);
- The use of her unsworn evidence in a decision made against the recognition of her rights, despite assurances that she was not giving evidence;
- The highly intrusive nature of the court order requested, which involved a stripping away of what this complainant described as "a part of me", her "modesty", "respect" and her "honour".[4]

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[3] As noted by Professor Elizabeth Sheehy, "Every law reform in evidence law that has been generated to overcome sex discrimination in the adjudication of rape has been met with counter-moves by the defence bar and the re-emergence of myths and stereotypes about women, men and rape in the guise of new legal practices and judicial discourses", in "Evidence Law and the "Credibility Testing" of Women: A Comment on the E Case" (2002) 2 Queensland University Technology Law and Justice Journal 157 at 173, and 157, 158, 172; see also Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) Alta. L. Rev. 743 at paras. 1- 4; Lise Gotell, "The Discursive Disappearance of Sexualized Violence" in Dorothy E. Chunn, Susan B. Boyd and Hester Lessard, ed. *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 127 at 135-136; Jessica Derynck, "Lacking Context, Lacking Change: A Close Look at Five Recent Lower Court Sexual Assault Decisions", (2009) 14 Appeal 108 -126; Melanie Randall, "Sexual Assault Law and "Ideal Victims"; Credibility, Resistance and Victim Blaming", forthcoming in (2010) 23(2) *Canadian Journal of Women and the Law*; Bakht, *What's in a Face?* at pp.3,7.

[4] For some women that wear the veil, the forced removal of the niqab would be experienced as nakedness, see Bakht, *What's in A Face?* at p.10.

6. Augmenting the approach of the preliminary inquiry judge in this case, the reviewing court directed a regime of numerous *voir dires* at which the complainant is a compellable witness made to establish the validity and sincerity of her religious beliefs *and* to describe the events of the sexual assault over and over again. According to the court below, she will have to testify on four (4) *voir dires* and at the preliminary inquiry, before learning whether or not the court will even hear her evidence at trial. Three times she will be led through her evidence in-chief and be cross-examined on the allegations of childhood sexual abuse *prior* to knowing whether or not she will be permitted to testify at trial. Further, according to the court below, she will be videotaped when testifying at the preliminary inquiry, though again this procedure would be without statutory authority or legal precedent.

7. The relevant context of this case also includes the marginalization and exclusion of women who wear the niqab in Canada, the racist and other stereotypes to which women who wear the niqab are often subjected, and the impact on this stigmatized minority of an order that the niqab be removed. In a political climate in which Muslims are perceived as a racial minority[5] and niqab-wearing Muslim women are the target of disdain, distrust and newly proposed laws designed to restrict their civic participation, the courts need to be vigilant to ensure that discriminatory barriers to the reporting and prosecution of sexual assault are not created for niqab-wearing women.

8. The wearing of the niqab may generate controversy within and outside Muslim communities. This debate, however, has no bearing on the right to equal access to justice for sexual assault complainants who hold a religious belief that wearing the niqab is a requirement

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[5] The Ontario Human Rights Commission in its Policy on Racism and Racial Discrimination (June 2005, updated December 2009) states: "A contemporary and emerging form of racism in Canada has been termed "Islamophobia." Islamophobia can be described as stereotypes, bias or acts of hostility towards individual Muslims or followers of Islam in general. In addition to individual acts of intolerance and racial profiling, Islamophobia leads to viewing Muslims as a greater security threat on an institutional, systemic and societal level" (at p.7 of downloaded document); Sherene Razack describes the "culturalization of racism" as a "central way in which racism is organized in contemporary society". She writes that "although racialized groups are no longer widely portrayed as biologically inferior...dominant groups often perceive subordinate groups as possessing cultures that are inferior..." and that "Muslims are stigmatized, put under surveillance, denied full citizenship rights, and detained in camps on the basis that they are a pre-modern people located outside of reason, a people against whom a secular, modern people must protect themselves", Sherene Razack, Casting Out, the Eviction of Muslims From Western Law and Politics (Toronto: University of Toronto Press, 2008) at pp.173-174; see also Bakht , What's in a Face.

of their faith. The very real risk in this case is that these women will be shut out of the Canadian justice system and left without its protection.

9. At the preliminary inquiry the complainant may wear the niqab without engaging the rights of the accused to make full answer and defence. Credibility is not an issue: cross-examination is un-impeded. So too at trial. The recognition of the very limited probative value of demeanour evidence generally, as well as its routine misuse in both the cross-cultural and sexual assault contexts, dictates that the right to full answer and defence is not violated by permitting the complainant to wear a niqab.

10. When the overall context is carefully considered, it can be seen that, from the perspective of the complainant, the forced removal of her niqab as a pre-requisite to testifying in a sexual assault prosecution turns the metaphor of re-victimization at trial into a literal reality. Denying women access to the criminal justice system unless and until they remove their niqab, constitutes a profound violation of their rights under ss.7 and 15 of the *Charter*.

## PART II - FACTS

11. The Appellant alleges that she was sexually abused from the age of six. The accused are the complainant's uncle and cousin.[6] They are charged with gross indecency, sexual assault, indecent assault and having sexual intercourse with a person under 14 years of age.

12. The Appellant is now a 32 year old married woman. She recounted to police a childhood plagued with sexual assaults. She reached out to a teacher for help in 1992 and the matter was investigated by the police at that time but the Appellant's father insisted that no charges be laid and the police agreed. In May of 2007 the Appellant asked the police to re-open the matter indicating she could not forget the sexual abuse and that the matter had been improperly handled by her father.[7]

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[6] Factum of the Respondent Crown, at para.3.
[7] *R v. N.S.*, [2009] O.J. No. 1766 at para. 80 ("*R v. N.S.*").

13. The accused object to the complainant giving evidence at the preliminary inquiry and trial while wearing her niqab. Relying on their *Charter* and common law rights to full answer and defence and their statutory right to cross-examination at the preliminary inquiry, the accused assert a right to see all of the complainant's face.

***The Preliminary Inquiry***

14. At the commencement of the preliminary inquiry, the accused conceded the sincerity of the complainant's religious belief in wearing the niqab. The accused resiled from this position on the second day of the preliminary inquiry, however, after the police took it upon themselves to interview the complainant on her reasons for refusing to remove the niqab while testifying.

15. The complainant was, at least initially, denied the right to counsel. As well, she was asked by the judge at the preliminary inquiry to sit in the witness box and answer questions from the bench about her religious beliefs, though not under oath.

16. The complainant's "evidence"[8] before the preliminary inquiry judge was that the niqab "is a part of me".[9] She said that she had been wearing the niqab for five years; it was a matter of "respect", "modesty" and "honour"; her religious convictions prevented her from removing the niqab in the presence of anyone that she could possibly marry; and she felt "very strongly" about not removing her niqab in the presence of those she could marry.[10] The presiding judge nevertheless ordered the complainant to remove her niqab as a precondition to her testifying at the preliminary inquiry.

***The Decision of the Superior Court***

17. The complainant sought an order by way of *certiorari* and/or relief under s. 24(1) of the *Charter*, setting aside the order of Justice Weisman and permitting her to wear her niqab. In his

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[8] "Evidence" is in quotations since the complainant was questioned by the preliminary inquiry judge without being sworn and without the benefit of counsel, *R v. N.S.*, *supra* at paras. 13, 14, 26-28.
[9] Appeal Record at p.104, lines 26-27.
[10] *R v. N.S.*, *supra* at para. 29.

reasons for judgment, Justice Marrocco directed a procedure for determining the accused's objection which essentially involved a number of "hearings" as follows:

(1) At the preliminary inquiry, there is to be an initial *voir dire* for the purposes of determining whether or not the complainant's religious beliefs are valid and sincerely held (purportedly without regard to the *Charter* rights of the complainant or the accused).[11] The court below makes clear that at this initial hearing "the onus is on the Applicant to demonstrate that her fundamental freedom of religion has been triggered".[12] If she fails to do so, the court then has the authority to demand that she either remove her niqab or not be permitted to testify;

(2) Assuming the complainant can establish the sincerity of her religious beliefs to the satisfaction of the court on the first *voir dire*, there is to be a second hearing to then determine whether the accuseds' statutory right to cross-examination has been met, despite the niqab.[13] At this hearing, the complainant is again the compellable witness. She will be examined in chief by the Crown Attorney. Then counsel for the defendants will be permitted to "attempt" to cross-examine her concerning the substance of the sexual abuse allegations.[14] If the preliminary inquiry judge concludes that the right of cross-examination has not been met, the complainant's evidence will not be admitted and the sexual assault allegations will not proceed to trial;

(3) If it is determined that the right of cross-examination can be met with the complainant wearing her niqab, then the preliminary inquiry proceeds and, unless the Crown and defence agree to admit the evidence on the *voir dire* as evidence at the preliminary inquiry, the complainant will then be examined in chief and cross examined, again, on the substance of the allegations;

(4) Assuming that there is a committal to trial after the preliminary inquiry, then the process will begin again on a pre-trial basis;[15] there will be an initial *voir dire* conducted by the trial judge to determine the sincerity and "voluntariness" [16] of the complainant's religious beliefs. Again she will be a compellable witness on the *voir dire*. She will be cross-examined on this *voir dire* in relation to how she practices her religion, whether her religious practices call for particular conduct, and whether she is sincere in her practice or belief. No guidance is given by the court below with respect to the scope of cross-examination on the sincerity of the complainant's religious beliefs and/or the extent to which collateral matters can

[11] *R. v. N.S. supra* at para. 89.
[12] *R. v. N.S*, *supra* at para. 91.
[13] *R. v. N.S., supra* at paras 102-3.
[14] *R. v. N.S, supra* at para. 103.
[15] *R. v. N.S*, *supra* at paras 122 to 124.
[16] *R. v. N.S*, *supra* at para. 117.

be explored during a *voir dire* that has the significant potential to involve pre-trial virtue testing of the complainant. Nor does the Court explain why a woman who observes a well-known practice of one of the world's major religions should shoulder the unusual burden of repeatedly demonstrating the sincerity of her belief in that practice, including possibly by way of evidence from religious officials, experts and "third-party references";[17]

(5) Again, assuming she has proven her religious sincerity, the complainant will be required to testify on a second pre-trial *voir dire* during which she will again be examined in-chief and cross-examined on the substance of the allegations of childhood sexual abuse. On this second pre-trial *voir dire* the court will determine whether or not the complainant will be permitted to testify at trial without removing her niqab.

(6) If the trial judge determines that the complainant can testify at trial wearing her niqab, the Court would then proceed to hear her evidence. The complainant's evidence at trial will be the fourth time she is examined and cross examined on the substance of the childhood sexual abuse.

18. Under this set of procedures, the complainant is subjected to four *voir dires* or "hearings" and a preliminary inquiry before her right to give evidence at trial may even be determined. Twice the complainant will be cross examined on the sincerity of her religious beliefs and, assuming her belief is found to be sufficiently sincere, the complainant will give evidence and endure cross-examination on the allegations of sexual abuse three times, all without knowing whether or not she will be permitted to testify at trial.

## PART III – LAW AND ARGUMENT

### A. Overview

19. LEAF's submissions in this appeal are as follows:

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[17] *R. v. N.S.*, *supra* at paras. 97 and 123. The procedure is also difficult to reconcile with the Supreme Court of Canada jurisprudence, which has clearly confirmed that "inquiries into a claimant's sincerity must be as limited as possible", the Court must not become an "arbiter of religious dogma" and the relevant inquiry is limited to the claimant's beliefs *at the time of the interference*, and not historically" see *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 47, 50, 53.

i. The Appellant is entitled to wear the niqab at the preliminary inquiry;

ii. The Appellant is similarly entitled to wear the niqab at trial without engaging or violating the rights of the accused;

iii. An order requiring the complainant to remove her niqab violates her s.7 and s.15 *Charter* rights. It is not necessary for this Court to determine her s.2(a) *Charter* rights to decide this appeal;

iv. The right to full answer and defence does not include an absolute right to demeanour evidence;

v. If this Court disagrees and finds that there may be circumstances in which the section 7 *Charter* rights of the accused are engaged by the complainant's niqab, the accused bear the onus of establishing that the niqab infringes their rights at trial. This onus will rarely, if ever, be discharged for reasons elaborated upon below.

## B. The Preliminary Inquiry

***The Purpose of the Preliminary Inquiry and the Jurisdiction of the Court: No Authority to Order the Removal of the Niqab***

20. Having regard to the legitimate purposes to which a preliminary inquiry is directed, there is no need to ever require a complainant to remove her niqab as a precondition to testifying.

21. It is not necessary for this court to adjudicate the *Charter* rights of the complainant at the preliminary inquiry and/or become mired in a social/political debate over the niqab. The complainant is entitled to wear the niqab while testifying at the preliminary inquiry and the presiding judge has no jurisdiction, *Charter* or otherwise, to force her to remove it.

22. The creation of unique pre-trial and trial procedures by the lower courts, in an effort to justify such an extraordinary order, are unnecessary, time-consuming and without jurisdiction, precedent or analogy. The proposed procedures are excessively invasive and burdensome for the complainant and offend principles of human dignity and respect.

23. It is difficult to imagine any victim/witness being made to repeatedly justify the legitimacy and sincerity of her religious beliefs and re-live the events of the alleged crime *before* even being permitted to testify at trial. It is even harder to justify this elaborate procedure in the context of a complainant testifying about such deeply personal and painful events involving her sexual abuse as a small child at the hands of family members.

24. The power and jurisdiction of the provincial court judge conducting the preliminary inquiry are circumscribed by the provisions contained in Part XVIII of the *Criminal Code*, either expressly stated or dictated by necessary implication. The court has no inherent jurisdiction. Rather, the procedural directions contained in the *Criminal Code* are exhaustive.[18]

25. A provincial court judge presiding at a preliminary inquiry is not a court of competent jurisdiction under s. 24 of the *Charter* and therefore has no power to grant *Charter* remedies.[19]

26. A preliminary inquiry is not a trial. The court presiding has no jurisdiction to acquit or convict. The court cannot impose a penalty nor grant a remedy. Assessments of credibility are not made at a preliminary inquiry.[20] An accused may use the preliminary inquiry to explore the Crown's case. However, an accused has no constitutional entitlement to a preliminary inquiry. As Justice G. Arthur Martin stated on behalf of this Court in *R. v. Arviv*:

> The so- called "right" to a preliminary hearing is not elevated to a constitutional right under the *Charter*. The "right" to a preliminary hearing under the *Code* may be displaced by the Attorney-General preferring an indictment under s. 507(3) which, as we have previously stated, does not per se contravene s. 7 of the *Charter*.[21]

27. The preliminary inquiry is a forum where accused are afforded an opportunity to discover the case against them. To the extent that the issue of accessing the complainant's "demeanour"

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[18] *R. v. Doyle*, [1977] 1 S.C.R. 597.
[19] *R. v. Mills*, [1986] 1 S.C.R. 863.
[20] See also the Law Commission of Canada observation that "given that the purpose of the preliminary inquiry is simply to determine if the Crown has some evidence upon which a jury could convict, it is unclear why an extensive and harsh cross-examination of the complainant is allowed at this stage"; see Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Minister of Public Works and Government Services, 2000) at 128-129.
[21] *R. v. Arviv*, [1985] O.J. No. 2602, 51 O.R. (2d) 551 (C.A.) at para.24; see also *R. v. S.J.L.*, [2009] 1 S.C.R. 426.

engages disclosure concerns (and for reasons stated below it does not) the review of disclosure decisions is not incidental to a justice's power to regulate the course of the preliminary inquiry.[22]

***The Complainant is Compellable***

28. The taking of evidence at a preliminary inquiry commences with the Crown calling witnesses under oath (or affirmation) in accordance with s. 540 of the *Code* and the provisions of ss. 14 to 16 of the *Canada Evidence Act*. Section 545 of the *Code* provides the preliminary inquiry judge with the power to imprison a witness who refuses, without reasonable excuse, to be sworn, or answer questions. Pursuant to s. 545 of the *Code* the witness may be imprisoned in 8 day increments until (at least theoretically) she cooperates and testifies. The Court has no jurisdiction to punish for contempt of court at a preliminary inquiry. However, an uncooperative witness is vulnerable to a charge of obstructing justice pursuant to s. 139(2) of the *Criminal Code*.[23]

29. A compellable witness who is ordered to remove her niqab and refuses, risks criminal sanction and/or imprisonment, thus engaging her s.7 *Charter* rights to life, liberty and security of the person.

***An Opportunity to Attack the Complainant***

30. It is imperative that the preliminary inquiry not be used as a vehicle to systematically attack the confidence and integrity of sexual assault complainants, to humiliate and intimidate them, so that they withdraw from participating at trial or are diminished and beaten down as witnesses for trial.

31. Defence counsel tactics to "whack the complainant" at the preliminary inquiry were infamously described in 1988 by lawyer Michael Edelson (as reported in the Lawyers Weekly) as follows:

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[22] *R. v. Patterson* (1970), 2 C.C.C. (2d) 227; *R. v. Giromonte* (1997), 37 W.C.B. (2d) 10 (Ont.C.A.); *R. v. Skogman* [1984] 2 S.C.R. 93.
[23] *R. v. Lacroix*, [1987] 1 S.C.R. 244.

> "Generally, if you destroy the complainant in a prosecution…you destroy the head. You cut off the head of the Crown's case and the case is dead. My own experience is the preliminary inquiry is the ideal place in a sexual assault trial to try and win it all. You can do things…with a complainant at a preliminary inquiry in front of a judge, which you would never do for tactical, strategic reasons – sympathy for the witness, etcetera – in front of a jury…you've got to attack the complainant with all you've got so that he or she will say I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge".[24]

32. In the sexual assault case of *R v. Darby*, Justice Romilly of the British Columbia Provincial Court made the following observations (cited with approval by L'Heureux Dube J. in *R. v. O'Connor*):

> The present state of the preliminary inquiry is akin to a rudderless ship on choppy waters. The preliminary hearing has been turned into a free-for-all, a living hell for victims of crime and witnesses who are called to take part in this archaic ritual.[25]

33. Defence tactics intended to "whack the complainant"[26] have not been eradicated. These practices continue to surface in many different guises. Vigilance is thus required to ensure that new barriers confronting women in the justice system are not created to replace recently-rejected ones.

34. In this case this means that complainants must not be required to partially disrobe at the preliminary inquiry as a precondition to giving evidence in relation to a sexual assault; they must not be forced to choose between participating in the justice system and observance of their religious practices.

## C. The Trial

35. The complainant is entitled to wear the niqab at trial. The accused have not, and cannot, establish that their *Charter* rights are engaged or violated by virtue of that fact alone.

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[24] Cristin Schmitz,""Whack" sex assault complainant at preliminary inquiry", *The Lawyer's Weekly* (27 May 1988), 22.

[25] *R. v. Darby*, [1994] B.C.J. No. 814 (Prov. Ct) at paras. 10 and 2-19; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para.170.

[26] *R v. Mills*, *supra*, at para.90; see also notes 1 and 3, *supra*.

36. A trial court has jurisdiction to grant *Charter* remedies, unlike the judge presiding over a preliminary inquiry. The sexual assault complainant who wears religious attire in court is not the *Charter* applicant. She bears no onus to establish anything in order to dress as she does. If the accused want a court order forcing the removal of an article of the complainant's clothing, supported by their *Charter* rights, the accused are the *Charter* applicants and bear the onus of demonstrating an entitlement to the remedy sought on a balance of probabilities.

37. The forced removal of a Muslim complainant's veil at a sexual assault trial could very well be seen and experienced as an act of racial, religious and gendered domination. The criminal trial must not be undermined by racist and sexist prejudices and practices.

38. The greatest challenge to the criminal justice system in this case is not the impact of the niqab-wearing witness on the accused's rights. Rather, in the current political climate of fear, distrust and heightened scrutiny of veiled Muslim women, the real task at hand is to prevent false assumptions being made about women who wear the niqab.

39. The operating prejudice in this case is that women who wear the veil have something to hide and/or are unworthy of belief and/or undeserving of the protection of the courts. The suggestion in this case that Muslim complainants will dishonestly "use religious dress to avoid direct confrontation with the accused",[27] thus requiring repeated examination of their sincerity, is evidence of just this tendency. The test of the criminal justice system will be its ability to dispel, rather than perpetuate, these false assumptions.

**The Accuseds' Section 7 Charter Rights**

40. The accuseds' objection to the niqab rests exclusively on an argument that demeanour evidence gleaned from the complainant's full face is fundamental to their *Charter* right of full answer and defence. The accused bear the onus of establishing that a trial in which the complainant wears a niqab unconstitutionally infringes their fair trial rights.

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[27] Factum of the Respondent Crown at para. 39.

41. The content of the right of the accused to full answer and defence in respect of demeanour evidence encompasses "multifaceted considerations"[28] with respect to the rights of the complainant and the administration of justice. As the Supreme Court of Canada has recognized, "a particular right or freedom may have a different value depending on the context".[29] The content of the right to full answer and defence in this case is informed in large part by the prejudicial nature of demeanour evidence in the sexual assault trial.

***The Limited Probative Value and Misuse of Demeanour Evidence***

42. The unreliability and limited utility of demeanour evidence in the criminal trial process is well established in case law and social science research.[30]

43. Demeanour evidence is a category of information/evidence that has the potential to subvert the truth-seeking process of the criminal trial. It has a proven history in this regard. Assumptions about the appropriate and inappropriate conduct/reactions of persons accused of a serious crime, cross-racial assumptions and rape mythologies have all negatively affected the criminal justice system. The misuse of demeanour evidence has had devastating consequences; take the examples of Susan Nelles and Guy Paul Morin.[31]

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[28] *R. v. Levogiannis* [1993] 4 S.C.R. 475 at p.483: "The examination of whether an accused's rights are infringed encompasses multifaceted considerations, such as the rights of witnesses, in this case children, the rights of accused and courts' duties to ascertain the truth."

[29] *R. v. Levogiannis, supra* at p.483, citing with approval *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 647.

[30] An empirical study conducted by Professor Ekman of the University of California determined that judges, trial lawyers, police, forensic psychiatrists and FBI agents did "no better than chance" in "spotting liars simply by their demeanour", Paul Ekman *Telling Lies* (New York: W.W. Norton, 1992) at 285; See also: Canadian Judicial Council, Model Jury Instruction in Criminal Matters, Instruction 4.11, Assessing evidence, at pp.45-46, para. 10, available at www.courts.ns.ca/General/resource_docs/jury_instr_model_april04.pdf; "What is the witness's manner when he or she testifies? Do not jump to conclusions, however, based entirely on how a witness testifies. Looks can be deceiving. Giving evidence in a trial is not a common experience. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or even the most important factor in your decision"; and in this case, *R v. M.S. and M.S.* (16 October 2008), SM 197/08 Toronto (Sup. Ct. J.) in which the preliminary inquiry judge acknowledged the "diminished emphasis" on, and unreliability of, demeanour evidence, referring to *R v. L.F.* [2006] O.J. No.4173 which holds that: "Courts are cautioned to place much less emphasis on a witness' demeanour", Appeal Record p.126.

[31] Government of Ontario, Ministry of the Attorney General, *The Commission on Proceedings Involving Guy Paul Morin*, 1998, presided over by then Justice Fred Kaufman, Vol.2, Recommendation 76A: *Overuse and misuse of consciousness of guilt and demeanour evidence*, p. 1142-3; In R. v. Nelles, the prosecution sought an inference of guilt from a physician's observation that Ms. Nelles had "a strange expression on her face" and showed "no sign at

44. In the context of the sexual assault trial, rape mythologies about how a rape victim ought to look or behave continue to pervade the judicial process. Courts have repeatedly acknowledged that "groundless myths and fantasized stereotypes" about rape victims have improperly informed the assessment of complainants' credibility in sexual assault trials, thus perpetuating women's inequality and undermining the truth seeking function of the criminal trial.[32]

45. Rape mythologies include assumptions which "deem certain types of women "unrapeable"", hold other groups of women responsible for the assault "because of their occupation or appearance", and are based on discriminatory beliefs that women frequently lie about being sexually assaulted, are not reliable reporters of events, are prone to exaggerate, are deluded or hysterical, and falsely report sexual assault for reasons of jealously, fantasy, spite, neurosis, or guilt over a sexual encounter.[33] For example, if a complainant is not angry and visibly upset when she reports the events of the sexual assault, it is often assumed that the offence was not serious or did not occur. On the other hand, if the complainant is perceived to be too angry and upset, it is often assumed that she is lying and vindictive.

46. Assessments of demeanour in the context of sexual assault trials risk compounding already prevalent sexist, racist and classist rape mythologies with respect to who is a credible victim and how a "real" victim will conduct herself on the stand.[34] The use of demeanour evidence in sexual assault cases has operated as a license to use (sometimes unarticulated) racist and sexist notions about women as a way to defeat their narratives and dismiss their allegations as untrue, penalizing those who do not fit the stereotype of a "real" or "credible" victim.[35]

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all of grief" at the death of one of the babies in question, see *R. v. Nelles*, [1982] O.J. No.3654 (Prov. Ct. Crim. Div.)(QL) at para.62.

[32] *R. v. Osolin* at p.670 (per Cory J.); *R. v. Mills* at para.90; see also Regina A. Schuller and Patricia A. Hastings, "Complainant Sexual History Evidence: Its Impact on Mock Juror Decisions" (2002) 26:3 Psychology of Women Quarterly 252 wherein researchers found that information provided to mock jurors about prior sexual intercourse between the complainant and the accused resulted in them finding the complainant less credible and more likely to have consented. Instructions from the judge not to rely on this information "exerted no impact on the decision process" (at pp.259-260).

[33] *R. v. Osolin*, *supra* at pp.624-625 (per L'Heureux Dube).

[34] *R v. Mills*, *supra* at para. 90; *R. v. Osolin supra* at pp.624-625.

[35] Bakht, *What's in Face?* at p.7.

47. Rape mythologies with respect to who is "rapeable", who is credible, and how a true victim of rape should look and behave in the witness box are simultaneously shaped by and perpetuate forms of discrimination:

> ...it is often assumed that it is gender and not race that is the meaningful factor at work in influencing how rape is "scripted" in court...Aboriginal women and women of colour, however, are considered inherently less innocent and less worthy than white women, and the classic rape in legal discourse is the rape of a white woman. The rape script is thus inevitably raced whether it involves intraracial or interracial rape.[36]

48. In this case, the sexual assault complainant is a woman of colour from a stigmatized racial/religious minority. The value of her demeanour evidence, already deeply suspect as a sexual assault complainant, is thrown into further question by the inevitable influence of prejudices (whether overt or hidden) relating to these additional markers of discrimination.

49. In addition, if required to testify stripped of her niqab, the demeanour of the complainant will no doubt be affected in ways which counsel and the Court are in no position to assess and judge. Even the most experienced witness would behave differently if asked to testify without, for example, his or her shirt on. How much more true for a complainant in a sexual assault case who is ordered to remove her religious clothing.

50. How women are dressed has historically been a recurring pre-occupation of sexual assault trials. The manner of dress has been used discriminatorily to substantiate consent, blame the victim as seductress, and portray the complainant as "unrapeable". Complainants, including "virtuous" complainants, (wearing a "bonnet and crinoline"[37]) are metaphorically undressed and laid bare, through cross-examination on their sexual histories, medical records, lack of corroboration, and other means. In short, women are either wearing too little or too much clothing to be either believed or worthy of protection.

51. The law has frequently rendered women's words, their resistance to advances, their versions of events, as ultimately unimportant. What has mattered is women's bodies. In this

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[36] Sherene Razack *Looking White People in the Eye: Gender, Race and Culture in Coutrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at p.68.
[37] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para.88.

case, defence counsel wants the niqab removed to see "what kind of a witness she is" and so that he might be prepared "for the nature of the witness you will meet at trial...".[38] Indeed, the court below makes the extraordinary suggestion that complainants who wear niqabs be videotaped while testifying on the *voir dire* for purposes of appellate review, again emphasizing the importance of the complainant's appearance over that of her testimony.

52. The accuseds' rights to cross-examination and to full answer and defence are fulfilled by their ability to test the complainant's credibility by scrutinizing what she says, not what her full face looks like. The potentially prejudicial impact of demeanour evidence and its (at best) limited probative value outweigh any interests the accused might have in stripping the complainant of her niqab in open court.

53. Finally, the "centrality" of the evidence of the sexual assault complainant to the prosecution does not elevate the importance or reliability of her demeanour above and beyond that of any other witness who appears before the Courts. Credibility assessments of various witnesses, whether "central" or not, are determinative in many if not most criminal trials, not just sexual assault cases. However, the suggestion that "central witnesses" have their credibility scrutinized more and differently than other witnesses has a long history of being used as an excuse for creating arbitrary and unnecessary obstacles to the evidence of sexual assault complainants, such as unique demands for corroboration and recent complaint.[39]

***Demeanour Evidence not Available in All Cases***

54. Finally, to suggest that a witness' evidence may not be received in court due to the inability of defence counsel to gauge the movement of her full face is troubling. Access to facial movement is not guaranteed even if a witness' face is uncovered. Some witnesses, such as men with full beards, may be partially concealed; other witnesses, whether for medical or other reasons, may have muscle limitations or varying impediments to, or degrees of, facial expression. What constitutes full access to demeanour is unclear. The standard is malleable, not absolute.

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[38] *R. v. N.S.*, *supra* at paras. 17-18.
[39] *R. v. Osolin* at pp.627-628 (per L'Heureux Dube J.).

55. It is also noted that as a result of the modernization of the hearsay rule, evidence may be adduced and admitted without any access by the parties or the Court to the demeanour of the witness.

## D. The *Charter* Rights of the Complainant

56. The substantive content of the s. 7 *Charter* rights of complainants engaged by the court order (requested by the accused) in this case include: the right to be free from state induced psychological harm; the right to personal dignity, autonomy and integrity; the right to physical security of the person; and the right to liberty.[40] These rights cannot be deprived except in accordance with the principles of fundamental justice. The relevant principles of fundamental justice include the complainant's right to a fair trial free of discriminatory practices and procedures and the right to access to justice unencumbered by arbitrary and insurmountable obstacles.

57. The s. 7 *Charter* rights of complainants must inform, and be informed by, their section 15 equality rights and the context of inequalities in the sexual assault prosecution. The gendered exploitation and invasiveness occasioned by the forced removal of the niqab constitutes a violation of the complainant's s.7 *Charter* rights, particularly as understood in relation to her rights to equality and dignity as a woman and a member of a marginalized racial group.

58. Further, section 28 of the *Charter* requires that women be provided with equal access to s.7 *Charter* rights. Section 28 of the *Charter*, which confirms the equal application of rights to men and women, demands that *Charter* rights be interpreted and defined by the experiences and political and social realities of men and women. Section 7 fair trial rights cannot be understood exclusively through the lens of men accused of sexual assault. The section 7 rights of the complainant at stake in this case are not subordinate or of lesser value or weight.

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[40] R. v. Morgentaler, [1988] 1 S.C.R. 30 at 54-56 and 173; R .v Seaboyer supra,at para. 21; Rodriguez v. British Columbia Attorney General, [1993] 3 S.C.R. 519 at pp.618-619; R. v. O'Connor, supra, at para.112; New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46 at paras.58-60; International Covenant on Civil and Political Rights (1966) 999 U.N.T.S. 171, Article 17 ; The Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/180 (1948), Article 12; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 312 U.N.T.S. 221, E.T.S., as amended (1950), Article 8.

59. The complainant's resistance to the demand by the accused that she remove her niqab to testify is not an assertion of "special rights" which compromise the rights of the accused. The section 7 *Charter* rights which this complainant asserts are foundational: the rights to liberty, to be free from state imposed psychological harm, to physical security, to a criminal justice system which operates free of discrimination and prejudice. A fair trial can only be achieved if these rights of the complainant are duly protected.

***The Forced Removal of the Niqab: Gendered Violation of Physical and Psychological Integrity***

60. Sexual assault is a crime which is committed predominantly against women and girls and has been recognized by the Courts as a practice of sexual inequality.[41] Sexual violence is an act of power and control. It is a form of violence intended to dominate and humiliate; it "has nothing to do with sex everything to do with power".[42] The exercise of power over, and the humiliation of, sexual assault complainants in the criminal trial process are not unconnected from this larger context of power relations.[43]

61. The "undressing" of sexual assault complainants through cross-examination on their sexual history, medical records and other areas, has repeatedly been analogized to the assault itself. The metaphorical re-enactment of the assault through cross-examination becomes literal when the niqab is ordered removed at the behest of the accused and over the objections of the complainant who describes the niqab as a "part of me".

62. The psychological harm in this case is uniquely gendered. In a public forum the complainant is ordered to remove a deeply personal item of religious dress worn only by women. Moreover, the forum is the sexual assault trial, where the criminal charges involve an act of male

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[41] *R v. Osolin, supra,* per Cory J. at 669.
[42] *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto*, [1998] O.J. No.2681 (Gen. Div.) at p.4 (of QL Download).
[43] See *R. v.* Ewanchuk at paras. 70-72 and the references therein to the *Convention on the Elimination of All Forms of Discrimination Against Women* in particular Article II (b), (f)); General Recommendation No.19 of the Committee on the Elimination of All Forms of Discrimination Against Women, paragraphs 6 and 24(b); and the United Nations *Declaration on the Elimination of Violence Against Women* , G.A. Res. 48/104, U.N. Doc. A/48/49 (1993).

power and where the figurative "undressing" tactics have been employed as a tactic to humiliate and demean the complainant.

63. An order that the complainant remove her niqab thus has numerous implications in the context of her s.7 and s.15 *Charter* rights. At a personal level for niqab-wearing women, such an order may very well be experienced as public stripping and nakedness (particularly for this complainant for whom the veil is a "part of" her). Such an order in this case would implicate the Canadian justice system in a very particular form of humiliation, contrary to the complainant's s.7 *Charter* rights.

64. Similarly, to the extent that the accuseds' request to remove the niqab falls into the history of tactics to "whack the complainant", the request is highly specific to the particular vulnerabilities of the complainant as a Muslim woman. In other words, her credibility and beliefs are challenged as a *Muslim* complainant, not in some generic sense. The unveiling of the complainant is meant to diminish her not only as a woman (by requiring her to undress in the highly gendered context of a sexual assault trial), but as *Muslim* woman, by requiring her to transgress her religious beliefs in order to access justice in a Canadian courtroom.

65. In a post-911 world in which Muslims are seen in the West as a racial group, the implications are particularly potent.[44] An order requiring the removal of the veil is more than an order requiring an individual woman to partially "undress". At this particular moment in history, such an order may be experienced by the niqab-wearing complainant as an enactment of dominant society's sense of cultural/racial/religious superiority over the Muslim minority – a forced unveiling to bring Muslim women into secular life.[45]

66. It may be that Western society believes that it is protecting Muslim women by forcing the removal of their veils.[46] But in this situation, it is directly harming them by taking away their

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[44] See references at note 5 *supra*.

[45] Historically, the forced unveiling of Muslim women, for example by the French in Algeria, has constituted an act of political and national domination. While this example may not be directly relevant to the Canadian context, the resonances are relevant.

[46] The purported desire to advance the equality of niqab-wearing women by stripping them of their clothing is suspect given the laws lack of similar pre-occupation with the restrictive clothing worn by women of other religions, such as nun's and their habits, or Orthodox Jewish women and their neck-down covering.

right to seek redress for wrongs done to them. There is a need to be vigilant to ensure that niqab-wearing Muslim women are not entirely excluded from the judicial process and barred from obtaining justice. The courts need to ensure equal access to justice for these women, not obstruct it.

***Women's Physical Security and the Reporting and Prosecution of Sexual Assault***

67. Despite the prevalence of the crime, sexual assault continues to be vastly underreported. As Justice L'Heureux Dube noted in *R v. Seaboyer* and *R v. Osolin*, the "net result" of the victimization of sexual assault complainants by the justice system is that "sexual assaults are, and continue to be, underreported and underprosecuted; furthermore, the level of convictions that result in those cases that do reach the courts is significantly lower than for other offences".[47] Less than 1 in 10 crimes of sexual violence are reported to the police. The rates of reporting of sexual assault are even less in minority communities.[48] In 2007, charges were laid in approximately a third of sexual offences reported to police, as compared to over half of other types of violent crime. In adult court, sexual offences are less likely than other violent crimes to result in a finding of guilt.[49]

68. The Supreme Court of Canada has repeatedly affirmed the importance of "encouraging the reporting of sexual violence" [50] and protecting the security of complainants. The Court has emphasized the legal system's "direct and vital interest in promoting the reporting of sexual

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[47] *R. v. Osolin, supra,* at p.669; *R. v. Seaboyer* at pp.648-651.

[48] See for example Government of Ontario, Ontario Women's Directorate "Sexual Assault Reporting Issues", downloaded on April 7, 2010 at http://www.citizenship.gov.on.ca/owd/english/resources/publications/dispelling/index.shtml#Issues which notes that fear of re-victimization by the justice system is compounded for women of colour, immigrant and refugee women.

[49] Statistics Canada, *Assessing Violence Against Women A Statistical Profile* (1993) at www.labour.gov.sk.ca/default.aspx?DN=af449366-ead4-4197-b4f0-d197efb74533 which found that only 6% of all sexual assaults are reports to the police with the likelihood of contacting the police increasing to 11% in cases of severe attack, see pp.1, 10, 34, 35; see also: Statistics Canada, The Daily, Monday October 2, 2006, "Violence Against Women: Statistical Trends"; Government of Ontario, "Sexual Assault Reporting Issues", *supra*; Statistics Canada, Centre for Canadian Justice Statistics, *Sexual Assault in Canada, 2004* (Minister of Industry, 2008); Backhouse, *supra* at p.294; *R. v. Osolin, supra,* at p.669; *R. v. Seaboyer* at pp.648-651.

[50] *Seaboyer, supra,* at p.606; *R. v. Mills, supra,* at paras.59, 72, 127; *R. v. Darrach,* [2000] 2 S.C.R. 443 at para. 25.

assaults" and acknowledged "that chronic under-reporting of sexual assault cases undermines the effectiveness of the criminal justice system".[51]

69. In order to be equal before the law, one has to have access to the system through which the law is enforced and not be shut out of it based on a prohibited ground of discrimination. If niqab-wearing women risk having to remove their niqabs to testify, or if they face an onerous or demeaning procedure to justify their veils, the likelihood of these women reporting sexual assault diminishes even further, thus heightening their risk of being sexually assaulted, denying them access to the justice system, and exacerbating their inequality.

***Liberty and Women's Inequality***

70. On an individual level, if the complainant is a compellable witness at the preliminary inquiry and trial and she refuses to testify in open court without her niqab despite an order requiring her to do so, her liberty is at risk. She may be charged and imprisoned for contempt of Court and obstruction of justice.

71. In addition, even the spectre of incarceration will further deter niqab-wearing complainants generally from reporting sexual assault, resulting in the corresponding increased risk to their physical security and diminishment of their liberty.

72. On a systemic level, male sexual violence against women has a profound impact on women's liberty, freedom of movement and personal choices.[52] As recognized by Justice MacFarland in *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto*:

> It is accepted that one of the consequences of the pervasiveness of male sexual violence in our society is that most women fear sexual assault and in many ways govern their conduct because of that fear. In this way male violence operates as a method of social control over women. For example, women are likely to avoid activities which they perceive may put them at risk of male sexual violence. They will, for example, avoid

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[51] *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 at paras. 58, 60.

[52] In *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307 at paras.49-53 the Supreme Court of Canada confirmed that s.7 liberty interests may be engaged when the law prevents persons from "making fundamental personal choices"; see also *R. v. Morgentaler*, supra, at pp.164-171 (per Wilson J.).

> going out alone in the evening. As plaintiff's counsel put it in written submissions "The sexual victimization of women is one of the ways that men create and perpetuate the power imbalance of the male-dominated gender hierarchy that characterizes our society".[53]

73. Women's liberty and inequality are thus always engaged in cases of sexual assault. The ultimate burden for reducing sexual assault should not fall to women's curtailing of their liberty.[54]

***Complainants' Rights to a Fair Trial, Free from Discrimination and Arbitrary Burdens***

74. Having regard to the prejudicial and discriminatory use of demeanour evidence, particularly in sexual assault trials, the proposed interference with the complainant's rights in order to make the complainant's full face available to the accused, is arbitrary,[55] fails to advance the truth seeking function of the criminal trial, does not serve the interests of justice, and is inconsistent with ensuring a fair trial for the accused, the complainant and society at large.

75. An order requiring the complainant to remove her niqab in order to expose her body perpetuates the discriminatory privileging of women's appearances over their sworn testimony and reinforces the inequality of sexual assault complainants.

76. The precepts of fundamental justice include "avoidance of unprobative and misleading evidence" and concern for "the fair trial process" from the point of view of the complainant and the community, as well as the accused.[56] Negating the complainant's significant *Charter* rights in this case in order to permit the accused to exploit a category of evidence which has proven misleading and discriminatory, would not accord with the principles of fundamental justice.

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[53] *Jane Doe, supra,* at p4.; see also *R.v. Seaboyer* at p.649 per L'Heureux Dube "Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they defined their relationship with larger society".

[54] Lise Gotell (2007), at p.151.

[55] A law or action is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind" the law or government action and when "the deprivation of the right in question does little or nothing to enhance the state's interest", see *Rodriguez, supra* at 595.

[56] *R. v. Mills, supra* at para. 72.

*Sections 7 and 15 and Equal Access to Justice*

77. The exclusion of niqab-wearing complainants from accessing justice further marginalizes and stigmatizes an already disadvantaged group of women and, as argued above, increases their vulnerability to sexual violence and other crimes.

78. The need to create an accessible and respectful space for niqab-wearing women in the courtroom is significant in terms of advancing the equality rights of these women and ensuring their equal participation in Canadian society, rather than their marginalization and exclusion.

79. Denying niqab-wearing women access to justice cannot be justified on the basis that it furthers their equality. Nor can this denial be justified on the basis that such exclusion is somehow liberating or that it will ultimately assist these women by mitigating their "self-selected segregation".[57]

80. Whatever one's personal views are on the niqab, effectively disenfranchising women who wear one from the criminal justice system is inconsistent with promoting their substantive equality and respecting and protecting their s.7 *Charter* rights.

## E. In the Alternative: The Procedure For Objections to the Complainant Testifying in her Niqab

81. It is impossible to imagine a set of circumstances where a sound evidentiary basis exists to justify an order that a sexual assault complainant remove her niqab to testify. For this reason, the complainant should never be ordered to remove her niqab.

82. In the event that this Court disagrees and concludes that there may be cases where the *Charter* rights of the accused are engaged, then the principles and procedures that govern so-called "records applications" (ss. 278.1 to 278.91 of the *Criminal Code* ) might be applied in a modified manner, including that: the objection by the accused must be made by way of written application; supported by evidence and argument as to the specific relevance of the full-face

[57] *R v. N.S.* at para.141.

demeanor of the complainant to the facts of the case; on notice to the complainant and the Crown; to be determined in a single *voir dire* at which the complainant is represented by counsel and non-compellable.

83. The Crown in its Factum proposes that as part of the procedure, the veiled complainant be subjected to cross-examination on the sincerity of her religious beliefs at the preliminary inquiry and then required to establish the authenticity of her religious beliefs again at the *voir dire* at trial.[58] Such a procedure will facilitate wide-ranging virtue testing of the complainant, as well as attacks on her credibility through a collateral attack on her religious beliefs. The "twin myths"[59] will be resurrected in new form: the complainant's religious purity will be challenged as a means of undermining her credibility in making the sexual assault allegations.

84. Despite the narrow inquiry into sincerity as set out in *Anselem* and other Supreme Court of Canada cases, one can easily foresee that questions asked of a niqab-wearing complainant might include: Do you pray five times a day? Have you been to the mosque recently? Were you recently in a restaurant eating non-halal meat? Do you drink alcohol? Have you had extra-marital sex? Accused may argue that the answers to these questions are relevant either to the sincerity of the belief or to the seriousness of the interference with the right. Moreover, sexual assaults are frequently committed by men known to the complainant, and often family members, as in this case. The accused are very often privy to details of complainants' lives. The potential for misuse of personal information in the sincerity examination arising from this dynamic is obvious.

85. For niqab-wearing complainants, the sexual assault trial must not automatically commence with a protracted hearing into the validity, sincerity and voluntariness of their religious practice. A Muslim complainant's religious convictions should be presumed, as they would be with a nun who comes to Court wearing a habit. There is simply no reason to assume that niqab-wearing sexual assault complainants are uniquely dishonest; that their resistance to an order that they remove their niqab is merely a ruse to "hide behind the veil". Rather, this Court should be careful to avoid reinforcing and perpetuating such stereotypes of Muslim women.

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[58] Factum of the Respondent Crown, para.35.
[59] *R. v. Darrach* at para. 32.

86. Consistent with the records application context (and as acknowledged by the Crown at page 29 of its factum)[60], the question to be determined at the *voir dire* is whether the accused has discharged his onus, on a balance of probabilities, of establishing that his right to a fair trial would be infringed by the admissibility of veiled testimony. A bald assertion of a right to demeanour evidence will not be sufficient to establish the necessary evidentiary foundation. Instead, the *voir dire* must be focused on whether legitimate reasons exist for requiring the extraordinary order on the particular facts of the case. Having regard to the potentially discriminatory uses of demeanour evidence and the history of "undressing" sexual assault complainants, the evidentiary basis for an order compelling the removal of religious dress of a sexual assault complainant must be sound.

87. In the rare circumstances where the evidentiary threshold is met, the determination of the *Charter* rights of the accused and the complainant must occur on a level playing field where rights inform and are interpreted in light of each other in a non-hierarchical fashion. The rights of the accused do not automatically trump the rights of the complainant.[61] In deciding whether to grant the *Charter* relief requested by the accused, the trial judge must recognize and give significant weight to the impact the court order will have upon the *Charter* rights of the complaint before the Court and of complainants generally.

88. In the event that any case meets the requirements above, it is imperative that a court appreciate exactly what is at stake when it grants a defence request to strip the complainant of her religious attire as a precondition to her giving evidence at her sexual assault trial. The rights of the complainant and the interests of society are weighty and include: the rights of sexual assault complainants to access to justice without having to relive being forcibly uncovered; the rights of Muslim women to practice their religion in accordance with their beliefs without sacrificing their fundamental right to the law's protection; and the right of sexual assault complainants to a non-discriminatory trial, free of stereotypes and mythologies relating to their demeanor.

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[60] Factum of the Respondent Crown, p.29, footnote 11.
[61] *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at para.72; *R v. Mills*, at para. 21.

## F. Conclusion

89. This case appears to be the first case in Canada in which a niqab-wearing sexual assault complainant has engaged the criminal trial process, though in some other Canadian legal proceedings witnesses have worn the niqab without issue.[62]

90. The protection of the substantive rights of the complainant in this matter will hinge on respect for her s.7 and s.15 rights to wear the niqab, and as importantly, ensuring a fair trial where the sexual complainant testifies wearing a niqab.

91. In this case, the greatest challenge to the criminal justice system is not the impact of the niqab-wearing witness on the accuseds' rights. It is the reverse. In the current political climate of fear and distrust of veiled Muslim women, courts and juries need to be alert to existing prejudices that a Muslim woman who covers her face cannot be believed. Careful instructions to the trier of fact will be crucial to prevent the potential misuse by the jury of the fact that the complainant wears a niqab. Judge and juries should be instructed that it is the complainant's right to wear the niqab and that they may not draw any adverse inference against her – or arrive at any conclusions whatsoever – based on the fact that she wears a niqab.

## PART IV – RELIEF REQUESTED

92. LEAF requests an order that:

**a.** requiring the complainant to remove her niqab would contravene her rights under ss.7 and 15 of the *Charter*; and

**b.** the complainant may wear her niqab at the preliminary inquiry and trial.

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[62] For example, there was no objection to niqab-wearing witnesses at the *Maher Arar* inquiry.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

April 12, 2010

Susan M. Chapman

April 12, 2010

Joanna Birenbaum

## PART V - AUTHORITIES

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| N.S. | - and - | HER MAJESTY THE QUEEN and MAKSUD S. and MAGBUL S. |
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